

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXIX

2023

NUMBER 1

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Mark Cammack

Hiding in Plain Sight: Corporate Legal Responsibility

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Not All Surrogacy & Rainbows: Barriers to Gay Men Seeking to Become Parents Through Surrogacy Within the European Union

Bianca Rector



SOUTHWESTERN LAW SCHOOL

Published Two Times Annually by the Students of
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles, CA 90010-1106
(213) 738-6857
lawjournal@swlaw.edu

Subscription Rates Commencing Volume Twenty-Nine

\$34.00 per year (domestic)

\$38.00 per year (foreign)

Single Copies: \$17.00 (plus \$5.00 for foreign mailing)

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RESTRAINT IN THE CLASSICAL ISLAMIC LAW

Zezen Zaenal Mutaqin*

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I. INTRODUCTION.

War kills people, destroys property, causes famine and displacement, uproots society from its culture, takes dreams and hopes of future

* Dr. Zezen Zaenal Mutaqin is the Head of MA Program and a lecturer at the Faculty of Islamic Studies, Indonesian International Islamic University (UIII). He is a former Assistant to the Asia Pacific Global Affairs Advisor of the ICRC and a consultant for Geneva Call. He is also currently a consultant advisor for UNICEF Indonesia. The author thanks Professors Khaled Abou El Fadl, Intisar Rabb and Stephen Gardbaum for their supervision and Professor Mark Cammack for his comments on the first draft. Email of the author: zezen.zaenal@uiii.ac.id

generations as well as creates a cycle of revenge. Despite all the brutalities and devastation caused by armed hostilities, human beings still resort to these means to solve their disputes. Because of the recurrence of war throughout human history, one might rightly ask questions such as: why does war occur? What is good about war? Is it justifiable?

In answering the aforementioned questions, thinkers in this field say that if war happens, it must have a just cause. Moreover, it should be waged by a legitimate authority with the right intention as well as doing no more harm than good. For warring parties, war is simply “a continuation of policy by other means,”¹ something that should be taken, as the last resort, to gain certain political objectives. Since resorting to war is the last chance for warring parties to win the political battle based on a just cause, it is probably justifiable.

However, historically, the just cause or pious end of the war has led to merciless conflicts. The question of what happens in war is as important as why it happens in the first place.² History has told us that war, for whatever reason, has a great impact, directly and indirectly, not only on those who participate in hostilities but also on the larger society and especially civilians. The time when the opposing armies met in the middle of desert or jungle has gone from the practice of modern warfare. Instead, they engage in combat in the middle of cities where civilian populations live. The effort to restrain war is even more challenging now than before. Thus, more than simply based on a just cause, wars must also have just conduct. War shall be limited and restrained, affecting only combatants and sparing non-combatants.

Indeed, attempts to restrain war are as old as war itself. Apart from customary rules, its evolution has culminated in the formulation of the modern law of war which consists of mainly two bodies of law: Geneva law³ and The Hague law.⁴ While the whole purpose of Geneva law is to

1. CARL VON CLAUSEWITZ, ON WAR 28 (Beatrice Heuser ed., Michael Howard & Peter Paret trans., 2006).

2. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 3-5 (1994).

3. *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005; III Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 UNTS 85; Geneva Convention for the

protect those who are not, or no longer participating in hostilities, The Hague law's purpose is to limit the method and means of warfare. Both bodies of law, of course, are interrelated since the effort to protect non-combatants is almost impossible to be realized without limiting the machinery and method of war.

This article will dwell on this intellectual discourse on limiting war and violence but from a different perspective and tradition. It will focus on the juridical discourse of restraining violence in armed conflict from an Islamic law perspective. My research will specifically be focused on juristic discourses during the Formative period of Islamic law, from first to fourth century Hijra/seventh to tenth century CE.⁵ This formative period will have a lasting impact on the development and evolution of Islamic law.

Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 UNTS 31 (Geneva law is a body of public international law that is known also as international humanitarian law or international law of armed conflict that consist of series of separated treaties (conventions) concerning the minimum protection and standard minimum human treatment of non-combatant. It consists of four Geneva Conventions and three additional protocols. Geneva Convention I concerns the treatment and protection of Wounded and Sick in armed forces in the field; Geneva Convention II regulates the protection and treatment of wounded armed forces at sea; Geneva Convention III is on the protection and treatment of prisoners of war while Geneva Convention IV is on the protection of civilians during armed conflict. The Additional Protocol I to III are concerning the regulations on the protection of victims of international armed conflict, the protection of victims of non-international armed conflict and the adoption of an additional distinctive emblem, respectively.)

4. For Hague laws, see, e.g., The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907; Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899; Declaration on the Launching of Projectiles and Explosives from Balloons, July 29, 1899; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972 (The Hague law is a body of law that consists of a series of conventions, treaties, and declaration on the limitation the means and method of warfare. Since the machinery and technology of war developed gradually, the development of the law also continuously grows. The law regulates wide-ranging method and means of war like on the settlement of international disputes, adaptation to maritime warfare, prohibition certain projectiles or bullets. The law regulating certain weapons is continuously updated. For example, in 1972 state parties agreed on the prohibition of biological weapons, in 1995 the use of blinding laser weapons was prohibited while cluster munitions were declared illegal in 2008.). See generally THE AVALON PROJECT, THE LAWS OF WAR, available at http://avalon.law.yale.edu/subject_menus/lawwar.asp (accessed Apr. 20, 2021) (containing a complete list of the law on the limitation of the means and method of warfare). See generally THE ICRC, WEAPONS, available at <https://www.icrc.org/en/document/weapons> (accessed on Apr. 20, 2021) (containing the most recent treaties on the prohibition of certain weapons).

5. See 27 Wael B. Hallaq, *Introduction*, in THE FORMATION OF ISLAMIC LAW xx (Wael B. Hallaq & Lawrence I. Conrad eds., 2004); 27 Christopher Melchert, *The Formation of the Sunni Schools of Law*, in THE FORMATION OF ISLAMIC LAW 351 (Wael B. Hallaq & Lawrence I. Conrad

Why have I chosen this path? I have at least two reasons for this question: contextual and intellectual.

In the Western media, the image of Muslim countries is synonymous with conflicts, wars, and primarily terrorism. They resemble the uncivilized barbaric past where fellow human beings are slaughtered, beheaded, enslaved, and civilians randomly killed daily; the place where beheading has become terror entertainment and the chopped head of the enemy is displayed openly in a parade.⁶

Are Muslim countries uniquely more prone to violence? Are they more barbaric and savage as depicted in the Western media?

The answer depends on how we see it. The first bias is clearly in assuming and confusing Muslim countries with the Middle East while the statistic shows that less than 20% of Muslims live in that region, in comparison to 60% of those who live in Asia.⁷ If we take a look at the ten largest Muslim populations, namely Indonesia, Pakistan, India, Bangladesh, Egypt, Nigeria, Iran, Turkey, Algeria, Iraq, only three of them experience violence at the level of civil war, at least in the last ten years. Of course, like other countries, they are not completely free from violence.⁸ However, most of them have escaped the worst situation and some of them, like Indonesia, have a stable democratic system in place.

If we see the data of internal war in the whole period after World War II, Muslim countries were not more prone to war. In fact, the number of civil wars during the Cold war era in Muslim countries was less than the general trend. However, if we limit the data to the period after 2000, we see a dramatic increase statistically. For example, in 2011 and 2012, there were six internal armed conflicts, and all of them took place in Muslim countries: Afghanistan, Pakistan, Sudan, Somalia, Syria, and Yemen.⁹ Out of 474 rebel armed groups recorded between 1946 and 2014, around 200 of them were Muslim insurgent groups.¹⁰ The majority of them operated in Muslim

eds., 2004), for discussion refuting the conclusion Joseph Schacht, which latter followed by many orientalist, delineates the year of 850 AD or the third century of Hijri as the zenith of the formative period and arguing that the period where Islamic law contained all its components and marked the end of the formative period were around the middle of the fourth/tenth century.

6. Dave Burke, "Housewife" Iraqi Militia Leader "Beheaded and Cooked" ISIS Fighters, DAILY MAIL (2016), <http://www.dailymail.co.uk/~article-3813316/index.html>.

7. See PEW RSCH. CTR., MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 6 (2009) (showing Muslims living in the Middle East and North Africa are around 20% of the total population).

8. Nils Petter Gleditsch & Ida Rudolfsen, *Are Muslim Countries More Prone To Violence?*, 3 RSCH. & POLITICS 1-9 (2016).

9. *Id.* at 1.

10. *Id.* at 2.

countries, fighting against fellow Muslim governments, while a minority of them operated in non-Muslim countries like in the Philippines (MILF-Moro Islamic Liberation Front) and Thailand (BRN-National Revolution Front). After 2000, while other parts of the world tend to be more peaceful, Muslim populations are experiencing a spike of violence and war. Thus, despite the fact that these conflicts are influenced by the geopolitical situation especially after 9/11, one may rightly conclude that what happens is basically the war between Muslims against Muslims—and kills mostly Muslims.

With regard to the assumption that Islam theologically teaches violence and therefore the conflicts in Muslim countries are more barbaric and savage, we can easily rebut this by comparing the use of violent discourses in Islam and other religions such as Christianity. Phillip Jenkins, for example, in his comparative study on the use of violence in The Qur'an and Bible, concludes that the biblical narrative is much more violent and barbaric than the Qur'an, to the extent that it recognizes genocide and another indiscriminate savagery as punishment.¹¹

Moreover, some studies have compared the “management of savagery” used by terrorist organizations with drug cartels in Latin America.¹² Due to the similarity in utilizing savagery and violence, even though they differ in their cause, the latter has been labeled “narco-terrorism.” In terms of victims, over seven years, between 2007 and 2014, around 164,000 people

11. PHILIP JENKINS, *LAYING DOWN THE SWORD: WHY WE CAN'T IGNORE THE BIBLE'S VIOLENT VERSES 1* (2011). Despite its controversy, the Qur'anic narrative on violence is far less savage and less violent in comparison to the Biblical narratives. In certain situation such as during hostilities, Qur'an commands to kill, but it always come with mercy and forgiveness. Biblical narratives on violence, in contrast to the Qur'an, marked by indiscriminate savagery. Deuteronomy 20, Joshua 8-9, and Psalm 137, for instance, command indiscriminate violence, command total destruction and extermination of the enemies: men, women and children—even animals. Moses was ordered to totally annihilate Canaan, while Joshua was ordered by God to show no mercy when conquering the city of Ai, killed twelve thousand inhabitants and slaughtered all livestock. God ordered King Saul to strike and kill all people of Amalekite, men, women and children. The Biblical concept of *herem* (ban) in which city under ban must be totally destroyed and killed, is probably similar to the modern conception of genocide. For the study on this topic, see KARI LATVUS, *GOD, ANGER AND IDEOLOGY: THE ANGER OF GOD IN JOSHUA AND JUDGES IN RELATION TO DEUTERONOMY AND THE PRIESTLY WRITINGS 1* (1998); JONNEKE BEKKENKAMP & YVONNE SHERWOOD, *SANCTIFIED AGGRESSION: LEGACIES OF BIBLICAL AND POST-BIBLICAL VOCABULARIES OF VIOLENCE 1* (2004); Athalya Brenner, “*On the Rivers of Babylon*” (*Psalms 137*), or *Between Victim and Perpetrator*, in *SANCTIFIED AGGRESSION LEGACIES OF BIBLICAL AND POST BIBLICAL VOCABULARIES OF VIOLENCE 56, 56-77* (Jonneke Bekkenkamp & Yvonne Sherwood eds., 2003); SUSAN NIDITCH, *WAR IN THE HEBREW BIBLE: A STUDY IN THE ETHICS OF VIOLENCE 1* (1995).

12. For an introduction, see, e.g., Phil Williams, *The Terrorism Debate Over Mexican Drug Trafficking Violence*, 24 *TERRORISM AND POLITICAL VIOLENCE* 259-78 (2012).

were killed in Mexico's drug war, in comparison to 103,000 during the same period in Afghanistan and Iraq put together.¹³ The cartel is also known for their extraordinary dramatic, public, and macabre violence even though to some degree, their violence is ignored by the Western media. Thus, the utilization of savagery in terrorist acts does not uniquely belong to the Muslim terrorist groups. However, it manifests and exists because it is presented by the media, or is intentionally exhibited by the perpetrators to spread anxiety among the general population as part of their strategy of terror.

While it is timely to dig into the intellectual debate on how to restrain and limit the violence of war, academic discourse in the post 9/11 era is relatively one-sided in scrutinizing reason and justification of violence (*jus ad bellum*). The study of jihadism has flooded academic discourse since then, studying it from different perspectives, be it historical, doctrinal, or political. While we may need a separate study on this issue, suffice to say that the other fields of study which deal with the limitation of violence, or the study of the norms, rules, and regulations on how to restrain war/violence in Islam (let us say, the "*Islamic jus in bello*" aspect) is still lagging. Thus, this article will hopefully fill the gap by paying attention primarily to this side by focusing on juristic discourse on the limitation of war in the Islamic law tradition. I hope this research can contribute to the development of this discourse, especially in English scholarly works. In addition, this article will also focus not only on a normative discussion of the topic but rather on the way this normative reference is debated and negotiated by Muslim jurists in a historical locus.

By elaborating legal opinions of the prominent Islamic schools of law (*madhāhib*) such as the Ḥanafīs, Mālikī, and the Shāfi'ī, the main part of this article will argue that the choice of methodological interpretation on the top of the socio-political contingencies has shaped different legal rulings on restraint, especially on the issue of protection. Some jurists use the consequential moral approach in their legal considerations, while others use the deontological moral approach. Muslim jurists must balance between the textual prescription and the socio-political contingencies that often forced them to utilize a purely pragmatical-utilitarian legal approach. In many cases, the Qur'an and the *sunna* moral prescriptions limit the juristic exercise of the utilitarian method. The Quranic and the Prophetic traditions are like a wall or a red line that limits the jurists' playing field. The Qur'anic moral prescriptions always pull jurists back to stay on track and

13. Jason M. Breslow, *The Staggering Death Toll of Mexico's Drug War*, FRONTLINE (July 27, 2015), <https://www.pbs.org/wgbh/frontline/article/the-staggering-death-toll-of-mexicos-drug-war/>.

do not transgress the limit of absolute textual moral imperatives.¹⁴ On the other hand, utilitarian and pragmatic interpretations make textual norms more flexible and less rigid in certain contexts.

Before we dwell on the main examination of the issue, primarily because the readers may come from different backgrounds without basic understanding of Islamic law, I feel obliged to start my elaboration on the notion of restraint by briefly discussing basic concepts of Islamic law. Understanding these concepts is a precursor to a proper understanding of the main ideas in the following parts. I have to warn the readers that the basic concept of Islamic law that will be discussed below is a simplification and selective, aimed simply to serve the interest of this article.

II. BASIC CONCEPTS OF ISLAMIC LAW.

II.A. Shari'a and Fiqh

We are dealing here with a very complex and sophisticated value and system of law which include its normativity, institutions, determinations, and practices that has been developed more than fourteen hundred years in a very diverse geographical location (from Spain to Indonesia) by different schools of law in responding to the dynamic of socio-political reality. It is extremely difficult to summarize this complex legal system in brief sentences. Nevertheless, it is essential to set out some basic information on Shari'a, Islamic law, and *fiqh* as well as its sources especially for those who don't have any background in Islamic law.

The term "Shari'a" and "Islamic law" are used most of the time interchangeably both by Muslims and non-Muslims discourses. Although it is not completely misguided, the term Sharia actually has a broader meaning depending on the context. For example, it is common in the classical Arabic term to find an expression like "*shari'a al-masihyya*" or "*shari'a al-yahudiyya*" which means simply Jesus law or the Jewish law respectively. Term *shari'a Muhammadiyah* also sometimes used by classical Muslim scholars to refer to the tradition of Muhammad or Muhammad's way of life—but it's never used to refer to Islamic jurisprudence.¹⁵ Linguistically, the term "*shari'a*" simply means the way or the path to the fountain or sources of nourishment. In this linguistic meaning, one can understand that the way to reach God is by following His

14. Khaled Abou El Fadl, *Islamic Law, Jihad and Violence*, 16 UCLA J. OF ISLAMIC AND NEAR E.L. 1–4 (2017).

15. KHALED ABOU EL FADL, *REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE* xxxii (2014).

way or path. In the legal context, Shari'a means the eternal, immutable law from God. As Abou El Fadl says, Shari'a is often used as the "universal, innate, and natural law" of the divine.¹⁶

While Shari'a is a universal absolute divine law, Islamic law, which is called in Arabic "*al-ahkām al-Shar'iyya*," is an outcome of Muslims' understanding of the divine law (Shari'ah). To borrow Abou El Fadl's definition, Islamic law is "a cumulative body of legal determinations and system of jurisprudential thought of numerous interpretative communities and schools of thought, all of which search the divine will and its relation to the public good."¹⁷ In other words, Islamic law is a profane fallible effort of human beings to interpret, understand and implement divine norms in specific socio-political situations throughout history to achieve human well-being (*taḥqīq maṣāliḥ al-ibad*). Thus, the interaction of the sacred and divine with the profane is an essential nature of Islamic law. While Shari'a is sacred, the very purpose of its revelation to the human being is worldly. For example, Muslim jurists agree that the purpose of Shari'a seeks to promote and protect five fundamental values: life, intellect, reputation or dignity, lineage or family, and property (human well-being).

In this regard, the term "Islamic law" connects closely to the term "*fiqh*" which literarily means "deep understanding" or "full comprehension" of the human being. In this literal meaning, any human understanding, not necessarily related to the law, could be understood as *fiqh*. An early book written by Imam Abū Ḥanīfāh (d.150/767) on theology, for example, is titled *fiqh al-akbar*.¹⁸ However, due to the primary role of Islamic law in its history, the term *fiqh* later conflates and is synonymous with the knowledge of Islamic law. Thus, while *fiqh* refers to the human activity of understanding the sacred law, the term *faqīh* or *fuqahā'* (jurists) in Arabic refer to those who possess that knowledge, but primarily of Islamic law.

Because the very nature of *fiqh* is temporal based on human understanding, it is bound by historicity. Through the accumulation of interpretative methods of understanding and reasoning that span more than a millennium, *fiqh* grew into diverse schools of law which was very much influenced by its historicity. As will be seen in our elaboration at the main part below, jurists (*faqīh*) in Medina like Imam Mālik, for instance, have a different opinion on the treatment of prisoners of war on the protection of properties, in comparison to Shaybāni who lived in Kufa and had a close

16. *Id.*

17. *Id.*

18. AL-NU'MĀN ABŪ ḤANĪFAH, AL-FIQH AL-AKBAR (Muhammad bin Yahya Ninowy trans., n.d.).

political connection to Harun al-Rashid, the Abbasid ruler. Throughout history, the interaction between historicity and the use of different interpretative methods and legal reasoning has led to the growth of numerous schools of Islamic law (*madhhab*), reaching more than one hundred schools. Most of them have extinct today except four Sunni schools of law (The Hanafi, Maliki, Shafi'i, and Hambali) and three Shi'i schools (Ja'fari, Zaydi, and Isma'ili).

Based on these reasons, it is proper to translate *fiqh* into English as Islamic jurisprudence. In my elaboration of the topic in the main section below, readers will find disagreement of jurists on certain legal issues such as on the protection of noncombatants and the enemy properties. Thus, this basic understanding of the development of *fiqh*, its numerous legal interpretations and legal reasoning that led to the establishment of legal schools (*madhhab*) is supremely important for our elaboration.

II.B. Sources of Islamic law.

A system of law must refer to an authoritative source of reference to claim its authority and legitimacy. In Islamic law, as argued by Abou El Fadl, there are two categories of sources: the formal and the practical or instrumental sources of law. While the formal sources of law are a substantive ideological construct, the practical sources of law refer to the set of interpretative methods and reasoning utilized in the legal practice to produce positive rules.¹⁹ Concerning the practical sources, it seems that the product of the reasoning is synonymous with the method and interpretative instruments.

It is agreed by the majority of Muslim jurists that there are two formal sources of law that must become a foundation for claiming legal authority and legitimacy. They are the Qur'an (infallible, literal words of God revealed to the Prophet Muhammad), and the Sunna (the cumulative tradition of the Prophet Muhammad and his companions). However, because of the prime role of *ijma'* (consensus and agreement of Muslim jurists) and *qiyas* (analogical or deductive reasoning) in the early formation of Islamic law, these instrumentalities of law have been recognized as the formal sources of law in a way that these tools are utilized as legitimating and foundational sources of law. Shi'i jurisprudence, however, recognized reason as the source of law instead of *qiyas* while agreeing on other sources.²⁰

19. ABOU EL FADL, *supra* note 15, at xxxiv.

20. *Id.*

With regard to the practical sources of law, there are varieties of methods and instruments that expand legal determinations. For example, among the practical sources of the law are the presumption of continuity (*istishāb*), the imperative of following precedent (*taqlīd*), the legal rationalization for breaking with precedent for a new determination (*ijtihād*), application of local practices and tradition (*‘ada and ‘urf*), judgment in equity (*istislāh*), equitable relief (*haja*), and necessity (*darura*), protection of public interest (*masāliḥ al-mursala*) and the prevention of harm (*sad al-dharā‘i*).²¹ Muslim jurists use these methods of legal interpretation to extract law or to examine cases and make legal determinations.

These complex legal methodologies were developed in Islamic jurisprudence to guarantee accountability, predictability, and the principle of the rule of law that ultimately leads to its authority and legitimacy. These sophisticated legal methodologies also represent a continuous tension and effort to balance between upholding normative morality expressed in the Qur’anic text or the Prophetic tradition (*sunna*) with a pragmatic, functional, and temporal legal determination based on socio-historical contexts (*fiqh*).²² The combination of these factors (the socio-political contingencies and the choices of interpretative methods utilized by Muslim jurists) has caused the diversity of opinion in Islamic law.

II.C. Jihad

War or armed conflict is one of the bloodiest human endeavors. Yet, despite its destructive effect, war has been part of the practice of human history. When Islam was born in Arabia, war, whether among tribes or between empires in its neighboring region, was part of a normal-survival mechanism.²³ Qur’anic injunctions on war in part were adaptive and responsive to the development of Islamic mission brought about by the Prophet Muhammad in the milieu of Arabic tribal society. Islamic jurisprudence later uses several terminologies that connect to other terms like *jihād*, *qitāl*, and *ḥarb* based on different Qur’anic injunctions.

The terms *jihād*, *qitāl*, and *ḥarb* in both the Qur’an and Sunna have relatively similar meaning. While jihad in the Western imagination has a distorted connotation of illegal use of violence by terrorist organizations, its

21. *Id.* at xxxiv–v.

22. Khaled Abou El Fadl, *Between Functionalism and Morality: The Juristic Debates on the Conduct of War*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 103-28 (Jonathan E. Brockopp ed., 2003).

23. See, e.g., MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 5–8 (2008); ‘ABD AL-RAḤMĀN IBN KHALDUN, MUQADDIMA 458–60 (2004).

basic term *j-h-d* in Arabic means “endeavor,” “exert oneself in anything,” “striving” or “struggling” toward a praiseworthy aim. The word *jihād* is quite often used in conjunction with the word *fi sabīl allāh*, which means “in the path of God.” While “qitāl” means “fighting,” or “battle” and the term “*ḥarb*” refers to war in general, these three words are similarly referring to an activity of struggling or fighting against the enemy. However, conceptually, only the word *jihād* encompasses a broader sense covering both physical and spiritual striving or struggling against the enemy. According to Muslim scholars, jihad is fighting against two types of enemy: the physical like in the war against enemies, and the spiritual which include the evil (*shayṭān*) and the self (*nafs*).²⁴ Thus, in this frame of meaning we understand that according to Muslim scholars, based on a narrated report from the Prophet, there are two types of jihad which include *jihād al-asghar* (lesser jihad), refers to a physical fight against enemy-unbelievers and *jihād al-akbar* (higher jihad), refers to the struggle against one’s self evil inclination. In addition to these three related terminologies, Muslim jurists in the classical books also use other terms such as *ghazw* (riding or military campaign) and *sarāyā* (military expedition sent by the Prophet) to describe the military activity of the Prophet.²⁵

Juristic discussions on the issue of jihad in the classical books were an outcome of a dynamic interaction between normative references found in the Qur’an and Sunna with the actual socio-political needs, facilitated by the use of interpretative tools and the method of legal reasoning, as we briefly discussed above. As indicated previously, jurists in Islamic history were challenged to balance the consideration of legitimating (or delegitimizing) practical acts in a certain social-cultural situation (functionalism) with the aspirational prescription of the text (morality). In other words, in the context of war, jurists should formulate a law that is neither too idealistic nor too realistic. The law should contain, to some degree, a realistic view of war while maintaining normative prescriptions.²⁶

This dynamic has led to the growth of diverse opinion on almost every issue under Islamic law, including jihad. This happens partly because, on the one hand, different choice of interpretative method and legal reasoning are used by jurists, and on the other hand, the contradiction of both the Qur’anic verses and the narrative of the Sunna (*al-ḥadith*) on a certain

24. WAHBAH AL-ZUHĪLĪ, *ATHĀR AL-ḤARB FĪ AL-FIQH AL-ISLAMĀMĪ DIRĀSAH MUQĀRANAHAH* 32 (1998); ASMA AFSARUDDIN, *STRIVING IN THE PATH OF GOD: JIHAD AND MARTYRDOM IN ISLAMIC THOUGHT* (2013).

25. *See generally* AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 19-41 (2011).

26. ABOU EL FADL, *supra* note 15, at 103; BEST, *supra* note 2, at 2–6.

issue. For example, some verses indicate that the nature of war against unbelievers is defensive while on other occasions the Qur'an indicates to wage war offensively. While the Quranic verses do not mention the execution of the prisoner of war (Q 47:4 mention only grace and ransom), several hadiths reported the Prophet Muhammad executed Al-Naḍr ibn al-Hārith and 'Uqba b. Abū Mu'aīṭ of the Quraysh, two prisoners of the Badr war, one of the biggest battles against the Meccan during the Prophet time.²⁷

For this paper, I would like to refer to some of the most influential classical books of Islamic jurisprudence mainly in the Sunni school such as *al-Mudawwana al-Kubra* (Maliki school), *Siyar al-Kabīr al-Shaybani* (Hanafi), *Al-Umm* (Shafi'i), *al-Mughni Ibd Qudama* (Hambali), *Bidāyah al-Mujtahid* (Ibn Rushd), *Ikhtilāf al-Fuqahā'* (Imam al-Ṭabarī) as a representative sample to show the dynamics of the juristic opinion. In addition, without any pretention to be an expert on Shi'i law, I also include in the discussion below some references to the Shi'i books both from the classical and contemporary periods like *al-Kāfi*, *al-Nihāyah*, *Musnad Zayd bin Ali* and *Bihār al-Anwār*. Based on my preliminary research, the juristic debate on jihad issues among Shi'i jurists is less sophisticated than the Sunni tradition. The reason for that is quite apparent: jihad is closely connected to how political authority preserve, manage, regulate and adjudicate power and territorial domination. Blankinship further argues that jihad used to be an imperial ideology for the survival and expansion of both the Umayyads and Abbasid dynasties in early Islamic history.²⁸ Shi'i Islam, for most of the time, especially in the classical period, was not part of or close to the dominant political power. And probably because of that, jihad topics are not their main priority.

III. THE IDEA OF PROTECTION IN THE CLASSICAL ISLAMIC LAW

If you engage in armed hostility and must subjugate your adversary, why should you spare some of them? Why does the law command you to protect and treat them well in some circumstances? Doesn't it contradict the objective of subjugating the enemy? Answering these questions will be more difficult if one believes that he/she engages in a holy war for a just

27. The reason behind their execution, whether their status as prisoners or because of other grave crimes against the prophet in Mecca, is debatable. See e.g., Lena Salaymeh, *Early Islamic Legal-Historical Precedents: Prisoners of War*, 26 L. & HIST. REV. 521, 521-44, 552-54 (2008) for a discussion of the debate over the reason behind their execution being their status as prisoners or because of other grave crimes against the prophet in Mecca.

28. KHALID YAHYA BLANKINSHIP, *THE END OF THE JIHAD STATE: THE REIGN OF HISHĀM IBN 'ABD AL-MALIK AND THE COLLAPSE OF THE Umayyads* (1994).

cause against the enemy who is evil and unjust. Philosophers, thinkers, and jurists have dealt with these moral questions, and their answers could be simplified into several approaches.

Firstly, the reason soldiers restrain their behavior in the battle is rooted in the notion of honor. The chivalric traditions guide warriors to follow ideal, heroic, noble, and honorable conduct in war. Morally, these notions would make warriors in the battle different, for instance, from a serial killer or a murderer. If both murderers and warriors engage in killing, they shall be differentiated by their ethical motives, moral conduct, and virtue. The sense of honor and moral traditions on warfare would limit warriors' possibility of turning themselves into a killing machine. Presumably, when a community, a polity, or a political authority gives their warriors the license to kill, it must come with some sort of ethical guide to restrain. Authorization to kill is a potent tool, and it must come with strict ethical and legal limits. For a warrior, transgressing the limit of restraint means a breach of honor to his community that trusts him with a license to kill virtuously. Thus, soldiers or warriors follow the laws of war because they think it is their honor to do so. If they kill, they do so under strictly restrained conditions and on behalf of their community, not for their interests.²⁹

Secondly, warriors' behaviors of sparing some enemy's persons and properties or treating humanely captured enemy soldiers are motivated by a mutual expectation that the opposing party would do similarly to them. Reciprocal behaviors (*muqābala bi al-mithl*) are still considered one of conflicts' most realistically observed principles. This approach, however, necessitates that all parties respect similar rules and ethics. It also necessitates the compliance of all parties. Breach of rules and noncompliance of one party may lead to a cycle and reciprocal violation of the law. For these reasons, modern laws of war, for example, emphasizes that compliance with the law shall not depend on reciprocity. Nevertheless, this "golden rule" is still considered an element that practically influences the soldiers' behavior in war.³⁰

Thirdly, restraint may be motivated by functional and pragmatic considerations. For instance, in pre-modern times, warriors treated the prisoners humanly because it was considered an asset they owned. Buildings, vegetation, and cattle belonging to the enemy were spared because the warriors expected their groups would own those properties after the subjugation. If you think that you will own something in the future,

29. LARRY MAY, WAR CRIME AND JUST WAR 30-35 (2007).

30. Eric A. Posner, *Rights and Reciprocity: Human Rights, the Laws of War, and Reciprocity*, in 6 LAW & ETHICS OF HUMAN RIGHTS 148-71 (2012).

through conquest, for example, it is not in your best interest to destroy them indiscriminately.

Last but not least, when warriors join the battle as part of religious duty, their restraint may be motivated by their compliance with a religious doctrine that regulates the conduct of war. They commit to restrain their behavior in battle, not because of expected future consequences but because their moral prescriptions demand that they do so. Thus, from this perspective, restraining behaviors is motivated simply by their conformity with the moral norms and not by other external factors.

From the perspective of moral theory, the above four points can be classified into three moral paradigms: consequentialism, deontology, and virtue ethics.³¹ The second and third points can be categorized under consequentialism. The first and fourth approaches can be classified under the virtue ethics and deontological moral paradigm, respectively.

The most prominent paradigm within consequentialism is utilitarianism. This paradigm sees good and bad by considering the possible outcome of a specific action. If it brings a more significant benefit and welfare or lesser harm, that action could be the right one. Deontological ethics, conversely, say that human actions shall not be dictated by their consequences or outcomes but rather by categorical moral imperatives derived either from God's will or from nature (natural law). Virtue ethics

31. See Larry Alexander & Michael Moore, *Deontological Ethics*, in STAN. ENCYCLOPEDIA OF PHIL. (2020); Walter Sinnott-Armstrong, *Consequentialism*, in STAN. ENCYCLOPEDIA OF PHIL. (2019); Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, in STAN. ENCYCLOPEDIA OF PHIL. (2022) (discussing summary on how consequentialism sees that there is no standard for rights and wrongs, good and bad beyond the practical values of the future outcome. As opposed to consequentialism, deontology maintains that there is an absolute standard for right and wrong or good and bad beyond practical consideration of the outcome. The standard can be derived from the natural law or from the will of God. Meanwhile, the virtue ethics focus on developing good and positive moral character (*akhlāq* in Islamic tradition) through habituation that will guide the behavior of human being. While consequentialism emphasizes on the consequence and deontology emphasizes on the rules, virtue ethics emphasize internal traits such as courage, wisdom, and justice. In other words, both consequentialism and deontology emphasize actions of human being while the virtue ethics focus on agency: how to create a virtuous agent from whom flows virtuous conducts. We must note that this categorization does not mean that each paradigm completely ignores one to each other. All these three paradigms constantly guide human behaviors. Consequentialists would consider other paradigms, but with a lesser portion. Thus, the categorization is not absolute and it is simply a matter of the centrality of approach for each paradigm). See also Gary Watson, *On the Primacy of Character*, in IDENTITY, CHARACTER, AND MORALITY: ESSAYS IN MORAL PSYCHOLOGY (Owen Flanagan & Amelie Oksenberg Rorty eds., 1997); THE HANDBOOK OF VIRTUE ETHICS (Stan van Hooff ed., 2014); Jason Kawall, *In Defense of the Primacy of the Virtues*, 3 J. OF ETHICS & SOC. PHIL. (2009); Elizabeth M. Bucar, *Islamic Virtue Ethics*, in THE OXFORD HANDBOOK OF VIRTUE (Nancy E. Snow ed., 2018); Khaled Abou El Fadl, *Qur'anic Ethics and Islamic Law*, 1 J. OF ISLAMIC ETHICS 7-28 (2017).

focus on the characters and traits of a human being to which good conduct is anchored.

On many occasions, utilitarianism is appealing, simple, and sensible. However, it might become perilous in some situations. For instance, using the consequentialist paradigm, one may consider torturing captives as permissible if the outcome is to prevent greater risks or disasters. Even in a large number, killing civilians intentionally to induce the enemy to surrender and destroy their morale seems justifiable and acceptable, especially if the stakes are very high. We see this justification, for example, in the case of the atomic bombing of Hiroshima and Nagasaki.³² In this regard, deontological moral virtues, or the so-called absolutist paradigm, shall limit utilitarianism's potential damage.³³

It is beyond the purpose of this article to elaborate on this moral debate further. However, this short elaboration is necessary to discuss the notion of protection in the classical Islamic juristic discourse. As we will see, when formulating and debating several legal issues in war, Muslim jurists, like modern thinkers, engaged continuously in considering these moral paradigms. In this part, I will argue that while historical and socio-political contingencies often guide jurists to use the consequential moral approach in their legal considerations, the Qur'an and the *sunna* moral prescriptions limit their exercise of the utilitarian method. The Quranic and the Prophetic traditions are like a wall or a red line that limits the jurists' playing field. The Qur'anic moral prescriptions always pull jurists back to stay on track and not transgress the limit of absolute textual moral imperatives.³⁴ On the other hand, utilitarian and pragmatic interpretation is utilized to make textual norms more flexible and less rigid in certain contexts.

I would like to divide this section into two parts. The first part will discuss the category of persons that shall be protected and shall not be targeted intentionally in the battle. The second part will deal with the issue of the protection of the property. However, dwelling into the elaboration on the notion of protection which falls under the issue of *jus in bello* (the law governing the conduct of hostilities) in the modern international humanitarian law (IHL), it is necessary to touch upon several topics under *jus ad bellum* (the law governing the use of force) that would lead us to a proper understanding of the topic. The reason for that is because, for the pre-modern jurists, both *jus in bello* and *jus ad bellum* are inseparable.

32. Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFFAIRS 123, 127 (1972).

33. *Id.* at 128.

34. Khaled Abou El Fadl, *Islamic Law, Jihad and Violence*, 16 UCLA J. OF ISLAMIC & NEAR E. L., 1, 1-4 (2017).

Furthermore, from the restraint's perspective, the limitation imposed by Islamic law on the warriors started even before the battle started. For instance, most jurists agree that the enemy shall not be harmed until the invitation to accept Islam and warning are delivered up to three times. If they refuse to accept Islam, protection is granted if they accept to pay *jizya* (poll tax). Last but not least, the elaboration on the issue of protection would not be sufficient without knowing certain types of war and types of enemy persons elaborated by jurists. Thus, it is unavoidable to briefly discuss several key issues under Islamic "*jus ad bellum*" as a precursor to our central elaboration.

III. A. Key Issues of Islamic *Jus ad Bellum*

War is a state of conflict where hostility among adversaries is manifested in extreme violence. By its nature, human beings are reluctant to be involved in such types of hostility. Thus, the parties involved in such conflict would typically resort to war only as a last option. Thinkers and scholars across centuries reflect on the nature of war's "necessary evil" by formulating a just-war moral theory. If parties must engage in war, it should be triggered by just causes and waged according to just conduct as a last resort. Importantly, *jus ad bellum* theory also necessitates the presence of a proper authority that can authorize war. War must also be pursued with the right intention. While these two aspects are separated into two distinct bodies of law, in its modern elaboration, pre-modern jurists did not recognize this separation.

Within Islamic legal tradition, we can confidently say that Muslim jurists have elaborated and debated jihad doctrines within the same parameter of defining the justness or unjustness of war. Unjust war, by definition, cannot be considered as a jihad. While there are many issues elaborated by Muslim jurists concerning the use of forces, I will only focus on three main relevant topics as follows:

III.A.1. Types of war/jihad

Islamic jurisprudence differentiates four types of war: the war against non-Muslims or unbelievers (*jihad*), the war against the apostates (*ridda*), the war against rebels (*bughāt*), and the war against the brigands/organized crimes (*hirābah*).³⁵ While the first category indicates the external nature of

35. Despite the fact that the earliest books of jurisprudence discussed legal issues concerning non-Muslim subjects or "the others" such as the People of the Books, the polytheists/idolators, the apostates and the rebel, this typology of conflict is defined more clearly by later jurists. Their discussion of non-Muslim subjects can be found not only under the chapter of jihad but also in

war, the last three categories are part of the internal armed fights. It might be fair to say that this typology is similar to the modern types of war, including international war/armed conflict and the non-international conflicts.³⁶ This differentiation is crucial from the Islamic legal perspective because Islamic law assigns specific rules and legal norms for each type of adversary and conflict.

Firstly, concerning the war (or military jihad) against non-Muslims, Islamic law differentiates between jihad against idolators/polytheists (*al-mushrikūn*) and jihad against the people of the book/scripturaries (*ahl al-kitāb*).³⁷ When waging war against idolators/polytheists, Islamic law

other legal issues such as when jurists talk about marriage, commerce, and contract. Regarding the law of war, the typology used here refers to al-Māwardī in his *al-Aḥkām al-Sultāniyyah*. See ABŪ AL-ḤASAN AL-MĀWARDĪ, *KITĀB AL-AḤKĀM AL-SULTĀNIYYAH WA AL-WILĀYĀT AL-DINIYYAH* 47, 84 (Ahmad Mubārak al-Baghdādī ed., 1989); MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 74 (1955).

36. KHADDURI, *supra* note 35, at 74–82; AL-DAWOODY, *supra* note 25, at 76–78.

37. It is important to note here that jurists disagree over which groups of people should be categorized as idolators as opposed to the scripturaries, especially as Islam expanded beyond Arabia. Other than the Jews and the Christians, Qur'an in 22:17 mentions the Sabians (*al-Ṣābi'ūn*) as well as *al-Majūs* (Magian or the Zoroastrians). With regards to the Sabians, some jurists argue that they are part of the Christian sects while some argue that they are part of the Judaic traditions. Mujāhid argues that *al-Ṣābi'ūn* is a religion in between Christianity and Judaism. Nevertheless, most jurists argue that they are considered as part of the people of the book. See, e.g., 13 ABĪ MUḤAMMAD IBN QUDĀMA, *AL-MUGHNĪ* 203–04 ('Abdullah ibn Abd al-Muhsin Al-Turkī ed., 1997).

Other issues debated by jurists are regarding the timing of their adherence to their religions and the coming of Islam as well as the issue of ethnicity. If someone adhered to a Christian faith after the prophecy of Muhammad, or the Jews who was born after the revelation of Qur'an, would they be considered as the scripturaries? Were the non-Arab idolators considered as part of the scripturaries or the polytheists? The first question regarding this issue arose when Muslim political authority during the Rightly Guided Caliph encountered Zoroastrian and the native Berber (West African) religion. The authority must decide their legal status: whether they were considered the People of the Books or the idolators like the Arab polytheists (*mushrikūn*) of the Prophet time. Based on the prophetic tradition conveyed to him by 'Abd al-Raḥmān ibn 'Awf, the Caliph 'Umar decided that the Zoroastrian would be treated like the scripturaries, especially on the issue of *jizya*. 'Uthmān ibn Affān, based on this precedent, treated the Berber religion similarly. At the later period, when Islam met Hinduism in India, the Muslim authority during the Caliph of 'Abd al-Mālik (the Umayyad) decided also that Hindu would be treated like Zoroastrians, following this precedent, at least for *jizya* purposes. See, e.g., AHMAD IBN YAḤYĀ AL-BALĀDHURĪ, *FUTŪḤ AL-BULDĀN* 617–19 ('Abd al-Allāh al-Anīs al-Ṭabbā' ed., 1987); YOHANAN FRIEDMANN, *TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN THE MUSLIM TRADITION* 85–86 (2003).

These practices would shape the juristic debates regarding the enforcement of *jizya* (and the protection) to non-Muslim. In summary, al-Shāfi'ī and Ḥanbalī School of law seems to argue that *jizya* may only be accepted from the Jews, the Christians, and the Zoroastrians. However, al-Shāfi'ī was reluctant to expand the case by analogy to other groups of religions other than the Zoroastrian. Furthermore, for al-Shāfi'ī, *jizya* is only valid for the followers of those religions who adhered to those religions before or during the prophet time. After the prophecy of Muhammad, it seems that the status of the scripturaries was no longer valid. And thus, if this reading is correct,

regulates that Muslims must offer the idolators the option to accept Islam before fighting can justly be pursued. The “sword verses” that stipulate, “fight the polytheists whenever you find them” (Q 9: 5) indicate that Islam cannot exist together with polytheism.³⁸ Concerning the scripturaries/the people of the book, Islamic jurisprudence regulates that Muslims must offer two options before fighting can begin: accepting Islam and paying *jizya* (poll tax) in return for protection (*al-dhimma*).³⁹ If the enemy fails to accept one of those options, Muslims may legitimately fight them.⁴⁰

for al-Shāfi‘ī, non-Muslims or unbelievers who adhere to their religion after the completion of the prophecy would be considered as idolators. For him, the ethnicity (Arab or non-Arab) was not a factor in deciding the status of the idolatry/scripturaries.

The Hanafi and Maliki schools have a different opinion. For them, all non-Muslims in general may enjoy the protection and retain their religion if paying *jizya*, except the Arabs idolators and the apostates. Importantly, for these two schools of law, the expansion of the status (scripturaries-like status) was only agreed upon the issue of *jizya*. When discussing other legal matters such as on the marriage and the food’s consumption, they would revert to the notion of limited definition of the people of the book/scripturaries that only include the Jews and the Christians. Thus, because of this debate, some scholars argue that the legal discussion on the status of non-Muslims particularly on *jizya* may be dictated partly by the fiscal and economic interests. See, e.g., YA‘QUB IBN IBRĀHĪM ABŪ YŪSUF, KITĀB AL-KHARĀJ 128–29 (1979); 1 MALIK IBN ANAS, AL-MUWAṬṬĀ (RIWĀYAH YAḤYĀ AL-LAYITHĪ) 374–77 (Bashār ‘Awād Ma’rūf ed., 1997); 5 MUHAMMAD IBN IDRIS AL-SHĀFI‘Ī, AL-UMM 399–423 (Rif‘at Fawzī ‘Abd al-Muṭalib ed., 2001); 13 IBN QUDĀMA, *supra* note 37, at 203–07; ABĪ JA‘FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, KITĀB AL-JIHĀD WA KITĀB AL-JIZYA WA AḤKĀM AL-MUḤĀRIBĪN MIN KITĀB IKHTILĀF AL-FUQAḤĀ’ 199–202 (Joseph Schacht ed., 1933).

38. KHADDURI, *supra* note 35. This verse would later be interpreted by some scholars as an instruction to wage ‘offensive war’ not only against the polytheists but also against the scripturaries, despite the fact that Qur’anic texts mention only the polytheists.

39. Banū Taghlib, a powerful tribe of the Christian Monophysite who lived in a strategic area between the Byzantine and the Muslim empire, was an interesting and exceptional case in this regard. Due to geo-political reasons, instead of imposing *jiza* on them, after a stern negotiation, Muslim authority during the Caliph of ‘Umar imposed *ṣadaqa/zakā*, the term that normally refers only to the Muslim’s obligation of paying charity or almsgiving. Banū Taghlib refused to pay poll tax under the term “*jizya*” because they saw it as a humiliation for their pride. This strategic move was purely based upon ‘Umar’s policy for securing alliance with a powerful Christian tribe in the fights against the Byzantine. At a glance, his policy seems to contradict the Qur’anic texts and the traditions. To differentiate it from the *ṣadaqa* for Muslims, ‘Umar doubled the amount of payment to the extent that it is similar to the amount of *jizya*. Unlike *jizya* which can only be imposed upon the male-abled body individuals, all Banū Taghlib persons, without exceptions, must pay the *ṣadaqa*. Under these conditions, Banū Taghlib shall give two sheep for every five camels, a one-dinar tax for every 20 dinars, 10 dirhams tax for every 200 dirhams. Because this was agreed by almost all Companions, Ibn Qudāma says that this policy was considered as *Ijma’* or consensus among them. Only during the caliphate of ‘Umar Ibn ‘Abd al-‘Azīz (‘Umar II) these terms were renegotiated. ‘Umar Ibn ‘Abd al-‘Azīz argues that Banū Taghlib had violated the conditions agreed with the Caliph ‘Umar, including the prohibition of baptizing their children. Other reason, obviously, was because during ‘Umar Ibn ‘Abd al-‘Azīz, Muslims had confidence that they could confront the Byzantine, even without the help of Banū Taghlib.

In my opinion, this was a smart policy of the Caliph ‘Umar because not only did he secure the strategic alliance, but he also secured and even doubled the fiscal interests. This precedent is also

It is essential to mention here the reasoning on the permissibility of fighting against unbelievers (the legality on the use of force). Al-Qur'an has contradictory accounts on this: on the one hand, it indicates that war or fighting against unbelievers (whether polytheists or the people of the book) are allowed only in the case where Muslims are persecuted and attacked (for example Q 22: 39-41).⁴¹ However, even if Muslims must fight against the aggressor, they are obliged to constrain their actions and not transgress the "boundary" (Q 2: 190-191).⁴² Having said this, Qur'an urges Muslims to use armed fighting only as self-defense to stop the aggression against

an example of how legal norms are negotiated to facilitate conflicting interests in achieving a higher objective (in this regard, it seems that for 'Umar, protecting Muslim land was much more important than simply establishing a legal term/norm). Banū Taghlib remained a Christian until around the ninth century. They gradually converted to Islam, especially after they were integrated into the politics of empire under the Umayyad and the Abbasid.

Based on this precedent, al-Shīrāzī (d.476/1083) argue that in the situation when non-Muslims are reluctant to pay poll tax under the name of *jizya*, and Muslim authority consider it reasonable to accept their request, it is then permissible to impose "*ṣadaqa*" instead of "*jizya*" to them under a condition that the amount deducted from them are equal to the *jizya*. For the discussion on *ṣadaqa* of Banū Taghlib, see, e.g., AL-BALĀDHURĪ, *supra* note 37, at 249–252; 4 ABĪ JA'FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, TĀRĪKH AL-ṬABARĪ: TĀRĪKH AL-RUSUL WA AL-MULŪK 40–41 (n.d.); ABŪ YŪSUF, *supra* note 37, at 121; 1 SAHNŪN IBN SA'ĪD AL-TANŪKHĪ, AL-MUDAWWANAH AL-KUBRĀ 333–34 (1994); 13 IBN QUDĀMA, *supra* note 37, at 223–26; 5 ABĪ ISHĀQ AL-SHRĀZĪ, AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀF'Ī 314–15 (Muḥammad Al-Zuhīlī ed., 1996).

40. After the second and the third century Hijra, the issue of invitation (*al-da'wa*) to Islam and warning to the enemy before fighting was a subject of disagreement. The reason for that is because jurists at that period examined that the invitation to follow Islam had been sufficiently conveyed to the enemy. Thus, by assuming that the Roman (the main adversary at that time) had been invited, some jurists from the Ḥanafī School argue that attacking the enemy is permissible without invitation to Islam (It means invitation is no longer necessary). Al-Shāfi'ī, however argue that it is an obligation to convey the invitation to Islam before fighting, if the enemy have not received it. Imām Malik simply says that the invitation to Islam before war is simply favorable, not an obligation. Like the Ḥanafī, Ibn Qudama of the Ḥanbali School also examines that invitation to follow Islam is no longer necessary, especially with regard to the Turk and the Roman. See AL-ṬABARĪ, *supra* note 37, at 2–3; 13 IBN QUDĀMA, *supra* note 37, at 29.

41. "Those who have been attacked are permitted to take up arms because they have been wronged—God has the power to help them (39) and those who have been driven unjustly from their homes only for saying, 'Our Lord is God.' If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause— God is strong and mighty (40)." Qur'an 22: 39-40.

42. To make it more accessible, I quote again here the translation of the verses: "Fight in God's cause against those who fight you, but do not overstep the limits. God does not love those who overstep the limits (190) Kill them wherever you encounter them and drive them out from where they drove you out, for persecution is more serious than killing. Do not fight them at the Sacred Mosque unless they fight you there. If they do fight you, kill them— this is what such disbelievers deserve." Qur'an 2: 190-191.

them.⁴³ The Hijāzī scholars such as Ibn Jurayj (d. 150/768), ‘Aṭā’ ibn Abī Rabbāh (d.115/733), and Imām Mālik, who lived geographically far from the frontier, were inclined to have a defensive approach to jihad.⁴⁴ Thus, for this group of jurists, aggressions and persecutions against Muslims are just causes for war.

However, on other occasions, Qur’an also urges Muslims to establish just public order. For this, Muslims use jihad to spread Islam in their endeavor to establish a world order based on Islamic values (see, for example, Q 2: 194, 217 and the famous of the ‘sword verse’ Q 9: 5, 29).⁴⁵ The ‘opening’ or liberation (*futh*), otherwise seen as conquest by some historians, of the neighboring lands, took place in an unprecedented velocity. Within two hundred years, Islam had become a hegemonic power from India to France. One might see it as “preemptive” self-defense because without actively raiding against the neighboring empires at that time, Islamic land would be in jeopardy. Spreading just order or exercising preemptive self-defense might be categorized as “offensive war.” The Syrian and Iraqi scholars like al-Shaybāni (d.189/805) and al-Shāfi’ī (d.204/802) who lived in the center of Muslim political power and faced a perpetual threat from the Byzantine Empire were inclined to approve of offensive jihad.⁴⁶ For this group of jurists, jihad may be pursued to spread Islam and eradicate disbelievers; it is not only for defense.

Secondly, the war against the apostates (*al-ridḍa*) is a fight against those who abandon Islam with hostile intention and become the enemy.⁴⁷

43. For a detailed study on this, see e.g., REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 47–67 (1999); BONNER, *supra* note 23, at 20–27.

44. 4 ‘ABD AL-RAZZĀQ AL-ṢON’ĀNĪ, *AL-MUṢANNAF* 479–81 (2015); J. Chabbi, *Ribāṭ*, 8 *THE ENCYCLOPAEDIA OF ISLAM NEW EDITION* 495–96 (1995); Roy P Mottahedeh & Ridwan al-Sayyid, *The Idea of the Jihād in Islam before the Crusades*, in *THE CRUSADES FROM THE PERSPECTIVE OF BYZANTIUM AND THE MUSLIM WORLD* 23, 27–28 (Angeliki E. Laiou & Roy P Mottahedeh eds., 2001); Ridwan al-Sayyid, *Dār al-Ḥarb and Dār al-Islām: Traditions and Interpretation*, in *RELIGION BETWEEN VIOLENCE AND RECONCILIATION* 123, 146–47 (Thomas Scheffler ed., 2002).

45. “And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place. Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much-forgiving, a dispenser of grace.” Qur’an 9:5.

46. Chabbi, *supra* note 44; Mottahedeh & al-Sayyid, *supra* note 44; al-Sayyid, *supra* note 44, at 123–25.

47. The nomad tribes of the Arabian Peninsula were very loyal to their customs and tradition. And due to this reason as well, the nomads/Bedouin (the *ʿAʿrāb*) were considered as one of the bitterest enemies by Qur’an (9:97). When the Prophet died, they considered no longer bound by their loyalty to Islam because their loyalty was to the Prophet. It is also important to consider the occasion of the revelation of the “sword verses” in which the leaders of the pagans Arabia were furious when ‘Alī declared, under the authorization of the Prophet, that after that day (after the

In my opinion, we have to differentiate between apostasy as political acts and apostasy as merely theological choices (leaving Islam and converting to other religions).⁴⁸ Even though apostasy as a theological choice is punishable by death in Islamic law,⁴⁹ the war against the apostates historically was fighting against those who revolted against Medina's Muslim authority. In the early Islamic history, especially during the Abū Bakr period, immediately after the Prophet Muhammad passed away, many Arab tribes such as Banū Ḥanīfa, Gatafān, Asad, and Tamīm reverted to their pagan religion, refused to pay almsgiving/tax (*zakah*) and denied the authority of Muslims in Medina. The *al-ridda* revolts also challenged the religion of Islam and Muhammad's prophecy, as shown by the rise of the "false prophets" such as Maslamah ibn al-Ḥabīb (d. 11/633), also known as Musaylama al-Kadhdhāb.⁵⁰ Thus, the newly established Muslim community had to face both political and spiritual crises, immediately after the passing of the Prophet. Under the leadership of Abū Bakr, the first Caliph, the revolts could be subjugated in around one year (in 11/633). This victory also marked the beginning of Muslim expansion and conquest. Those tribes who revolted against Medina were re-integrated into the *umma*. Many of their warriors even took part in the conquests beyond Arabia.⁵¹

From a juridical perspective, regarding the apostates, most Muslim jurists argue that if the apostates are numerous and powerful enough to

revelation of the "sword verses") the pagans/idolators were barred from entering the holy sanctuary and the sacred mosque. They threatened to break the treaty with Medina. *See, e.g.*, 15 MUHAMMAD FAKHR AL-DĪN AL-RĀZĪ, *TAFSĪR AL-FAKHR AL-RĀZĪ (MAFĀTĪḤ AL-GHAYB)* 226–27 (1981); 5 IBN ḤAYYĀN AL-GHARNAṬĪ, *TAFSĪR AL-BAḤR AL-MUḤĪṬ* 9 ('Abd al-Razzāq Al-Mahrī ed., n.d).

48. I concur mainly with the elaboration of al-Alwānī in his book on Apostasy in Islam. *See* TAHA JABIR ALALWANI, *APOSTASY IN ISLAM: A HISTORICAL AND SCRIPTURAL ANALYSIS* 98 (2011).

49. *See, e.g.*, 12 ABĪ MUḤAMMAD IBN QUDĀMA, *AL-MUGHNĪ* 264 ('Abdullah ibn Abd al-Muhsin Al-Turkī ed., 1997).

50. According to Imām al-Shāfi'ī, there are two categories of apostates: those who abandon Islam and revert to their paganism and those who still adhere to the religion of Islam but refuse to pay almsgiving/tax (*al-ṣadaqā*). *See* 5 AL-SHĀFI'Ī, *supra* note 37, at 516.

51. It is beyond the objective of this part to elaborate in detail both legal and historical aspects of the apostasy in Islam. For this discussion, *see, e.g.*, ABĪ JA'FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ, *THE HISTORY OF AL-ṬABARĪ, VOL X THE CONQUEST OF ARABIA* (Fred M. Donner trans., 1993); Elias Shukri Shoufani, *Al-Riddah and the Muslim Conquest of Arabia: A Re-Evaluation* (Jan. 1968) (Ph.D. dissertation, Princeton University) (ProQuest); Frank Griffel, *Toleration and exclusion: al-Shāfi'ī and al-Ghazālī on the treatment of apostates*, 64 *BULL. OF THE SCH. OF ORIENTAL & AFRICAN STUDIES* 339, 339 (2001); Michael Lecker, *Al-Ridda*, 12 *THE ENCYCLOPEDIA OF ISLAM: NEW EDITION* 692 (2004); FRIEDMANN, *supra* note 37; Ahmad Atif Ahmad, *Al-Ghazālī's Contribution to the Sunnī Juristic Discourses on Apostasy*, 7 *J. OF ARABIC & ISLAMIC STUD.* 50 (2007).

challenge the authority, jihad against them is unavoidable. However, Islamic law recommends that Muslim rulers negotiate and urge them to repent and return to Islam (up to three times and should wait for three days) before fighting.⁵² In my opinion, it is fair to say that war against apostates (*ridda*) is similar to the fight against those who commit high treasons and secession in the modern context.⁵³

Third, the war against rebellion or insurrection (*bughā*) is a complicated subject in Islamic law.⁵⁴ Nevertheless, to simplify, while the war of *ridda* resembles a fight against secessionists, *bughā* is a fight against rebels or dissenters who challenge and aim at toppling the authority. In principle, presumably, Muslims are not allowed to fight one another. They are considered to have committed a grave sin for doing so. However, when a group of Muslims dissent based on a plausible interpretation or cause, separate fighting rules are applied (Islamic law on *bughā*). These rules are different from the rules that apply for fighting against non-Muslims or apostates. For example, in the *bugha* war, Muslim fugitives and the wounded may not be dispatched, the Muslim prisoners may not be enslaved or executed, children and women may not be targeted intentionally, and their property may not be taken as spoils of war.⁵⁵

Lastly, the discussion on *bughā* in Islamic law is closely related to the discussion on the fight against organized crime/the brigands or terrorism (*hirābah*) because they are connected. Islamic jurisprudence differentiates the brigands from rebels by testing whether two requirements are met: the insurrection based on plausible rationales/interpretation or cause (reason of renouncing the authority/*ta'wīl al-muhtamal*) and the degree of strength and ability to fight (*shawka*).⁵⁶ If these two requirements are met, then it may be considered as *bughā*. If a group has different plausible interpretations but did not renounce the authority and does not actively rebel (let's say like a peaceful opposition), they can reside peacefully. The authority may persuade them to abandon their interpretation and return to the orthodoxy.

52. For the juristic elaboration from the classical to the contemporary studies, see e.g., ABŪ YŪSUF, *supra* note 37, at 128–29; 7 MUHAMMAD IBN AL-HASAN AL-SHAYBĀNĪ, AL-ASL 510 (Muḥammad Boynukalin ed., 2012); 12 IBN QUDĀMA, *supra* note 49, at 264; 5 AL-SHĀFI'Ī, *supra* note 37, at 516; 10 MUHAMMAD IBN AḤMAD AL-SARAKHSĪ, KITĀB AL-MABSŪT 98 (n.d); KHADDURI, *supra* note 35, at 76; ALALWANI, *supra* note 48, at 89; ABDULLAH SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM (2017).

53. WAEL B. HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 319 (2009).

54. For the elaboration of this topic, the best study is written by Professor Abou El Fadl. See KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 206 (2006).

55. Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 MUSLIM WORLD 144, 155 (1999); ABOU EL FADL, *supra* note 54, at 173.

56. ABOU EL FADL, *supra* note 54, at 145–49. For a more elaborate discussion on different juristic opinions on this issue, see ABOU EL FADL, *supra* note 54, at 219.

However, when they fight (with weapons) opposing the authority, their status is regulated under *bughā*. The Khārijite (Khawārij) case is a clear example: when they disagreed with the Caliph Ali (the 4th Caliph), they were allowed to use their mosque and live in Islamic territory as long as they did not oppose Ali with their strength.⁵⁷ Meanwhile, organized criminals or brigands (*hirābah*) may have one requirement: the degree of strength they use for criminal activities, but they do not have the intent and the plausible cause to rebel and topple the authority.

Islamic jurisprudence does not elaborate on what is the parameter of the plausible interpretation and cause and the degree of strength. Muslim jurists rely on historical precedent rather than setting systematic theoretical parameters.⁵⁸ For example, Muslim jurists argue that Muawiyya and ‘Aisha relied on plausible causes when they rebelled against the Caliph ‘Alī. However, as Abou El Fadl says, plausible interpretation simply means religious disagreement that is not heretical, while the plausible cause is “a grievance from a perceived injustice.” Further, Abou El Fadl argues that “in principle, Muslim jurists were not willing to equate Muslims who fight or rebel because of “higher motives” or unselfish reasons, and those who resort to violence out of the desire for personal gain or out of blind allegiance to a tribe or family.”⁵⁹ Concerning the degree of strength, Muslim jurists do not elaborate on the minimum number of people or minimum strength for the *shawka* to exist. Instead, they simply stated that one or two people clearly do not meet the requirement.⁶⁰

III.A.2. Obligation of jihad

Muslim jurists agree that jihad is a collective obligation (*farḍ al-kifāyah*).⁶¹ It means that each individual is not obliged to do certain

57. *Id.* at 151–52.

58. *Id.* at 145.

59. *Id.*

60. *Id.* at 148.

61. This agreement, however, is not clearly formulated until al-Shāfi‘ī. If one investigates the earliest books of Islamic law, such as *al-Muwatta’*, *al-Mudawwana*, *al-Aṣl*, *Siyar al-Kabīr*, one will not find their elaboration on the issue of jihad’s obligation. In al-Muṣannaf, ‘Abd al-Razzāq interestingly reported that when Ibn Jurayj (d. 150/768) asked ‘Aṭā’ ibn Abī Rabbāh (d. 115/733) regarding whether jihad is an obligation upon each Muslim, ‘Aṭā’ replied very briefly saying he had no knowledge about this. 4 AL-ṢON’ĀNĪ, *supra* note 44, at 479.

Unlike other jurists in his period, al-Shāfi‘ī, in his *al-Umm*, systematically elaborates the obligation of jihad by presenting the evolution of this obligation. To summarize, his elaboration basically says that both Quran and the Prophetic traditions seem to have contradictory accounts. On the one hand, in many verses it commands Muslims to participate in jihad. Relying solely on these verses, one may conclude that jihad is an obligation upon each Muslim. However, on the other hand, Qur’an also stipulates that some Muslims may not participate in the battle; they may

obligations (in this regard, jihad) when part of the Muslim community has performed it. A minority jurist, such as Saʿīd ibn al-Musayyab (d. 94/712-5), one of the early prominent jurists of Medina, however, argues that jihad is an obligation upon every Muslim (*farḍ al-ʿayn*).⁶² In addition, ʿAbd Allāh ibn al-Ḥassan (d. 61/680) says that jihad is simply a voluntary or recommended act.⁶³

The nature of collective obligation changes to be an individual obligation when the enemy attacks Muslim polity and the community are in danger. If the enemy attacks Muslim territory in military aggression, every individual in the occupied land is obliged to wage jihad against the aggressor, and it remains so until the aggressor of the hostile force is defeated.⁶⁴

decide to stay with the community for a legitimate reason (*al-takhalluf*), such as for study. Qurʾan says “Yet it is not right for all the believers to go out [to battle] together: out of each community, a group should go out to gain understanding of the religion, so that they can teach their people when they return and guard themselves against evil.” Qurʾan 9:122. Historical account also shows that in each battle the Prophet instructed some of his companions to stay in Medina to guard the city and to take care of the community. Al-Shāfiʿī, one of the greatest jurists with a brilliant legal mind, resolved this superficial contradiction by proposing what he calls *farḍ al-kifāya*. 5 AL-SHĀFIʿĪ, *supra* note 37, at 384. Unlike *farḍ al-ʿayn* where each Muslim must perform certain obligations such as praying, fasting, almsgiving and pilgrimage, the *farḍ al-kifāyah* is an obligation upon Muslims as a community. Thus, in this regard, if some individuals have performed such obligation, the rest are exempted. For full elaboration on the obligation of jihad according to al-Shāfiʿī, see *id.* at 361–91.

62. 3 SHIHĀB AL-DĪN AL-QARĀFĪ, AL-DHAKHĪRAH 385 (Muḥammad Abū Khubzah ed., 1994). Ibn al-Musayyab, however, see jihad as a defensive mechanism, such as when the enemy attack the Muslim land. Thus, in this situation, jihad becomes an obligation upon each Muslim.

63. 2 MUḤAMMAD IBN RUSHD, BIDĀYAH AL-MUJTAHĪD WA NIHĀYAH AL-MUQTAṢĪD 329 (Muḥammad Hasan Hallaq ed., 1994). In *al-Muṣannaḥ* we found that some Meccan scholars seems to argue that jihad is merely a good deed like *ṣadaqa*. 4 AL-ṢONʿĀNĪ, *supra* note 44, at 479–83.

64. This juristic formulation, according to my investigation, is rarely found in the books of jurisprudence before the fourth/ninth or fifth/tenth century. The idea of jihad as an individual obligation in the situation of emergency/necessity (*jihād al-Idṭirār*) is elaborated primarily because starting around the sixth/eleventh century, Muslims faced an imminent danger and crisis posed by both the Mongols and the Crusaders. Ibn Qudāma (d. 620/1223), one of the most prominent Hanbali jurists, argues that jihad become an obligation for each Muslim (*farḍ al-ʿayn*) in three situations: where one meets the enemy in the frontline, when the enemy enters and attacks the Muslim land and if one is conscripted by the authority. 13 IBN QUDĀMA, *supra* note 37, at 9. Ibn Taymiyya (d. 728/1328) who lived during the crisis following the Mongol attacks that captured Baghdad and many parts of the Muslim territory, elaborates this issue in his *al-Siyāsah al-Sharʿiyyah*. TAQĪ AL-DĪN IBN TAYMIYAH, AL-SIYĀSAH AL-SHARʿIYYAH FĪ IṢLĀḤ AL-RĀʾĪ WA AL-RĀʾIYYAH 163–64 (ʿAlī ibn Muḥammad Al-ʿImrān ed., n.d). A Ḥanafī jurist who lived in the ninth century Hijra, Ibn al-Hammām al-Ḥanafī (d.861/1456) similarly examines this issue when saying that it is an obligation upon each Muslim when the enemy attacks their land. It is also an obligation for Muslims living in a nearby territory to help their fellows who are under attacks. 5 AL-ḤANAFĪ IBN AL-HAMĀM, SHARḤ FATH AL-QADĪR 425 (2003). This juristic ruling would later be integrated into the modern Islamic juristic discourses on jihad. For the modern discussion, see,

While most of the jurists agree that in the case of defensive war (*jihād al-daf‘ū*), every Muslim may participate in jihad without any authorization, scholars disagree on the role and nature of Muslim rulers in "offensive jihad" (*jihād al-ṭalab*). The majority of Muslim jurists agree that in the case of jihad for establishing just and public order (to spread the Islamic faith or the so-called ‘offensive jihad’) through a military operation, the conduct of jihad must be authorized by Muslim leaders (either Caliph or Imams). However, Sunni and Shī‘ī scholars have a different opinion on the nature of Muslim leaders whom Muslims must obey their jihad’s authorization.

Most Sunni jurists see that any established Muslim authority, whether just or not, can authorize jihad. The personal behaviors of a leader are not an issue when authorizing jihad.⁶⁵ Imam Aḥmad (d. 241/855) even says that if one knows a commander or a leader drinks alcohol and is malignant but has the quality of compassion, prudence, and strength that would prevent Muslims from being defeated, one should join the jihad and ignore these personal matters. He also said that if one sees possible defeat during the war because the army leader is weak, then one may refuse to join the jihad. Thus, for him, also for many of the Sunni scholars, the strength (*al-quwwa*) of the leader that could guarantee the victory of jihad is more important than personal piety.⁶⁶

Shī‘ī jurists like Muḥammad Ibn Ya‘qub al-Kulaynī (d. 329/941), Abū Ja‘far al-Ṭūsī (d. 460/1068) and Al-Hurr al-‘Āmilī (d. 1014/1693), by contrast, argue that the presence of a divinely appointed just leader (Imam) is a necessary condition for the authorization of (offensive) jihad.⁶⁷ Al-Hurr

e.g., 1 YŪSUF AL-QARADĀWĪ, *FIQH AL-JIHĀD: DIRĀSAH MUQĀRANAHA LI-AḤKĀMIHI WA FALSAFATIHI FĪ ḌAW’ AL-QUR’ĀN WA-AL-SUNNAH* 114–16 (al-Ṭab‘ah 1 ed. 2009); 16 WIZĀRAH AL-AWQĀF WA AL-SHU‘ŪN AL-ĪSLAMIYYAH, *AL-MAWSŪ‘AH AL-FIQHIYYAH* 130–31 (1989).

65. See, e.g., 4 AL-ṢON’ĀNĪ, *supra* note 44, at 552–53; 1 AL-TANŪKHĪ, *supra* note 39, at 497; 13 IBN QUDĀMA, *supra* note 37, at 14; 1 MUḤAMMAD IBN AḤMAD AL-SARAKHSĪ, *SHARḤ KITĀB AL-SIYAR AL-KABĪR* 110–12 (Abī ‘Abd Allāh Muḥammad Ḥasan Ismā‘īl ed., 1997); 3 AL-QARĀFĪ, *supra* note 62, at 404; ABĪ ‘ABD ALLĀH MUḤAMMAD AL-BUKHĀRĪ, *ṢAḤĪḤ AL-BUKHĀRĪ* 705 N. 2852 (2002). Ibn Taymiyya who lived in a period when Muslim community was experiencing the crisis of leadership, further elaborates this issue by asking a hypothetical question regarding the choice between the trustworthy as opposed to strong leadership (*al-quwwah wa al-amanah*). He argues that it should be measured by the need upon those qualities in certain situations. In the context of war, for example, a strong leader is preferable although he might be untrustworthy. Despite his opinion, from overall discussion it seems that strong leadership is preferable in this hypothetical situation for Ibn Taymiyya. See IBN TAYMIYYAH, *supra* note 64, at 19–25.

66. 13 IBN QUDĀMA, *supra* note 37, at 14–15.

67. See 5 MUḤAMMAD IBN YA‘QUB AL-KULAYNĪ, *FURŪ‘ AL-KĀFĪ* 13–14 (2007); MUḤAMMAD IBN AL-ḤASAN IBN ‘ALĪ AL-ṬŪSĪ, *AL-NIḤĀYAH FĪ AL-MUJARRAD AL-FIQH WA AL-FATĀWĀ* 290 (1970); 6 MUḤAMMAD IBN AL-ḤASAN AL-ḤUR AL-‘ĀMILĪ, *WASĀ‘IL AL-SHĪ‘A ILĀ TAḤṢĪL MASĀ‘IL AL-SHARĪ‘A* 32 (1962); AL-ZUHĪLĪ, *supra* note 24, at 92.

al-‘Āmilī even said that jihad without the presence of a just Imām is forbidden just like the eating of dead animals, blood and swine is forbidden for Muslims.⁶⁸ The presence of a just leader for Shī‘ī jurists is necessary to guarantee that Muslims’ jihad is for God’s cause only, not for personal and political purposes like the consolidation of power or the expansion of the empire.⁶⁹

It is essential to mention this discussion here because the contemporary Muslim extremists would later reinterpret the nature of jihad as an individual obligation in the modern global conflict. Started from the colonization of the Muslim lands by European until the age of the post-9/11, Muslim scholars like Ḥassan al-Banna (d.1949), ‘Abd al-Salam Farāj (d.1982), ‘Abdullah ‘Azzām (d.1989), to Abu Musab al-Suri have formulated reasoning to justify individual obligations of jihad against invaders or corrupt leaders without any authorization from de facto Muslim leaders.⁷⁰ As we have discussed, shifting the jihad narrative from a collective to an individual obligation started during the Mongols’ invasion. At that time, half of the Muslim empire was devastated by their invasion (except Egypt and the Levant). At that period, the Muslim community was also constantly challenged by the Christian crusaders.⁷¹

III.A.3. Muslim territory⁷²

A state’s territory is not fixed and visibly defined by a clear boundary until the post-Westphalian period and colonization. By contrast, the territory of a polity or an empire during the classical time was fluid and dynamic. It depended on its ability to preserve or expand the existing territory and power. Thus, the idea of an obligation to participate in *ribāṭ* (the guard duty at the frontier outposts) as part of jihad at least once every year for Muslims, as promulgated by the classical Islamic jurisprudence, could be understood in the context of preserving and expanding boundary.

68. 6 AL-ḤUR AL-‘ĀMLĪ, *supra* note 67.

69. Abdulaziz Sachedina, *The Development of Jihad in Islamic Revelation and History*, in CROSS, CRESCENT, AND SWORD THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION 35, 40–47 (James Turner Johnson & John Kelsay eds., 1990).

70. I will not discuss this issue in this part. For a summary introduction on this topic, see e.g., Nelly Laboud, *The Pitfalls of Jihad as An Individual Obligation*, in JIHAD AND ITS CHALLENGES TO INTERNATIONAL AND DOMESTIC LAW 87 (M. Cherif Bassiouni & Amna Guellali eds., 2010).

71. Paul L. Heck, *Jihad Revisited*, 32 J. OF RELIGIOUS ETHICS 95, 113–14 (2004).

72. For a comprehensive discussion on this issue, see DĀR AL-ISLĀM / DĀR AL-ḤARB: TERRITORIES, PEOPLE, IDENTITIES (Giovanna Calasso & Giuliano Lancioni eds., 2017); SARAH ALBRECHT, DĀR AL-ISLĀM REVISITED: TERRITORIALITY IN CONTEMPORARY ISLAMIC LEGAL DISCOURSE ON MUSLIMS IN THE WEST (2018). For a brief but yet nuanced discussion, see al-Sayyid, *supra* note 44.

By a routine military campaign on the border (*ribāʿ*), the state continuously asserted its power in the borders/frontiers to prevent the enemy from entering the land of Islam. The raiding in the frontier area (*thughūr*) was also an effort to delineate their territorial sovereignty.⁷³

According to most classical interpreters, al-Qurʿan declares that jihad should continue until the entire earth belongs to God (Q: 2:193).⁷⁴ However, this apocalyptic aspiration would later meet the reality that the Roman-Byzantine empire remained strong and could not be subjugated. Presumably, while waiting until the entire earth “belongs to God,” Muslims must draw a temporary line between Muslim’s land and the land of the enemy. Thus, the idea of territorial boundary of the land of Islam (*dār al-Islām*) versus the land of the war/unbeliever (*dār al-harb/dār al-kuffār*) is a juridical construct of the imperial period of Islam to respond to that geopolitical reality. While Qurʿanic verses never mention such division, classical Muslim jurists, started by Muhammad Nasf al-Zakiyya (d.145/762) and al-Shāfiʿī, constructed the division based on the political reality of their time in which the Abbasid rulers were in a constant confrontation with the Byzantine.⁷⁵ Muslim jurists disagreed on the definition or situation that constitutes the territory of Islam (*dār al-Islām*). Some said it requires Islamic law application; some said the land must be ruled by the Muslim sovereign or Muslims can safely reside and practice their religion. Some said it is the land where Islamic law applied, and

73. Heck, *supra* note 71, at 31.

74. “Fight them until there is no more persecution (*fitna*), and worship (*dīn*) is devoted to God. If they cease hostilities, there can be no further hostility, except towards aggressors.” Most of the classical exegetes interpret the word “*fitna*” in this verse as “*kufr*” (unbelief) or “*shirk*” (polytheism/paganism) and the word “*dīn*” as simply “the religion” instead of “worship.” Thus, if following this interpretation, as often found in the classical exegeses, fight and jihad should not stop until Muslims eradicate polytheism and unbelief (*shirk* and *kufr*) from this earth. But this interpretation is inaccurate since this verse, when read along with the surrounding verses (Q 2:189-194), is talking about the fear of the prosecution by the Meccan against Muslims in the context of peace treaty of al-Ḥudaybiyya. See also 3 ABŪ JAʿFAR AL-ṬAHĀWĪ, MUKHTASAR IKHTILĀF AL-ʿULAMĀʾ 426 (ʿAbd Allāh Nadhīr Aḥmad ed., 1995).

75. Mottahedeh & al-Sayyid, *supra* note 44, at 28–29. Importantly, this type of the world division is not unique to the Muslim experience. In the Roman-Byzantine tradition, the world also divided between the Roman and the Barbarians. See Roberta Denaro, *Naming the Enemy’s Land Definition of Dār al-Harb in Ibn al-Mubarak’s Kitāb al-Jihād*, in *DĀR AL-ISLAM/DĀR AL-ḤARB TERRITORIES, PEOPLE AND IDENTITIES* 93–94 (Giovanna Calasso & Giuliano Lancioni eds., 2017). Furthermore, Denaro argues that before the term *dār al-harb* was “invented,” many scholars such as Ibn al-Mubārak (d. 181/797), to whom one of the oldest treaties on jihad is ascribed, simply uses the term *al-ʿaduww* (the enemy) to refer to the Muslim enemy in general. In many occasions, Ibn al-Mubārak refers to the enemy of Islam by naming their geographical origins such as the Sicily, Iraq and Syria, or refers to their inhabitants such as the Roman (al-rūm), the Turk or the Persians. The term *dār al-harb* is very rarely used (if not at all) in Ibn al-Mubarak’s book. *Id.* at 94–98.

Muslims and the people of the covenant are safe. *Dar al-ḥarb*, by logic, is simply defined as the absence of those criteria.⁷⁶

When the peace agreement between Muslim rulers and the Roman-Byzantine existed, partly because the Abbasid rulers should combine military excursions with diplomatic missions to expand and maintain its territory, al-Shāfi'i later added to the theory of territorial boundary his conception of *dār al-'ahd/dar al-sulḥ* or the land of covenant/the land of non-belligerence. It refers to a concept in which non-Muslim polities have a peace accord with Muslims, generally under conditions that they must pay the poll tax (*jizya* or *kharāj*).⁷⁷ We could conclude that the division of the realm is a political conception rather than a religious one. However, the territorial division would later become an important legal concept that determines other legal determinations like the ruling on residing in the non-Muslim territory, the security guarantee (safe conduct), the application of Islamic criminal law (*hudūd*), and the distribution of the spoils of war in *dār al-harb*.⁷⁸

III.B. Restraint: protection of persons

Is it legitimate to pursue a just-caused war unjustly? In other words, is it justifiable to dictate and measure the means by its end? If you think you are fighting against the enemy for just and noble causes, you are tempted to do whatever possible to subjugate and destroy the enemy. For example, in the holy war, when the enemy is judged as morally wrong and evil, you may think that your conduct in war is always lawful. Thus, there is an inherent risk in assuming that one wage war against the enemy by a just cause: unrestrained war. When the Medieval church engaged in the Crusades against Muslims, as elaborated by Johnson, the church saw that restraint (and the law in general) was not extended to war against Muslims.⁷⁹

Contrary to this tendency, not only do Qur'anic norms, prophetic traditions, and Muslim juristic discourses recognize certain legal rights of non-Muslims, but they also further regulate limits, restraints, and

76. AL-DAWOODY, *supra* note 25, at 92-93.

77. 5 AL-SHĀFI'Ī, *supra* note 37, at 433-35, 461-63, 476-78; Mottahedeh & al-Sayyid, *supra* note 44, at 29; Halil Inalcik, *Dār al-'Ahd*, 2 THE ENCYCLOPAEDIA OF ISLAM NEW EDITION 116-7 (1983).

78. See Khaled Abou El Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 J. OF RELIGIOUS ETHICS 127 (1994).

79. The medieval Christian traditions recognized the limits of war among Christians only. See JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* 108-11 (1997).

protections granted for them. However, when discussing the conduct of warfare, it is crucial to recognize that Muslim jurists were not occupied with an abstract discussion on the issue of justice and fairness toward non-Muslims. Their concern on regulating the limits of war was instead motivated by their effort in finding a balance between holding “the normative impulses inherited from the Prophet and his Companions, against the discretionary leverage conceded to the ruler in promoting the interests of Muslims.”⁸⁰

After briefly discussing critical issues on the law governing the use of force in Islam, now it is time to dwell on the juristic discussion on the conduct of hostilities (*jus in bello*). However, due to limited space, this will only be focused on the protection aspects. We need to examine juristic elaboration on the limitations in a separate study. This part will further be divided into two main sections. We will start the discussion by examining juristic debates and their evolution on the protection of persons. It will be followed by a discussion on the protection of property.

III.B.1. Protection of “noncombatants”

The combatant and noncombatant category in the modern law of armed conflict has a long history that is deeply rooted in human traditions. It evolves and gradually changes over time. There is no doubt that this humanitarian categorization is very modern, appeared concomitant with the rise of modern humanitarian law. This distinction or discrimination is essential in defining the line between a legitimate and illegitimate target in battle. This principle is considered one of the cornerstones of the model law of armed conflict.

While we could undoubtedly find similar principles in classical Islamic law, we can nevertheless ask whether the motive of protecting certain categories of people is dictated by “humanitarian” interest or determined by the advancement of the Muslim interests or merely following the textual prescription (moral imperatives). For example, according to Heck, one may see the discussion in the classical Islamic law on the issue of protection such as the prohibition of targeting/killing captives, elderly, women, and children in the frame of Muslims’ effort to “debilitate the enemy’s capacity for attacking in the future and upsetting the frontier line or balance of power between neighboring states.” Thus, for Heck, such discussion should not be seen as an “odd twist of categorization between combatants and noncombatants, soldier and civilian,” something that is very modern.⁸¹

80. Abou El Fadl, *supra* note 34, at 20.

81. Heck, *supra* note 71, at 112.

Heck's pragmatic and functional approach, in my opinion, is a simplification because Muslim jurists, as will be discussed, most of the time have to balance between holding functional needs and following the moral imperative of the texts (Al-Qur'an and Sunna).

III.B.1.a. Women and children

Islamic traditions, also probably other civilizations at that time, consider all adult male able-bodied individuals as combatants in a war situation.⁸² By contrast, all Muslim jurists agree that women and children categorically enjoy the status of noncombatants.⁸³ Because of their status, women and children shall be protected and cannot be targeted or harmed by intent.⁸⁴ Muslim jurists, however, disagree on targeting them in three different situations: in the situation of necessity,⁸⁵ when they participate in the fighting, and if they are harmed unintentionally as collateral damage. While all the three situations need elaboration, for now, let us focus on the issue of women and children's participation in hostilities.⁸⁶

82. See, e.g., 2 IBN RUSHD, *supra* note 63, at 336.

83. Ibn Qudama, when discussing the status of women and children, express the logic of reasoning behind the ruling: jurists would regard women and children as non-combatants based on the prevailing customs and practices (*al-'ādah*) of that time. While jurists refer to the prevailing traditions and practices, however, they also constantly use textual prescriptions as the reference in their judgement. See 13 IBN QUDĀMA, *supra* note 37, at 180.

84. Abū Bakr, in his "ten commandments," orders his warriors to protect and leave the enemy's women and children unmolested. The prohibition of targeting women and children by intent in the battle is unanimously agreed by jurists across ideological and jurisprudential spectrum. See, e.g., 1 ANAS, *supra* note 37, at 577–78; 5 AL-SHĀFI'Ī, *supra* note 37, at 576; 1 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, KITĀB AL-SIYAR AL-KABĪR 29–33 (Abī 'Abdullah Muhammad Ḥasan Ismā'īl ed., 1997); 4 AL-ṢON'ĀNĪ, *supra* note 44, at 498; MUSLIM IBN AL-ḤAJJĀJ AL-NAYSĀBŪRĪ, ṢAḤĪḤ MUSLIM 828 N. 1831 (2006); 4 ABĪ DĀWUD AL-SIJISTĀNĪ, SUNAN ABĪ DĀWUD 303-5 N. 2668-70 (Shu'ayb Al-Arnu'ūt ed., 2009); AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-'ĀMILĪ, *supra* note 67, at 43, 47–49.

85. *The situation of necessity* according to Wahbah al-Zuhaylī refers to "state of danger and severe hardship which comes to face a person and as a result he fears an injury to his life, his organs, his offspring, his reason or his property. In such a situation, committing an illegal act or neglecting or delaying an obligation becomes obligatory or permissible." Under this definition, three elements of necessity are: the existence of compelling situation, there should be a genuine threat to life or severe injury and the severe injury should be directed to one of five fundamentals (*al-darūriyat al-khamsa* which include life, organs, offspring, reason, property). WAHBAH AL-ZUHĪLĪ, NAZIRIYYAH AL-DHARŪRAH AL-SHAR'IYYAH MUQĀRANAHA MA'A AL-QĀNŪN AL-WADHĪ'Ī 67–68 (1885). For a comprehensive study on the concept of necessity in Islamic law, see, e.g., Mansour Z. Al-Mutairi, *Necessity in Islamic Law*, 1997.

86. When giving the interpretation to the notion of direct participation in hostilities in IHL, the ICRC (International Committee of the Red Cross) set three constitutive elements that can qualify certain act as an act of participation in hostilities. Those elements are: "1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected

When one reads through the book of Islamic jurisprudence, modern and pre-modern alike, one will find this legal question: if women and children participate in hostilities, join with the enemy in a fight against Muslims, is it permissible to kill them? In answering these questions, an overwhelming majority of jurists argue that women and children forfeit their protection rights if they play a role in armed conflict. Women and children who join the battle with their arms can be killed.⁸⁷ Furthermore, al-

against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).” NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16 (2009).

87. 14 ABI ‘UMAR YŪSUF ‘ABD ALLĀH IBN ‘ABD AL-BARR, *AL-ISTIDHKĀR AL-JĀMI‘ LI MADHĀHIB FUQAHĀ’ AL-AMṢĀR WA ‘ULAMĀ’ AL-AQTĀR FĪMĀ TADĀMANAHU AL-MUWAṬṬĀ’* 60–61 (‘Abd al-Mu‘ī Amin Qal‘ajī ed., 1993); 13 IBN QUDĀMA, *supra* note 37, at 179.

While it seems that jurists like Ibn Abd al-Barr and Ibn Qudama firmly state that there was no disagreement on this issue during his time, my investigation suggests that the exceptional rule to the original directive “women and children cannot be killed” in battle indicates an advance development of juristic elaboration, extracted from the text using advance legal logic. From my investigation, I found that this question is not elaborated in some of the earliest books of jurisprudence. The earliest books of jurisprudence only briefly discuss the original directive that women and children must not be killed based on the Prophetic tradition and the Abu Bakr’s report (the Ten Commandments). This prohibition is only interpreted by the later jurists, mainly by the students of the author, by explaining that the prohibition is valid as long as women/children do not take any role in the fight.

The legal elaboration in this issue goes even further when jurists further ask what kind of role and what degree of involvement are sufficient to judge their participation (and so women and children forfeit their right of protection)? For example, jurists argue that merely throwing a stone or giving a warning or guarding the enemy soldiers would not be sufficient to drop their immunity.

In *Kitab Siyar al-Kabir*, Al-Shaybānī (d. 189/805) does not explain the condition of women’s participation in the hostility that may cancel their rights of protection. Al-Sarakhsī (d.483/1090) the fifth/eleventh century jurist who saved the original text of al-Shaybānī in his commentary, however, put an explanation regarding this issue by saying: women and children should be protected as long as they do not take part in fighting against Muslims.1 AL-SARAKHSĪ, *supra* note 65, at 32.

Similarly, in both *al-Muwaṭṭa* and *a-Mudawwana*, among the earliest references of the Maliki school, we could not find this exceptional rule. We only find its elaboration, for example, in *al-Istidhkār*, written by Ibn ‘Abd al-Barr (d. 463/1071), the fifth/eleventh century Andalusian-Maliki jurists and in *al-Dhakhīrah*, written by al-Qarāfī, the seventh/twelfth century Maliki jurists. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 54–55, 60–61; 3 AL-QARĀFĪ, *supra* note 62, at 399. By the seventh/thirteenth century it seems that this exceptional directive has been established as part of the legal discourse on the law of war. For example, in *Al-Mughnī* Ibn al-Qudama, a prominent Hanbali jurist, claims that there is no disagreement on this issue (that women and children shall be protected unless they take part in the battle), as we discussed.

My investigation asserts that al-Shāfī‘ī is probably the first jurist who elaborated this logic in his *al-Umm*. He argues that all protected persons can be killed if they fight because the condition that is required for its prohibition (being non-combatants) has ceased to exist by their participation in fighting. He further extends the logic by saying that women and children should not be executed if

Shīrāzī (d.476/1083), a Shāfi'ī jurist, argues that the permissibility of killing women and children in such a situation is based on a report from Ibn Abbas: The Prophet passed by a woman who was killed in the battle of Hunayn, and he asked: "who killed this woman?" One of the companions said he killed her because she followed him from behind and tried to take over his sword to kill him. When he was aware of it, he instead killed her in self-defense. Then the Prophet says, "What was wrong with this woman? We are not supposed to kill her."⁸⁸ This report indicates that in this situation, for self-defense and because the woman was actively engaged in the hostility, Muslims may target them.

However, some jurists, especially from the Maliki school, put an extra precaution to this ruling: warriors must, beyond a reasonable doubt, believe that the women and children possess and use the weapon in the battle to harm Muslims. For example, if women or children help the enemy by shouting and give a warning, or if women guard the enemy's soldiers, or even if women throw a stone at Muslim warriors, all of that would not be sufficient to forfeit their rights of protection.⁸⁹ Some Shi'ī jurists further emphasize that even if women and children help the enemy soldiers in the battle, Muslim soldiers must refrain from attacking them as much as possible.⁹⁰ Jurists also set an extra precaution when Muslim soldiers doubt whether the target is a man or a woman, or when the target is the *khunthā*

they are captured or injured in the battle because the condition that allows them to be a target has ceased to exist as well. Thus, the law is returned to the original verdict that women cannot be killed or targeted by intent. 5 AL-SHĀFI'Ī, *supra* note 37, at 581–82. In *al-Iqnā'*, Ibn Mudhir (318/930), one of the most prominent Shāfi'ī jurists, following his teacher, elaborates that women and children forfeit their rights of protection by taking part in the battle. 1 ABĪ BAKR MUḤAMMAD IBN AL-MUNDHIR AL-NAYSĀBŪRĪ, *AL-IQNĀ'* 463–64 ('Abd Allāh ibn 'Abd al-Azīz al-Jibrīn ed., 1988). This exceptional directive became a standard elaboration after al-Shāfi'ī and it has influenced other school's juristic elaboration.

88. In another report, the narration is slightly different. The prophet says that "she was not the one who would have fought." 5 AL-SHĪRĀZĪ, *supra* note 39, at 250; 13 IBN QUDĀMA, *supra* note 37, at 180; 13 ABĪ BAKR ABĪ SHAYBAH, *AL-MUḤANNAF* 128 (Usāmah Ibrāhīm Ibn Muḥammad ed., 2007). As we discussed, in the previous notes, the extraction of this exceptional directive to the protection of women from this hadith is indicative of the advanced development of Muslim legal discourse.

89. Unless that throwing kills Muslim. For this discussion, see 3 AL-QARĀFĪ, *supra* note 62, at 399; 2 MUḤAMMAD 'ARĀFA AL-DASŪQĪ, ḤĀSHIYYAH AL-DASŪQĪ 'ALĀ AL-SHARḤ AL-KABĪR 176 (n.d).

90. For these jurists, however, women and children may still be killed in the situation of absolute necessity. The fact they argue that Muslims soldiers have to refrain from killing although women and children play a role in the battle indicates that for the Shi'ī jurists the bar of precaution and the protection should be elevated into a higher level, probably by assuming that women and children by default are incapable of killing Muslim in the battle. 5 AL-KULAYNĪ, *supra* note 67, at 18; AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-'ĀMILĪ, *supra* note 67, at 47–48.

(hermaphrodite person who looks both a man and woman or who has both male and female genital organs). In this situation, Muslim soldiers must refrain from attacking and assume that they are women. Muslim soldiers must avoid killing when in doubt.⁹¹ This juristic elaboration should remind us of the notion of direct participation in hostilities in the modern law of war.

Concerning this issue, Muslim jurists further elaborate on whether women and children who fight can be executed if they are captured, presumably because they have dropped their immunity by fighting. Some jurists hold that once women and children play a role in a war, they may be killed during the battle or executed upon captivity. The Ḥanafīs argue that killing women and children who actively fight against Muslims is allowed only during the battle. Once they are captured, they cannot be killed. The reasoning for that is that killing them in the battle is for repealing the evil of war (*dafʿu shar al-qital*) while executing them upon captivity is a punishment (*al-ʿuqūbah*). Since women and children are not part of the group punishable by execution upon their captivity, killing them when captured is prohibited.⁹² Al-Shāfiʿī similarly argues that women and children can be killed if they fight, but when they are captured or injured, they cannot be killed/executed because the condition that allowed them to be a target has ceased to exist. Thus, the law should be returned to the original directive: women and children cannot be killed by intent.⁹³ Al-ʿAwzāʿī (d. 158/774) concurs with the Ḥanafīs, saying that while it is permissible to kill them in the battle, they must not be killed once they are captured. Sufyan al-Thawrī argued that women joining the battle with the enemy might be killed, but it is still disfavored to target children in that situation.⁹⁴

III.B.1.b. The Clergy

In this regard, Islamic tradition uses two terminologies to refer to the clergy: *al-shamāmasah* and *al-ruhbān*. These two terms can roughly be interpreted as the deacon as opposed to the monk. Sometimes the texts simply refer to it as *aṣḥāb al-ṣawāmiʿ* (the resident of the monastery). Legal discourse on the clergy's protection is mainly based on a report that comes from Abū Bakr. When Abū Bakr instructed his commanders, he said, "[...] you will find people who claim to have devoted themselves to God in their

91. See, e.g., 5 AL-SHĪRĀZĪ, *supra* note 39, at 249.

92. 14 IBN ʿABD AL-BARR, *supra* note 87, at 54.

93. 5 AL-SHĀFIʿĪ, *supra* note 37, at 581.

94. AL-ṬABARĪ, *supra* note 37, at 8–9.

monasteries, leave them to what they claim to themselves. But you will also find a people who shaved a bald spot in the middle of their head (tonsured), so you may kill them with your sword [...]"⁹⁵

It is interesting to see this differentiation as mentioned in the tradition above. If the verbatim narration originated from Abū Bakr, he presumably knew quite well the Christian tradition in the Roman-Byzantine land to the extent that he knew different hierarchies and roles of the priesthood within the church ministry. One may speculate that this knowledge was well known at that time, at least among the scholars and the leaders. However, it seems that it was not the case, at least for some. Al-Bayhāqī (d. 458/1066), one of the canonical hadith compilers, in his hadith collection narrates that Muḥammad Ibn Ja'far ibn al-Zubayr (d. 99/717), a companion, was asked: "do you know why Abū Bakr distinguished between the deacon (*al-shamāmisah*) and the monk (*al-ruhbān*)?" He replies, "I see that the monk secluded and deserted themselves in their monastery, while the deacon does fight in a battle."⁹⁶

The distinction between the two types of clergy has a significant impact on their protection. For most jurists, if the priests are not involved in public affairs and stay away from their participation in conflict in any form, they shall be protected and considered noncombatant. It is important to note that for the classical Muslim jurists, simply giving bits of advice or having opinions in hostilities is enough to forfeit their protection. While in the case of women and children the ceiling of protection is high enough to the extent that Muslim soldiers must put extra precaution, the priests, it seems, do not enjoy that level of privilege.

Prominent jurists such as Abū Ḥanīfah, Imam Mālik, and al-Shāfi'ī, according to some reports, even deny their right to protection completely.⁹⁷ In *al-Siyar al-Kabīr*, one may find surprising what Abū Ḥanīfah said when answering a question from Abū Yūsuf, one of his prominent students, regarding the question on killing priests. He says: "Killing them is righteous

95. 1 ANAS, *supra* note 37, at 577; 1 AL-SHAYBĀNĪ, *supra* note 84, at 32–33; 4 AL-ṢON'ĀNĪ, *supra* note 44, at 498, N. 101000; 11 ABĪ BAKR ABĪ SHAYBAH, AL-MUṢANNAF 130, N. 33704-6 (Usāmah Ibrāhīm Ibn Muḥammad ed., 2007).

96. 18 ABĪ BAKR AḤMAD AL-BAYHAQĪ, AL-SUNAN AL-KABĪR 299 N. 18202 ('Abdullah ibn Abd al-Muhsin Al-Turkī ed., 2011).

97. Al-Dawoody in *The Islamic Law of War* does not mention this important dynamic. He rushes to his conclusion by saying "the jurists unanimously grant noncombatant immunity granted to all hermit [...]." Al-Dawoody, however, recognizes that Ibn Hazm (d. 456/1064), a literalist Andalusian jurist, dissents on this issue by arguing that the clergy is considered as combatant. But he fails to elaborate that even in the mainstream schools, the discourse is very dynamic. AL-DAWOODY, *supra* note 25, at 115.

(*husnan*) because they are occupied by many endeavors of sinful disbelief, and so they entice people toward *kufr*.”⁹⁸

Similarly, according to Saḥnūn in his *al-Mudawwana*, Imām Mālik has a contradictory account on the protection of the clergy (*al-ruhbān*). On the one hand, he sees the priests/the clergy as a combatant because of their advice, and their intellectual and spiritual competence could be detrimental to Muslims. On the other hand, as stated clearly in his *al-Muwattāʾ*, Imām Malik considers the clergy as a noncombatant, and they should enjoy protection. Mālik even further says that their property like monastery and possessions should be left unmolested to sustain their life.⁹⁹

Al-Shāfiʿī, furthermore, is also unclear in this regard. In one part of his *al-Umm*, he argues that Muslim warriors must refrain from attacking the clergy and anyone who lives in hermitage, following Abū Bakr’s precedent. On the other part, when he elaborates on al-Wāqidi’s juristic opinion on the law of war, he says that “I do not see any disagreement on the status of the monk that they shall accept Islam, pay the poll tax (*jizya*) or be killed.” His statement indicates that for him, the monk is a combatant.¹⁰⁰ Ibn Mundhir (d. 318/930), a prominent fourth/tenth century al-Shāfiʿī jurists, in his *al-Iqnāʾ* further states: “I do not see clear and firm textual evidence that prohibits Muslims from killing the monk....”¹⁰¹

Jurists who came later have resolved this apparent contradiction by defining a clear boundary between the clergy who secluded themselves, lock their monastery from outsiders, and ultimately stay away from conflict as opposed to those who mingle with people and potentially would take part in hostility. For example, al-Sarakhsī in his commentary to the *al-Siyar al-Kabir* says that one should read the statement of Abū Ḥanīfa (that killing priest can be righteous) in the situation when the priest performs social services and mingle with people, giving the enemy support or comfort them to endure on their religion.¹⁰² Thus, for al-Sarakhsī, giving support to the

98. 4 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, *KITĀB AL-SIYAR AL-KABĪR* 196 (Abī ‘Abdullah Muhammad Ḥasan Ismāʿīl ed., 1997).

99. 1 ANAS, *supra* note 37, at 577; 1 AL-TANŪKHĪ, *supra* note 39, at 499–500.

100. 5 AL-SHĀFIʿĪ, *supra* note 37, at 581, 699; 4 ABŪ BAKR MUḤAMMAD IBN IBRĀHĪM IBN MUNDHIR, *AL-ISHRĀF ʿALA MADHĀHĪB AL-ʿULAMĀʾ* 23–24 (Abū Ḥammād Al-Anṣārī ed., 2004).

101. 1 IBN AL-MUNDHIR AL-NAYSĀBŪRĪ, *supra* note 87, at 464. Imām al-Baghāwī, a prominent sixth/twelfth century Shāfiʿī jurist, argues that Shāfiʿī’s position on this issue leans toward the permissibility of targeting the monk. He further adds that Abū Bakr’s instruction should not be interpreted as the prohibition (*tahrīm*) of attacking the monk but rather a suggestion for Muslim soldiers to prioritize subjugating the enemy combatant and do not distracted by fighting and attacking against less strategic targets like the monastery. See 11 ABĪ MUḤAMMAD AL-ḤUSAYN IBN MASʿUD AL-BAGHAWĪ, *SHARḤ AL-SUNNAH* 12 (Shuʿayb Al-Arnūūṭ ed., 1983).

102. 1 AL-SARAKHSĪ, *supra* note 65, at 39; 4 MUḤAMMAD IBN AḤMAD AL-SARAKHSĪ, *SHARḤ KITĀB AL-SIYAR AL-KABĪR* 196 (Abī ‘Abdullah Muhammad Ḥasan Ismāʿīl ed., 1997).

enemy in any kind, such as advice, opinion, or monetary donations, is enough for the clergy to be deprived of their protection. However, if the monks are devoted to their religious life entirely in their monastery, not only shall they not be harmed, but also Muslims must neither attack their monastery nor seize their belongings.¹⁰³

It is worthwhile to note that, according to my investigation, Shī'a jurists omit the elaboration on this issue, even though they talk about women and children's protection. It is probably because the primary textual evidence for this matter has relied on the chain of transmission that ends in Abū Bakr's authority.¹⁰⁴ Because they are silent, we could not judge the legal positions of the Shī'a jurist on this specific issue. In addition to that, interestingly, although the report on the protection of the clergy (Abū Bakr ten commands) is included in the earliest book of hadith collection such as al-Muwattā and al-Muṣannafāt, the reports are omitted from many canonical hadith's collections such as Ṣaḥīḥ al-Muslim, al-Bukhārī, Sunan al-Nasā'ī, and al-Turmudhī. The reason for that is probably, as echoed by Ibn Ḥazm, because the reliability of the report is disputed.¹⁰⁵

III.B.1.c. Other groups of people

There are numerous separate reports within the prophetic tradition and juristic discourses about other categories of people that should be protected. However, Muslim jurists disagree on what conditions (like whether they

This ruling becomes a predominant norm and we can find this legal position across the board of the Sunni legal schools, except the literalist. Ibn Ḥazm, a prominent literalist, argues that because of their infidelity (kufr), all non-believers, combatants, and non-combatants alike, can be killed in war. The exception is granted only to the women and children because the textual evidence says so. Other groups of people, including the clergy, can be harmed because the textual evidence that guarantee their protection are unreliable and weak. See 7 ABŪ MUḤAMMAD IBN SA'ĪD IBN ḤAZM, AL-MUḤALLĀ 296–98 (1930).

103. 1 AL-TANŪKHĪ, *supra* note 39, at 499. The prohibition of seizing the belongings of the monk mainly refers to the Mālikī School. Interestingly, Al-Qarāfī mentions that if the property in the monastery is plentiful, according to Ṣaḥnūn, Muslims may seize part of it but must leave some of it for their survival. See 3 AL-QARĀFĪ, *supra* note 62, at 399.

104. I must admit that this conclusion is possibly because of the limitation of my investigation. In my investigation, I focus on these Shī'a references: AL-TŪSĪ, *supra* note 67, at 291; 6 AL-ḤUR AL-ĀMILĪ, *supra* note 67, at 47–48; 5 AL-KULAYNĪ, *supra* note 67, at 17–19; 9 MUḤAMMAD MUḤSIN AL-FAYD AL-KĀSHĀNĪ, KITĀB AL-WĀFĪ 92–96 (2000); 100 MUḤAMMAD BĀQIR AL-MAJLISĪ, BIḤĀR AL-ANWĀR AL-JĀMĪ' AH LI ḌURARI AKHBĀR AL-A'IMMAH AL-ATHĀR 25–26 (1983).

105. In the books of hadith collection that I mentioned, several hadiths narrate the protection of women and children, but they do not mention the monk, except in al-Bayhaqī where he mentions the report from Abū Bakr, as we discussed. See AL-BUKHĀRĪ, *supra* note 65, at 742–45; AL-NAYSĀBŪRĪ, *supra* note 84, at 823–24; 3 MUḤAMMAD IBN 'ĪSĀ AL-TURMUDHĪ, SUNAN AL-TURMUDHĪ AL-JĀMĪ' AL-KABĪR 29–54 (2016); 4 AL-SIJISTĀNĪ, *supra* note 84, at 303–05; 8 ABI 'ABD AL-RAḤMĀN AHMAD B. SHU'AYB AL-NASĀ'Ī, KITĀB AL-SUNAN AL-KUBRĀ 23–28 (2001).

participate in fighting or posing threats) and based on what reasoning (like whether it is based solely on the Muslim interests or merely following the precedent or textual prescription) they deserve protection. Included in this category are the aged, the blind, the sick, the hermaphrodite person, the traveler, the idiot, the hired man, the helper, and the farmer.¹⁰⁶ This long list simply indicates that jurists are willing to include any individual if they meet noncombatants' conditions.

Disagreement among jurists, specifically in this case and on the issue of protection of noncombatants in general, is based on different approaches in defining the *ratio* (*illah*) or legal reasoning for a legitimate killing in war: one group of jurists like al-Shāfi'ī and Ibn Ḥazm argue that the status of *kufr* (unbelief/disbelief) is the *ratio* for legally killing or inflicting harm against the enemy. Because of this reasoning, all non-Muslims can be killed unless the textual evidence says otherwise (such as women, children, and the clergy).¹⁰⁷

The majority of jurists, like the Mālikī, the Ḥanafī, and the Ḥanbalī, argue that the *rationale* for legally killing or inflicting harm against the enemy is their ability to fight or their actual threats against Muslims. In other words, for the second group of jurists, the enemy disbelief (*kufr*) or their status of non-Muslims in itself is not sufficient reasoning for Muslims to legally attack the enemy. Fighting may only be pursued if they are capable of making aggression or posing threats against Muslims. Based on this reasoning, while also referring to the hadiths, they are willing to extend the list of protected persons to other categories other than women, children, and the monks as long as they meet the criteria: the aged, the blind, the farmer, the hired men, and others.¹⁰⁸

Due to limited space, I simply summarize the earliest Muslim jurists' opinion on the permissibility of targeting these categories of people in the battle in the column below. This classification is based on the discussion of al-Ṭabarī in his book *Ikhtilāf al-Fuqhā*,¹⁰⁹ and Ibn Rushd in his *Bidāyah al-*

106. We have discussed some of individuals such as the aged in the report from Abū Bakr in his "ten commandments." We can find other hadiths mentioning these groups of people, for example, in Sunan al-Bayhaqī. See 18 AL-BAYHAQĪ, *supra* note 96, at 303 nn.18208-11.

107. 5 AL-SHĀFI'Ī, *supra* note 37, at 581–82.

108. The summary of this discussion can be found in *e.g.*, 2 IBN RUSHD, *supra* note 63, at 399; AL-DAWOODY, *supra* note 25, at 111; Abou El Fadl, *supra* note 55, at 152. 'Abd al-'Azīz al-Zīr has collected opinions of Ibn Taymiyya in which we can find a deep elaboration from different legal schools specifically on this issue. See TAQĪ AL-DĪN IBN TAYMIYYAH, QĀ'IDAH MUKHTAṢARAH FI QITĀL AL-KUFFĀR WA MUHĀDHATHIHIM WA TAHRIMI QATLIHIM LI MUJARRADI KUFRIHIM ('Abd al-'Azīz 'Abd Allah Al-Zīr ed., 2004).

109. AL-ṬABARĪ, *supra* note 37, at 9–13.

Mujtahid.¹¹⁰ I have also cross-checked their elaboration with other books of the classical comparative jurisprudence such as *al-Ishrāf*,¹¹¹ *Mukhtasar ikhtliāf al-Ulamā*,¹¹² *al-Istidhkar*,¹¹³ and *al-Mughnī*¹¹⁴ and put information if needed:

Jurists	Opinions
The Mālikī	Al-Ṭabarī only briefly mentioned Mālik’s opinion in this regard. He only mentions that Imām Mālik prohibits attacking the clergy/monk, and they must be left unmolested. However, in <i>al-Bidāyah</i> , Ibn Rushd summarizes that, according to the Mālikī school, the clergy, the blind, the sick, the aged who do not fight, the insane, the farmer, and the laborer cannot be killed in the battle.
Al-‘Awzā‘ī	The blind, the young sick person, the traveler (<i>al-jawwāb</i>), the helper, the aged, the clergy, cannot be killed. If they are killed, presumably unintentionally, Muslims must repent to God. He further argues that if those protected persons are suspected of helping the enemy, Muslim warriors cannot kill them until they gain more evidence that they fight against Muslims. Targeting them merely based on presumptions is not allowed.
The Ḥanafī	The aged, the insane, the sick, and the blind cannot be killed. Presumably, the list can be added if those individuals are considered unable to fight, as indicated by the list of the protected persons mentioned in <i>al-Bidāyah</i> that include the clergy, the blind, the sick, the aged who do not fight, the insane, the farmer, and the laborer.
Al-Thawrī (161/778)	The young, sick, and wounded person, the client (<i>al-mawlā</i>), the traveler (<i>al-sā‘ih</i>) can be killed. The monk shall be protected if they pay <i>jizya</i> . The blind and the disabled/incapacitated (<i>al-muq‘ad</i>), if they can fight (<i>ma‘ūnah and quwwah</i>), may be killed. However, if they cannot fight, then they should be protected. The

110. 2 IBN RUSHD, *supra* note 63, at 336–37.

111. 4 IBN MUNDHIR, *supra* note 100, at 20–26.

112. 3 AL-ṬAHĀWĪ, *supra* note 74, at 455–56.

113. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 54–81.

114. 13 IBN QUDĀMA, *supra* note 37, at 175–84.

	insane and the idiot, in his opinion, may also be killed. ¹¹⁵
Al-Shāfi‘ī	His opinion on the clergy has been discussed above. Furthermore, for al-Shāfi‘ī, as we discussed, all individuals other than women, children, and the monk can be killed unless they pay the jizya or become Muslim. Al-Ṭabarī only explicitly mentions the farmer, the laborer, and the aged. According to al-Shāfi‘ī, they should be protected if they pay the jizya or become a Muslim. ¹¹⁶

Here, we must briefly add the opinion of the Ḥanbalī School, represented by Ibn Qudāma in his *al-Mughnī*. The Ḥanbalī, in essence, are following the majority opinion, arguing that all those groups of people cannot be killed because they are not combatants.¹¹⁷

The Shī‘ī and Zaydī jurists such as Zayd bin ‘Alī (d. 121/739), Abu Ja‘far al-Ṭūsī and al-Hurr al-‘Āmilī has no significantly different opinion from above mentioned Sunni jurists. Zayd bin ‘Ali, one of the earliest authorities in Shī‘ism, said in his *Majmu‘* that women, children, and the aged should be protected.¹¹⁸ Al-Ṭūsī argues that only women and children who are being protected and all other persons are legitimate targets unless they accept Islam or pay tribute/the poll tax (*jizyah*) if they are Christians, Jews, or Zoroastrians. Al-Hurr al-‘Āmilī said that women, children, the aged, and the hermit/the monk could not become targets.¹¹⁹

The above column shows how jurists exercise the juristic logic in almost every issue in the classical *fiqh*. There is no clear-cut answer for every legal issue because every problem in jurists’ hands should be

115. In *al-Istidhkār*, Al-Thawrī argues that the aged, women and children cannot be killed in the battle. 14 IBN ‘ABD AL-BARR, *supra* note 87, at 72.

116. We have to add here the opinion of the textualist school, represented by Ibn Hazm (456/1064) who concurs with the al-Shāfi‘ī’s position. For Ibn Hazm, all other groups of people other than women and children are a legitimate target for attack and killing. He argues that the various reports that mention their protection in the battle are weak and unreliable. Thus, beyond women and children, for Ibn Hazm, can be targeted. 7 IBN ḤAZM, *supra* note 102, at 296–99. It is also worthwhile to mention one reasoning stipulated by one of the al-Shāfi‘ī jurists, Ibn Mundhir regarding the permissibility of killing the aged. For him, the aged is not excluded from the general meaning of the verse 9:5 (the “sword verses”) and because of that the aged may be killed. Importantly, Ibn Mundhir further argue that the elderly is no longer useful and have no benefit for Muslims, so they may be killed. Quoted from 13 IBN QUDĀMA, *supra* note 37, at 177.

117. 13 IBN QUDĀMA, *supra* note 37, at 178–79.

118. ABĪ AL-ḤUSAYN ZAYD IBN ‘ALĪ, *AL-JUZU‘ AL-AWWAL MIN MAJMU‘ AL-FIQH* 231–34 (Eugenio Griffini ed., 1919).

119. AL-ṬŪSĪ, *supra* note 67, at 290–92; 6 AL-HUR AL-‘ĀMILĪ, *supra* note 67, at 43–44.

weighed upon a unique contingency and following the precedents and religious texts. However, because the precedents and textual references quite often contradict one another, jurists' opinions are also diverse and contradicting one another.

Take, for example, the issue of the permissibility of targeting the aged. Based on the precedent from Abū Bakr, who instructed clearly to avoid targeting children, women, the elder, and the monks/hermit, some jurists argued that targeting them is clearly prohibited. However, there are reports from the Prophet that during the war of Hunāyn, a very old warrior of the unbeliever, Durayd ibn al-Ṣomma, a veteran of Badr war, also a military strategist, was executed even though he was very old and wounded.¹²⁰ In the absence of an explicit condemnation or prohibition from the Prophet, some jurists, such as the al-Shāfi'ī, conclude that targeting the aged is permissible.¹²¹ Those who have argued for the prohibition reply that the incident was an exception and applied only to that particular situation. Durayd was executed because he participated in the battle by giving his opinion and advice to plan the military operation.¹²²

It is also interesting to briefly touch upon other examples regarding the permissibility of killing the wounded in the battle (especially if they are young), as argued by some jurists like al-Shafi'i. One may find this ruling inhumane, especially if one uses the modern law of war as one's standard. However, the expression in Arabic used by al-Shāfi'ī in his *al-Umm* when he says '*duffifa 'alā al-jarhī*,' implies that the execution of the seriously wounded enemy in the battlefield should be very quick and aimed at ending the agony of the wounded.¹²³ Torturing and pending the execution that may prolong the pain and suffering or humiliate the wounded soldier is prohibited. Most of the jurists prohibit execution that may cause prolonged

120. According to al-Shīrāzī, planning and giving advice in war may contribute greatly to the winning of the battle than the battle itself. See 5 AL-SHĀFI'Ī, *supra* note 37, at 582; 5 AL-SHĪRĀZĪ, *supra* note 39, at 250; 14 IBN 'ABD AL-BARR, *supra* note 87, at 73.

121. They also rely on several reports in which the Prophet commands Muslims to "kill the elders of the enemy and spare their children." See 2 MUḤAMMAD IBN 'ISA AL-TURMUDHĪ, SUNAN AL-TURMUDHĪ AL-JĀMI' AL-KABĪR 592, N. 1687 (2016); 4 ABĪ DĀWUD AL-SIJISTĀNĪ, SUNAN ABĪ DĀWUD 304, N. 2670 (Shu'ayb Al-Arnu'ūt ed., 2009); 18 AL-BAYHAQĪ, *supra* note 96, at 306 n.18215; 14 IBN 'ABD AL-BARR, *supra* note 87, at 73.

122. See, e.g., 1 AL-SARAKHSĪ, *supra* note 65, at 32. According to Al-Dawoody, Al-Shawkānī (1255/1839), the nineteenth century jurist, even further argues that if the aged persons support the army of the enemy by giving advice, Muslims are not permitted to kill them. AL-DAWOODY, *supra* note 25, at 144; 4 MUḤAMMAD IBN 'ALĪ AL-SHAWKĀNĪ, AL-SAYL AL-JARĀR AL-MUTADAFIQ 'ALĀ ḤADĀ'IQ AL-AZHĀR 503 (Maḥmūd Ibrāhīm Zayid ed., 1988).

123. 5 AL-SHĀFI'Ī, *supra* note 37, at 582.

suffering.¹²⁴ Thus, illuminating this juristic opinion in this light might help us understand that the purpose of execution of the seriously wounded soldier in the battle at that time is for the dignity of the victim.

To put it in perspective, in some Asian cultures, such as the Japanese Samurai, a wounded warrior would prefer to kill himself to avoid prolonged agony and avoid humiliation for his dignity.¹²⁵ Thus, measured by the prevailing standard and practice at that time, the ruling of al-Shāfi‘ī that the badly injured enemy can be killed in the battle is not surprising or cruel at all. It is, in fact, guided by virtue of avoiding prolonged suffering.

Part of the modern expectation that the wounded should be protected in the battle is because the modern law of war stipulates the presence of a neutral entity in which its primary responsibility is to help the wounded soldiers regardless of their affiliation. The classical Muslim jurists indeed talk about women’s participation in the battle to care for the wounded.¹²⁶ However, their participation is intended to take care of the wounded soldiers from their party only. It was unthinkable at that time, among Muslims and non-Muslims alike, to nurse the wounded indiscriminately, let alone think of a neutral entity in the conflict taking care of the sick and the wounded indiscriminately.¹²⁷

To conclude on this part, Muslim jurists unanimously agree that women and children should not intentionally be targeted all the time in war because they are noncombatants unless they participate in the fighting. Jurists have a different standard in setting the bar to define their participation in the battle. However, it seems that Muslim soldiers must put extra precautions for the women and the children, and they must be convinced that they pose actual threats before attacking them. According to

124. Jurists extract the ruling from a widely reported hadith that says: “verily Allah has enjoined goodness to everything; so when you kill, kill in a good way and when you slaughter, slaughter in a good way.” From this report as well, jurists extract a ruling on the prohibition of mutilation and torture. *See, e.g.*, AL-NAYSĀBŪRĪ, *supra* note 83, at 941 n.1955; 2 AL-TURMUDHĪ, *supra* note 121, at 482 n.1476-7; AL-ṬŪSĪ, *supra* note 67, at 293.

125. *See, e.g.*, ANDREW RANKIN, SEPPUKU: A HISTORY OF SAMURAI SUICIDE (2012).

126. *See, e.g.*, 4 AL-ṢON’ĀNĪ, *supra* note 44, at 565; 1 AL-SHAYBĀNĪ, *supra* note 84, at 129; 1 AL-TANŪKHĪ, *supra* note 39, at 499.

127. It is important to mention here a dissenting opinion on the permissibility of executing the wounded in the battle. Ibn Abī Shaybah in his *al-Muṣanaf* quotes a report on the prohibition of executing the wounded. During the *futh al-Makkah* (the liberation or the conquest of Mecca) the Prophet said: “do not kill those who surrender, do not execute the wounded and anyone who stays in their house will be protected.” 11 ABĪ SHAYBAH, *supra* note 95, at 155–56. Ibn Abī Shaybah also mentions other reports in which Alī Ibn Abī Ṭālib instructed his soldier during the war of Camel (the civil war between Alī and ‘Ā’ishah) by saying: “do not run after those who retrieve, do not kill the wounded and the prisoners; those who stay in their house or give up their weapon are safe; do not loot the property and possession of the enemy.” *Id.*; ‘ALĪ IBN ABĪ ṬĀLIB, NAHJ AL-BALĀGHAH 398 (Muḥammad al-Ḥusaynī Al-Shīrāzī ed., n.d).

the majority of jurists, the status of the monk/the clergy follows that of women and children with some very minor disagreements. However, unlike women and children, jurists are very strict and push the standard of participation in hostility to the lowest bar. Merely mingling with people or giving an opinion will be enough to forfeit their protection's right. Other categories of persons such as the farmer, the trader, the hired man, the wounded, and the aged may not be targeted with or without conditions, such as paying tribute, depending on the school of law that becomes the reference. But it seems that most jurists see that they enjoy the protection simply because they usually do not fight. If they participate in the fighting, like in the case of women, children, and the monk, they forfeit their protection rights.

While it is certainly not as strict as the modern laws of war in defining the parameter of participation in hostility, for me, it is still fascinating to find a detailed and elaborate discussion on the issue of taking part in hostility. This aspect is substantial evidence of how Islamic law restrains the evil of violence while also considering military interest. In its juristic elaboration, the weight sometimes leans toward Muslim military interests. Nevertheless, that fact should not invalidate our judgment that Muslim jurists are unwilling to unleash the evil of war, even against the enemy. For its contemporary, this elaboration indicates the sophistication of Islamic jurisprudence.

III.B.2. Treatment of prisoners

After the first major battle between the Prophet and the Mecca polytheists in Badr, where Muslims gained the victory, around seventy polytheists were taken captives. Abū 'Azīz ibn 'Umyr Ibn Hashim, one of the prisoners recounted, "When they ate their morning and evening meals, they gave me the bread and ate the dates themselves following the orders that the apostle had given about us. If anyone had a morsel of bread, they gave it to me."¹²⁸

In an exciting expression, Al-Qur'an (76:8-9) instructs the believers to take care of captives or prisoners just like the believers are obliged to take care of the poor and the orphanage by giving them the best possible meals and kindness. In other verses, Al-Qur'an (47:4) also mentions rules regarding the treatment of the captives by saying that "now when you meet (in war) the unbelievers, smite their neck until you overcome them fully,

128. 2 'ABD AL-MALIK IBN HISHĀM, AL-SĪRAH AL-NABAWWIYAH 287 ('Umar 'Abd al-Salām Tadmūrī ed., 1990); NŪRĪ ḤAMŪDĪ AL-QAYSI, AL-FURŪSIYYAH FĪ AL-SHI'R AL-JĀHILĪ 87-89 (1964); 'ABD AL-MALIK IBN HISHĀM, MUḤAMMAD IBN ISHĀQ & ALFRED GUILLAUME, THE LIFE OF MUHAMMAD: A TRANSLATION OF ISHĀQ'S SĪRAT RASŪL ALLĀH 309 (1998).

and then tighten their bonds; *but thereafter set them free, either by an act of grace or against ransom*, so that the burden of war may be lifted.” Following this precedent and the textual references, Muslims are obliged to treat the captives well.¹²⁹ They should also release the captives either with grace or ransom once the hostility ends (Qur’anic normativity). No other options are available according to this Qur’anic injunction.

However, despite this clear Qur’anic command on captives by the third century of Hijra, the majority of Muslim jurists (al-Shafi’i, Maliki, Hambali, Al-Awza’i, Abū Thawr) assert that it is up to the Muslim political authority (Imam) to decide which option is serving the best interest for Muslim among four available choices: freeing, ransoming, execution or enslavement (the so-called Muslim best interest approach).¹³⁰ Abū Hanifah dissents by arguing that the only available options are execution or enslavement. He does not suggest other options like releasing the captive by grace or ransom, asserting that returning the captives to the enemy would only strengthen them.¹³¹ Interestingly, the earliest Muslim jurists like Ibn ‘Abbās, ‘Abd Allāh ibn ‘Umar, Ḥasan al-Basrī, and Aṭā’ Ibn Rabbah argue that the only available option for the Muslim political authority (Imam) is by releasing them, either by the act of grace or payment of ransom, as mentioned in the Qur’an (47:4). Al-Hasan ibn Muḥammad al-Tamīmī, as quoted by Ibn Rushd in *Bidāyah*, even said that this option is “the consensus of the Companions of the Prophet.”¹³² In addition, Shi’i jurists like al-Hillī concur with this opinion.¹³³

The reason for these different rulings among jurists is that there is an apparent contradiction, at least on the surface, between verses in the Qur’an and the contradictory reports regarding the Prophet’s practice. It has been agreed that the Prophet freed the captives of the Badr war by pardon or ransom. However, some reports are mentioning the exception: at least two of the captives, al-Naḍr bin al-Hārith, and ‘Uqba bin Abū Mu‘āyṭ, were

129. See, e.g., Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, 49 ISLAMIC STUDIES 463, 492 (2010); 2 YÜSUF AL-QARAḌĀWĪ, *FIQH AL-JIHĀD: DIRĀSAH MUQĀRANAHA LI-AḤKĀMIHI WA FALSAFATIHI FĪ ḌAW’ AL-QUR’ĀN WA-AL-SUNNAH* 955 (al-Ṭab’ah 1 ed. 2009).

130. See, e.g., 1 AL-TANŪKHĪ, *supra* note 39, at 501–03; ABĪ ‘UMAR YÜSUF ‘ABD ALLĀH IBN ‘ABD AL-BARR, *KITĀB AL-KĀFĪ FĪ FIQH AHL AL-MADĪNAH AL-MĀLIKĪ* 467 (Muḥammad Āḥīd Al-Mawrītānī ed., 1978); 3 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, *KITĀB AL-SIYAR AL-KABĪR* 124–27 (Abī ‘Abdullah Muhammad Ḥasan Ismā‘īl ed., 1997); 5 AL-SHĀFĪ’Ī, *supra* note 37, at 602; AL-ṬABARĪ, *supra* note 37, at 141–46; Munir, *supra* note 129, at 465–66; LENA SALAYMEH, *THE BEGINNINGS OF ISLAMIC LAW: LATE ANTIQUE ISLAMICATE LEGAL TRADITIONS* 67–69 (2016).

131. AL-ṬABARĪ, *supra* note 37, at 145; AL-DAWOODY, *supra* note 25, at 137.

132. 2 IBN RUSHD, *supra* note 63, at 333.

133. Munir, *supra* note 129, at 486; SALAYMEH, *supra* note 130, at 44.

executed. In other battles like the Ḥunayn (6,000 captives) and the battle against Banū Qurayzah (600 to 900 combatants were taken captive), the Prophet enforced a different ruling: pardoning and execution, respectively. As asked by contemporary scholars like Munir and Salaymeh, the question is whether the execution of prisoners is an exceptional rule or part of the established norm.¹³⁴ Let us discuss Munir's conclusion briefly.

Munir argues that in the first century of Islam, from the Prophet's time until the period of Umār Ibn' Abd al-'Azīz, there were only six or seven cases of prisoner execution. In addition, the execution of al-Hārith and 'Uqbah is unrelated to their captivity, but rather it was because of their grave crime against the Prophet and Muslims previously in Mecca. Furthermore, Munir asserts, the execution of Banū Qurayzah is historically unreliable, or even if we accept the reports, the execution (some scholars instead describe it as 'the massacre') has solely relied on their Jewish law, decided by their arbiter, Sa'd ibn Mu'ādh. Based on this evaluation, Munir concludes that the only option for treating prisoners in Islamic law is by releasing them.¹³⁵

Munir's conclusion may go too far. His elaboration is correct but one-sided. His discussion on prisoners' issues is imbalanced and tends to avoid juristic opinions that contradict his conclusion. While he briefly acknowledges the majority opinion, he fails to elaborate on those opinions and instead digs into one side of the tradition to find support for his conclusion: that Islamic law prohibits all treatment other than releasing the captive by grace. While I understand that Munir's purpose is to reinterpret tradition and make Islamic law relevant in modern times, his approach is incorrect. His conclusion that Islamic law allows only releasing the prisoner is dictated by his understanding of the modern law of war, and he uses it as a benchmark when he evaluates the tradition.

In every book of classical jurisprudence, one can find discussion on the power of Muslim authority to decide the captives' fate. When Saḥnūn (d. 240/854), the ninth century Maliki jurist, discusses prisoners' treatment, it seems that the rule is simple and unquestionable: a captive can be executed. He refers to several precedents such as the execution of sixty people of Banū Qurayza, the execution of 'Uqbah ibn Mu'ayṭ after the battle of Badr, the execution of a prisoner from al-Khazar (the Turk) by 'Umar ibn 'Abd al-'Azīz, and the practices of Muslim commanders such as Abū 'Ubayda

134. Munir, *supra* note 129, at 463; Salaymeh, *supra* note 27, at 525–29.

135. Munir, *supra* note 129, at 490–92.

and ‘Iyād ibn ‘Uqbah when subjugating the Byzantine town.¹³⁶ In *al-Mudawwana*, he does not even mention the dissenting opinion regarding this, nor mention the Qur’anic norms on the treatment of prisoners. Saḥnūn’s approach, in which he simply mentions the precedent that supports his argument, should remind us of Munir’s approach of our time.

Likewise, Al-Shāfi‘ī, concurring with the majority opinion, argues that the Muslim authority shall decide the best choice for Muslims between execution, releasing by grace, or ransom. He further argues that execution is permissible, mainly based on a consideration that it will strengthen the religion of God and weaken the enemy. It seems, for al-Shāfi‘ī, the enemy’s debilitation is one of the main reasons for allowing execution. Ransoming and pardoning are allowed if the Muslim authority sees that it will lead to their acceptance of Islam or ending their hostility to Muslims. For al-Shāfi‘ī, it is unfavorable to release captives based on other interests.¹³⁷ Those who are enslaved or taken for ransom become part of the spoils of war and should be distributed according to the law of the spoils. Women and children taken in Muslim captivity, for al-Shāfi‘ī, are considered the property of Muslims. They shall not be executed.¹³⁸

Furthermore, in *al-Muhadhab*, al-Shīrāzī mentioned that three Badr captives were executed, instead of two as mentioned in other reports: Muṭ‘ām ibn ‘Adī, al-Naḍir Ibn al-Ḥārith, and ‘Uqbah ibn Abī Mu‘ayt.¹³⁹ He also reported that Abū ‘Izza al-Jumahī, a captive of Uhud battle, and Ibn Khaṭāl, a captive during the conquest of Mecca, were executed. Thus, in his report, four individuals were executed under the Prophet’s order during the Prophet’s time.¹⁴⁰ However, he also emphasizes that releasing the captives by grace or ransom is permissible based on Qu’ran 47:4. It implies that for al-Shīrāzī, this verse is not abrogated by the “sword verses.” He also discusses the rules on the captive who become Muslim in his captivity. He argues that by becoming a Muslim, the captive must be exempted from execution. However, the captive still faces three possibilities: servitude, grace, or ransom. On this issue, according to al-Shīrāzī, jurists have different opinions. On one hand, while the captive may still be enslaved, other options are dropped. On the other hand, some jurists argue that the captive cannot be enslaved but may still face ransoming or releasing by

136. As we discussed, the number of captives of Banū Qurayza is debatable. Here, in his *al-Mudawwana*, we have information that the number of captives is only sixty people instead of six hundred. 1 AL-TANŪKHĪ, *supra* note 39, at 502–03.

137. 5 AL-SHĀFI‘Ī, *supra* note 37, at 637–38.

138. *Id.*

139. 5 AL-SHĪRĀZĪ, *supra* note 39, at 258–61.

140. *Id.* at 259–60.

grace.¹⁴¹ Thus, becoming a Muslim will not automatically release a captive from punishment, although the possibility of execution is dropped.

Instead of going into the elaboration of partial textual traditions to support a conclusion, as Munir did, my approach is somewhat different. While I recognized the existing rules on captive, I also tried to understand its evolution, from Quranic normativity (ransoming and releasing by grace only) to the Muslim-based-interest approach.

III.C. On the protection of properties.

A fascinating historical account narrated in Sunan Abū Dawud: When the truce between the Muslims and the Jews of the Khaybār tribe was concluded, Muslim soldiers started looting and plundering. The Jewish leader of Khaybār complained to the Prophet: “O the Prophet, how could your people kill our donkey, eat our fruits, and beat up our women?” The Prophet was infuriated and told his commanders and his soldiers in an assembly after praying: “[...] you are not permitted to enter the houses of the People of the Book; beat up their women; eat up their fruit when they have kept up their terms.”¹⁴²

Another interesting juristic debate narrated in *al-Muhadhdhab* on the looting and taking food stocks from the enemy’s territory.¹⁴³ Al-Shīrāzī, the author, asked a question: is it allowed to take food stocks for consumption if needed? The answer, as always, is not clear-cut. One opinion says it is not allowed to take the food stocks excessively without need, based on the opinion of Ibn Abi Hurayrah (d. 345/946), one of the al-Shāfi’ī jurists. The other groups of jurists, including al-Shīrāzī, say that it is allowed to take food stocks at any portion.¹⁴⁴ However, they agreed that it is forbidden to sell those food stocks because it is only taken for consumption. According to two separate opinions, if Muslim warriors return to the Muslim territory and still have leftovers of food stocks they took, then the leftovers should either: 1) become a spoil of war and does not need to be returned or 2) must be returned to the previous owner in the enemy territory because it should only be taken by the necessity for consumption.¹⁴⁵ An alternative juristic opinion was given by Imam al-Nawawī, who says: if the remaining food

141. *Id.* at 262.

142. 4 AL-SIJISTĀNĪ, *supra* note 84, at 656 n.3050; Muhammad Munir, *The Prophet’s Merciful Reforms in the Conduct of War: The Prohibited Acts*, 2 INSIGHT 221, 228 (2009).

143. For the prophetic report on the prohibition of looting, see, e.g., AL-BUKHĀRĪ, *supra* note 65, at 1404 n.5516; 13 IBN QUDĀMA, *supra* note 37, at 145.

144. 5 AL-SHĪRĀZĪ, *supra* note 39, at 276–77.

145. *Id.*

stocks are plentiful, then it must be returned to the owner at the enemy territory, but if it is only a little, then no need to return it.

The short discussion above represents a juristic discussion on this issue which weighs two considerations: in order to subjugate the enemy, by necessity, it is permissible to inflict damage not only against the inanimate property like their fortress, armaments, and other buildings but also against their living property like cattle or vegetation. However, this damage must not be excessive and cross “the boundary” that would lead to the act of *al-fasad* or corruption, waste, and unnecessary destruction on earth as prohibited both by Al-Quran (2:205) and Hadith.¹⁴⁶

On this issue, as discussed, Muslim jurists also relied on a widely reported instruction of Abū Bakr to his army when he says: “you shall not cut down palm trees or burn it; shall not cut down any fruit-bearing vegetation, shall not slaughter animals and livestock except for consumption.”¹⁴⁷ These textual references on the prohibition of excessive destruction of the property also match the pragmatic consideration: excessive destruction is disadvantageous for Muslims’ interest if Muslims expect to acquire and seize the town in the future.

Muslim jurists agree on the following principle on this issue: if Muslims have retained or taken control over the enemy’s property by subjugation, it is unlawful to destroy such property by any means of destruction including burning,¹⁴⁸ killing, or demolition.¹⁴⁹ If the property becomes the spoil of war, then it shall follow the rule of the law of prize and booty (*salb* and *ghanimah*).

Muslim jurists, however, disagree with the situation when Muslims must undergo a military operation to subjugate the enemy. Here we can see how jurists weigh the balance of military objectives and the prohibition of committing *al-fasad* (unnecessary destruction). It seems that for the Māliki and the Ḥanafī schools, achieving a more significant objective (subjugating

146. Sohail H. Hashmi, *Islamic Ethics and Weapons of Mass Destruction, An Argument for Nonproliferation*, in *ETHICS AND WEAPONS OF MASS DESTRUCTION RELIGIOUS AND SECULAR PERSPECTIVES* 329 (2004).

147. 1 ANAS, *supra* note 37, at 577–78; 5 AL-SHĀFI’Ī, *supra* note 37, at 576; 1 AL-SHAYBĀNĪ, *supra* note 84, at 29–33; 4 AL-ṢON’ĀNĪ, *supra* note 44, at 498; AL-NAYSĀBŪRĪ, *supra* note 84, at 828 n.1831; 4 AL-SIJISTĀNĪ, *supra* note 84, at 303-05 nn.2668-70; AL-ṬŪSĪ, *supra* note 67, at 292; 6 AL-ḤUR AL-‘ĀMILĪ, *supra* note 67, at 43, 47–49.

148. On the use of fire as a weapon, jurists differentiate between using it as a tool of punishment and tool for attacking (incendiary weapon). While using fire to burn the enemy as a punishment is unanimously prohibited, most jurists have no reservation in using fire as incendiary weapon. Regarding incendiary weapons, however, most jurists agree that if Muslims still have an available alternative of weapons, the incendiary tool should be avoided. 13 IBN QUDĀMA, *supra* note 37, at 143–44; Hashmi, *supra* note 146, at 139.

149. AL-ṬABARĪ, *supra* note 37, at 102.

the enemy) is more meritorious than preserving the enemy's property, especially if there is no hope that Muslims may acquire that territory in the near future.¹⁵⁰

Following other jurists who argue for the permissibility of destroying the enemy's property, Saḥnūn embarked on a consequentialist interpretation when he elaborated that the command of Abū Bakr to his commander is not motivated by his leniency and mercy to the enemy's infidelity, but rather based on his prediction that the territory (Syria) would become a Muslim land in the foreseeable future. Thus, for him, in the situation when Muslims have no hope of overcoming the enemy and acquiring its territory, all methods of destruction such as cutting down trees, flooding or destroying the enemy's edifices are permissible. However, according to some reports, some of the Māliki jurists prohibit burning livestock and palm trees.¹⁵¹

Al-Awzā'ī, a Syrian jurist who lived in the frontier area, presents a contrasting opinion on this issue. Interestingly, he gives a detailed reservation on destructive methods, as quoted by al-Ṭabarī. Al-Awzā'ī rejects destructive methods such as cutting and destroying vegetation, burning and demolishing edifices or killing animals. However, Muslims may still destroy it out of necessity if the enemy used it as a fortification or a stronghold for their defense.¹⁵² Nevertheless, it seems that Al-Awzā'ī was not convinced by the consequentialist interpretation of Abū Bakr's command, such as of the Saḥnūn's interpretation, and asserts that Abū Bakr's instruction to avoid destruction should be understood within the Quranic norms that condemn *al-fasad* (such as Q 2:250).¹⁵³ Other jurists such as Abū Thawr (d. 240/854) concurs with al-Awzā'ī's opinion and says that it is forbidden to commit all kinds of destruction.¹⁵⁴

In response to al-Awzā'ī, the Ḥanafī jurists argue that since it is permissible to kill a human (the enemy's combatants), which is more valuable than property, it is illogical to reject the permissibility of damaging

150. 1 AL-TANŪKHĪ, *supra* note 39, at 500.

151. 3 IBN ABĪ ZAYD AL-QAYRAWĀNĪ, AL-NAWĀDIR WA AL-ZIYĀDĀ 'ALĀ MĀ FT AL-MUDAWWANAH MIN GHAYRIHĀ MIN AL-UMMAHĀT 63 (Muḥammad Hajjī ed., 1999); 14 IBN 'ABD AL-BARR, *supra* note 87, at 75; 2 IBN RUSHD, *supra* note 63, at 340; AL-ṬABARĪ, *supra* note 37, at 102–03. In al-Ṭabarī, Malik is reported to only prohibit the killing of livestock.

152. AL-ṬABARĪ, *supra* note 37, at 103–06; 2 IBN RUSHD, *supra* note 63, at 340; 1 AL-SHAYBĀNĪ, *supra* note 84, at 33–34. Al-Awzā'ī argues that Abu Bakr clearly prohibits those acts and for him, Abu Bakr more knowledgeable than anyone else in interpreting the verse of Q 59: 5 (“Whatever you [believers] may have done to [their] palm trees—cutting them down or leaving them standing on their roots—was done by God's leave, so that He might disgrace those who defied Him.”).

153. “[...] When he leaves, he sets out to spread corruption in the land, destroying crops and livestock. God does not like corruption.” Ayah al-Baqarah (The Cow) 2:205.

154. AL-ṬABARĪ, *supra* note 37, at 107.

the enemy's property. Like the Māliki jurists, the Ḥanafis also opt for a consequentialist interpretation to the Abū Bakr's precedent.¹⁵⁵ For the Ḥanafis, the destruction is permissible because it weakens the enemy, forces them to surrender, and disrupts their unity. Even if Muslim traders or captives inhabit a fortress, the attack and destruction may still be launched because defeating the enemy is more meritorious to protect Islam than preserving the traders' lives. The defeat of Islam is of greater harm than sacrificing the life of the traders.¹⁵⁶

The al-Shāfi'ī's position concurs with the majority's opinion which gives room for a certain degree of destruction, although the approach is slightly different. For al-Shāfi'ī, if Muslims launch an attack against the enemy's town and see no possibility of defeating them or forcing them to pay *jizya*, Muslims may take necessary steps to destroy the enemy using any method of destruction. However, al-Shāfi'ī asserts an exception for all living property such as the enemy's cattle and horses, based on an explicit prohibition from the Prophet. It is only permissible to slaughter their cattle/animal if Muslim warriors need for consumption.

Why does al-Shāfi'ī prohibit killing and destroying the living being while allowing any destruction to the inanimate property? Al-Shāfi'ī asserts that to irritate and destroy the enemy, Muslims must not resort to a prohibited act. He further argues that if the sole purpose is to irritate the enemy, destroy their morale, or defeat their force while ignoring all prohibition, then killing their women and children should be allowed. Isn't the execution of their children and women more demoralizing than just killing their animals? Muslims are prohibited from killing women and children, although it contributes to the objective of defeating the enemy. Thus, like in the case of women and children, killing living creatures such as cattle and honeybees is prohibited despite its practical value in winning the battle, based on the textual instructions.¹⁵⁷

Before the conclusion, I would like to mention an interesting discussion indicating how legal elaboration on this topic is enriched and developed. On the issue of the destruction of vegetation, Ibn Qudāma, seventh/thirteenth century Ḥanbalī jurist, elaborates that we may first

155. 1 AL-SARAKHSĪ, *supra* note 65, at 32–33; 7 AL-SHAYBĀNĪ, *supra* note 52, at 455.

156. 4 BURHĀN AL-DĪN ABĪ BAKR AL-MARGĪNĀNĪ, AL-HIDĀYAH SHARḤ AL-BIDĀYAH AL-MUBTADĪ 224 (1996). Jurists who argue for the permissibility of cutting down trees and demolishing edifices often refer to a report that the Prophet curtailed the date trees belong to Banū Naḍīr to force them to surrender. To see the list of this report, see, e.g., 13 IBN QUDĀMA, *supra* note 37, at 147.

157. 5 AL-SHĀFI'Ī, *supra* note 37, at 633–34. Abū Thawr and the Ḥanbalī concur with the al-Shāfi'ī jurists in this regard (prohibition of killing and slaughtering living creature except for consumption. See 13 IBN QUDĀMA, *supra* note 37, at 143–44.

differentiate vegetation into three groups. First, the vegetation that needs to be destroyed by military necessity. For example, Muslim may destroy trees because the vegetation is too close to the enemy's fortification, or because Muslim warriors need to cut it down for their access, or because it may hinder the attack. Second, the vegetation which may bring harm if destroyed such as if the vegetation is used for consumption, Muslims must not cut down and destroy this type of vegetation. The third group is the one that does not fall under the first or the second category: it will not harm Muslims or hinder the military operation if vegetation is destroyed. Jurists have two different opinions about this last category. Al-Awzā'ī, Abū Thawr, and al-Layth (d. 175/791) opt for the prohibition of the destruction based on Abu Bakr's clear command. Imām Mālik, al-Shāfi'ī, Ishāq, and Ibn Mundhir argue that Muslims may destroy the vegetation because it will contribute to the enemy's subjugation. Some jurists even go further by saying that destroying such vegetation is not only permissible, but recommended.¹⁵⁸

IV. CONCLUSION

From our long elaboration, we can use the al-Shāfi'ī and the Ḥanafī schools as the representation of two opposite paradigms in formulating legal ruling on the issue of protection. On one hand, al-Shāfi'ī argues that all unbelievers may be targeted by default, except, in the case of the scripturaries, if they accept the hegemony of Islam by paying poll tax or becoming a Muslim. Other exceptions are given to women, children, and the clergy/the monk who confine in their monastery and do not involve in hostility in any way. These last three exceptions are not based upon the premise of their inability to pose an actual threat and engage in aggression, as argued by the majority of jurists, including the Ḥanafī. The reason Muslims must protect women, children, and the clergy is that Muslims must follow textual-normative prescriptions. In other words, al-Shāfi'ī seems to represent a typical moral deontologist: it is the right thing to protect women, children, and clergy because the textual tradition (the norms of the Quran and the *sunna*) says so. They are protected not because of any other functional-practical considerations. Because of this approach, al-Shāfi'ī excludes other categories of people such as the trader, farmer, helper, and elder from noncombatant status. They may be targeted in war, except if they pay the *jizya* or become a Muslim. Ibn Hazm of the textualist school of law (al-Ẓahiri) has relatively similar standing.

158. 13 IBN QUDĀMA, *supra* note 37, at 146–47.

Interestingly, this type of reasoning may lead to a more restrained approach in other issues, as explained when discussing the property's protection. While al-Shāfi'ī, in general, concurs with other majority jurists that allow any destruction method to achieve Muslims' military advantage, he nevertheless prohibits killing and slaughtering animate property. Again, his reasoning is based on a deontological paradigm: the exception of the prohibition of destroying animate property is because the text instructs Muslims to do so.

However, we could not assume that al-Shāfi'ī is detached completely from a rational and logical consideration. Al-Shāfi'ī is known for his synthesis of the rational (the Ḥanāfi) and the traditional approach (the Māliki) of legal reasoning. Moreover, we can see this approach clearly throughout our discussion. For example, when he discusses the permissibility of killing women and children who join a battle, he says that all protected persons can be killed if they fight because the condition that causes their protection has ceased to exist by their participation in the fighting. He further extends the logic by saying that women and children should not be executed if they are captured or injured because the condition that allows them to be a target has also ceased to exist, and thus the law is returned to the original verdict.

On the other spectrum is Ḥanāfi and other jurists, which argue that all unbelievers may deserve protection, except if they pose an actual threat against Muslims. By custom, they considered all able-bodied males of the unbelievers as a threat and are considered able to fight. Because of that, they are excluded from the protected category. By default, women and children shall be protected because they are unable to fight and are not a threat. They further extend the protection to other categories of people who are unable or merely not posing a threat to Muslims, such as the clergy, the helper, the elder, the farmer, the trader, and the laborer.

Underlying these legal rulings is the functional moral paradigm: the enemy may or may not be protected based on the calculated possible outcome. The helper, the elder, and the farmer are considered noncombatant because they are expected to be peaceful and will not endanger Muslims. Based on this functional consideration, Syaikh Niẓām, a Hanafi jurist of the Mughal period, argues that if a woman is the Queen and a child is the Prince King of the enemy, they may be targeted because of their political status. Syaikh Niẓām further argues that if a wealthy woman

spends a great deal of her wealth to aid the enemy or to incite enmity against Muslims, she can be killed as well.¹⁵⁹

Muslim jurists often elaborate in a rather bizarre hypothetical situation to discuss legal issues. In this regard, some jurists, for example, argue that a man with no right hand and with no legs shall be protected while a man with no left hand and has one leg may be killed/targeted because the right arm is the main strength of the body. This example also explains that Muslim jurists quite often push the threshold of protection to a minimum limit and give more room for military interest by elaborating on many exceptions.

While this logic has brought these jurists to a more restrained approach concerning individuals' protection, it is not the case for property protection. Their reasoning seems to have led them to conclude that all destructive methods may be permissible if it is advantageous militarily for Muslims.

Along with these two lines of approaches, we have also discussed al-Awzā'ī's opinions on the issue of protection briefly. Al-Awzā'ī's legal arguments seem to be more restrained than both the rational and the traditional jurists. Modern scholars have difficulty fitting al-Awzā'ī into their categorization, but usually, he is considered a traditionalist because he relied a lot on a living tradition while occasionally used rudimentary logical reasoning.¹⁶⁰ From our discussion, al-Awzā'ī, who lived during the Umayyad but survived the Abbasid revolution, who also lived in the frontier area (Syria), surprisingly proposed a much less hawkish approach, compared to other schools. Unfortunately, the elaboration of his juristic thoughts on this issue is hindered by the fact that none of his treaties reach us, other than the fragments preserved by other jurists. But from knowing al-Awzā'ī's opinion (also other jurists like Abū Thawr), we may hypothesize that the evolution toward the advancement of Muslim military interests is evolving along with the line of the conquest and political expansion (of the Abbasid period).

159. 2 AL-SHAYKH NIẒĀM, AL-FATĀWĀ AL-HINDIYYA 113 ('Abd al-Laṭīf 'Abd al-Raḥmān ed., 2000); IBN QUDĀMA, *supra* note 37, at 215.

160. Steven C. Judd, *Competitive Hagiography in Biographies of al-Awzā'ī and Sufyān al-Thawrī*, 122 J. OF THE AM. ORIENTAL SOC'Y 25, 25-27 (2002).

ISLAMIC LAW AS HERMENEUTIC DEVELOPMENTS WITHIN TRADITIONALIST ISLAM IN INDONESIA

Mark Cammack*

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INTRODUCTION

I learned a great deal from Zezen's excellent analysis of Islamic doctrine on the law of war. But I've chosen to address a different issue related to Islamic law. Though off-topic, my comments are not entirely unrelated to today's program, since Zezen is among those who helped me understand my subject.

I have spent nearly forty years researching Islamic law and legal institutions in Indonesia and have worked with a wide range of Indonesian scholars, judges, and lawyers. As my circle of contacts in Indonesia expanded, I was increasingly impressed by the fact that a large share of the most capable scholars in the country have one thing in common: they all spent years studying, often memorizing, impenetrable Arabic legal texts that are consumed with questions like determining the precise moment at which succession opens to the estate of a person turned into stone by the devil, and whether it is permissible to ride on a camel that has consumed wine.¹

* Professor of Law, Southwestern Law School. I am indebted to Arif Maftuhin and Haider Hamoudi for invaluable comments and guidance. The spelling of Arabic terms is based on conventional Indonesian transliteration without diacritics.

1. N.J. COULSON, A HISTORY OF ISLAMIC LAW 81-82 (1964).

These Indonesians who have training in the classical tradition of Islam are not only some of the country's best scholars; they are also the most socially progressive interpreters of Islamic law. For them, the values of human dignity and equality are the core values of Islam, and the common dignity and equality of all humans must be the foundation for any interpretation of Islamic law. That this vision of Islamic law should come from scholars steeped in the Islamic literature of the Middle Ages came as a surprise. I naturally began the study of Islamic law with a set of assumptions about what I would find. That it would be with scholars from an obscurantist background that I would feel most at home did not accord with those assumptions. How is it, I asked myself, that spending your youth sitting cross legged on the floor in a sarong poring over medieval legal treatises equips you with the critical and analytical skills to be a first rate twenty-first century scholar while at the same time cultivating an understanding of Islam and Islamic law as tolerant, pluralistic, egalitarian, and democratic?

The question is important and deserves fuller consideration than I can give it here. But my abbreviated answer is that, for those who engage with it deeply, Islamic law is not, as it is often portrayed, a set of fixed and immutable rules. Islamic law is rather a rich and complex tradition of inquiry exploring the meaning of virtue and justice in Islam and the Islamic injunction to command good and forbid wrong. Students trained in the tradition acquire a set of moral references and tools of analysis that provide a framework for critical examination of the conditions for human flourishing. While the tradition was long thought to have closed itself off to further growth more than a thousand years ago, Indonesian Muslims have increasingly come to realize that it can be made applicable to the problems of modern life.

ISLAMIC LAW AS METHODOLOGY

Everyone has heard that Islamic law is based on the Quran—the scripture revealed to Muhammad in the seventh century—but what is not widely appreciated is that what is contained in the Quran is not the law itself but what are called “indications” of the law.² The strictly legal content of the Quran constitutes only a small fraction of the text³ and consists mostly of verses stating “broad and general propositions as to what the aims

2. Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* 82 (2009).

3. See generally Knut S. Vikor, *Between God and the Sultan: A History of Islamic Law* 33 (2005). Of the 6200 verses in the Quran only about 350 are relevant to law and the largest number of these deal with matters of ritual practice. *Id.*

and aspirations of Muslim society should be.”⁴ The small number of verses containing explicit rules or norms were revealed casuistically in response to specific historical circumstances and do not, in themselves, constitute a comprehensive set of regulations for any topic.⁵ In addition to the Quran, there is also a second source for Islamic law that is comprised of what might be called precedents from the life of Muhammad and the early days of Islam.⁶ But these precedents, called *hadith* or *Sunnah*,⁷ don’t provide clear answers to most legal questions either. They have a lot to say on many different issues, but their meaning is often obscure, and the body of *hadith* as a whole is filled with inconsistencies and contradictions. There is also a huge problem of determining which precedents are genuine and which are simply unfounded rumor.⁸

Islamic law is the law of God but, for better or worse, God chose not to reveal His law as a finished product. God provided indications or evidence of the law in the Quran and the *hadith* but left it to humans to discover its precise terms through a process of interpreting the meaning of those texts. The specific rulings generated by that process of interpretation are collectively called *fiqh*, which means understanding.⁹ In distinguishing between the law itself—which is called the *Shariah*—and human understanding of the law—*fiqh*¹⁰—the Islamic legal tradition recognizes that the interpretation of texts is a tricky business, and that not all attempts at interpretation are going to get it right.¹¹

The project of interpreting the Quran and *hadith* to extrapolate legal rules was open to anyone willing to invest the effort and acquire the

4. COULSON, *supra* note 1, at 11.

5. *See id.*

6. *See* KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARIAH IN THE MODERN AGE 36 (2014).

7. *See id.* The word *hadith* refers to a narrative of the conduct of the Prophet whereas *Sunnah* is the example or the law that is deduced from it. *Id.*

8. For a discussion of the methodology for analyzing the authenticity of *hadith*, see MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 58-116 (Islamic Texts Soc’y, 3d ed. 2003).

9. *See* EL FADL, *supra* note 6, at xl.

10. *See id.* (“[S]hariah was considered to be the immutable, unchangeable, and objectively perfect divine truth. Human understanding of Shari’ah, however, was subjective, partial, and subject to error and change. While Shari’ah is divine, *fiqh* (the human understanding of Shari’ah) was recognized to be only potentially so, and it is the distinction between Shari’ah and *fiqh* that fueled and legitimated the practice of legal pluralism in Islamic history.”).

11. *See* BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 88 (1998) (“[M]uslim jurists. . . [a]s astute observers of the text-critical and interpretive processes involved in the formulation of the law. . . understood perfectly well that certainty in the understanding of the law often lay beyond the reach of the interpreter and that probable constructions of the law were often the most the interpreter could hope to attain.”).

necessary skills.¹² These scholar-jurists understood their mission to be one of discovering the law implicit in the sources rather than making it up themselves,¹³ so early on they developed an elaborate and sophisticated set of rules of interpretation designed to make the process as objective as is humanly possible.¹⁴ This common interpretive methodology, called the science of *usul al-fiqh*, provided standards for evaluating the quality of scholarly interpretations and ensured that the accumulated body of doctrine had a significant degree of consistency and coherence. But with no organizational hierarchy—no supreme court—with the authority to declare the case closed,¹⁵ the interpretative enterprise flourished for nearly one thousand years producing a gigantic literature of interpretations, re-interpretations, commentaries, and commentaries on commentaries. Scholars were convinced that their own interpretations and the interpretations of those who agreed with them were correct, but because, as the saying goes, “God knows best,” they openly acknowledged the possibility that the others might be right and they might be wrong.¹⁶

This recognition of the inevitability of difference of opinion gives Islamic law one of its most characteristic features—its extreme diversity of doctrine. “[O]ne would be hard pressed to find any significant legal issue about which juristic disputations and discourses have not generated a large number of divergent opinions and conflicting determinations.”¹⁷ The existence and acceptability of this diversity is formalized in Sunni Islam with the recognition of four different schools of doctrine or *madhhab*.¹⁸ The

12. KHALED ABOU EL FADL, *SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 37 (2003) (“In theory, there is no formal bar to becoming a jurist except the attainment of the requisite knowledge of the linguistic practices and conceptual categories of the juristic culture.”).

13. See WEISS, *supra* note 11, at 86 (“Among Sunnis, the use of analogy gained acceptability, as we have seen, only because it was shown not to conflict with the conviction that no law should be formulated apart from the foundational texts.”).

14. For a thorough and readable discussion of the legal methodologies of Sunni Islam, see KAMALI, *supra* note 8.

15. EL FADL, *supra* note 12, at 11 (“Sunni Islam. . . lack[s] a formal institutional and hierarchical structure of authority. There is no authoritative center other than God and the Prophet, but both God and the Prophet are represented by texts.”).

16. VIKOR, *supra* note 3, at 106.

17. EL FADL, *supra* note 6, at xlili. See also MOHAMMAD HASHIM KAMALI, *SHARI’AH LAW: AN INTRODUCTION* 99-122 (2008) (discussing diversity of doctrine in classical Islamic jurisprudence).

18. See CHRISTOPHER MELCHERT, *THE FORMATION OF THE SUNNI SCHOOLS OF LAW* (Ruud Peters & Bernard Weiss eds., 1997), for the leading study of the development of the four canonical schools of Sunni legal thought. See HALLAQ, *supra* note 2, at 60-71, for a summary treatment of the issue. See ISLAMIC LEGAL STUD. PROGRAM, HARVARD L. SCH., *THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS* (Peri Bearman, Rudolph Peters &

four *madhhab*, named after their putative founders, though adhering to a common jurisprudential theory about the sources of the law and the means of their interpretation, differ significantly on many specific points of law.¹⁹ Moreover, the scholars of one *madhhab* often disagree with other scholars working within the same *madhhab*. This doctrinal diversity was considered both unavoidable and beneficial. Difference of opinion within the community of Muslims, according to a well-known *hadith* report, “is a sign of the bounty of God.”²⁰

THE CRISIS OF MODERNITY

The philosopher Alasdair MacIntyre makes the point that the life of a tradition often includes periods of crisis.²¹ A crisis occurs within a tradition when its methods of inquiry and forms of argument are no longer able to provide satisfactory responses to the concerns that are addressed by the tradition.²² Beginning in the eighteenth century, after operating virtually unchallenged for almost a millennium, the Islamic legal tradition found itself in just such a crisis.²³ Though often described as resulting from European colonialism, the rupture with the past that occurred in the eighteenth century is more accurately explained as a result of the emergence of a new civilizational form which, by its nature, could not be confined to its place of origin. The crisis facing Islamic law consists in adapting to the conditions of modernity.

Frank E. Vogel eds., 2005), for an examination of the significance of the *madhhab* both historically and today.

19. For a careful and nuanced examination of inter-*madhhab* diversity with respect to the law of marriage, see KECIA ALI, *MARRIAGE AND SLAVERY IN EARLY ISLAM* (2010).

20. COULSON, *supra* note 1, at 102.

21. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 364 (1988). MacIntyre defines a tradition as,

an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretive debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted. *Id.* at 12.

The late Patrick Glenn has expanded on MacIntyre’s concept of a tradition and used it to as a framework for understanding law. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 3, 137 (2000). For a discussion of the use of the concept of a tradition in the context of Indonesian Islamic law, see R. MICHAEL FEENER & MARK E. CAMMACK, *Introduction to ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS* 1-5 (R. Michael Feener & Mark E. Cammack eds., 2007).

22. MACINTYRE, *supra* note 21, at 361-62.

23. See WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 357-70 (2009).

Overcoming an epistemological crisis, according to MacIntyre, requires the development of new concepts, theories or modes of analysis capable of providing solutions to problems that had appeared insoluble through the use of the tradition's existing methodologies.²⁴ Over the past century Islam has generated a variety of new approaches to the law that, for simplicity's sake, I will refer to collectively as "modernist." None of these new approaches has proven fully satisfactory, and Islamic modernism functions as an alternative to rather than replacement of the "traditionalist" approach of the classical era jurists.²⁵

In the crudest terms, the difference between modernist approaches to Islamic law and traditionalist approaches is that traditionalists recognize the authority of *fiqh* and modernists do not. The term used to describe the traditionalist attitude toward *fiqh* is *taqlid* which means "imitation." For traditionalists, answers to questions of law come through following or "imitating" the efforts of the classical era jurists. The comparable term used in connection with modernists is *ijtihad* which roughly means interpretation. The modernist movement called for a return to the original sources of the law.²⁶ Rather than accepting the interpretations arrived at by the classical era jurists, modernists believe that the answers to contemporary legal problems should be determined through a fresh interpretation of the Quran and *hadith*. Traditionalists adhere to the law of the *madhhab* to which they are affiliated, while modernists, because they

24. MACINTYRE, *supra* note 21, at 361-62.

25. For a summary of efforts to develop a modern methodology of Islamic law, see WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UŞŪL AL-FIQH 207-54 (1997). Hallaq concludes that none of the proposed approaches is sufficiently well developed to serve as the basis for a modern Islamic jurisprudence. *See id.*

26. The modernist movement to reinterpret Islam's foundational texts in accordance with the conditions of modern society, which was forward-looking and progressive, was preceded by a reactionary revivalist program intent on restoring Islam to the "pure" religion of the Prophet and his Companions and purging the faith of medieval scholasticism and what were regarded as non-Islamic practices such as veneration Muslim saints. The most influential revivalist movement was that founded by Ibn Abd al-Wahab (d. 1792) in central Arabia. The two figures most prominently identified with having launched the modernist movement are the late nineteenth century Egyptian reformer Muhammad Abduh (d. 1905) and Abduh's student Rashid Rida (d. 1835). *See, e.g.*, MALCOLM KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD ABDUH AND RASHID RIDA (1966); ALBERT HOURANI, ARABIC THOUGHT IN THE LIBERAL AGE, 1798-1939 (1983). On reformist Islam in Indonesia see generally DELIAR NOER, THE MODERNIST MOVEMENT IN INDONESIA: 1900-1942 (1973); JAMES L. PEACOCK, MUSLIM PURITANS: REFORMIST PSYCHOLOGY IN SOUTHEAST ASIAN ISLAM (1978); MITSUO NAKAMURA, THE CRESCENT ARISES OVER THE BANYAN TREE: A STUDY OF THE MUHAMMADIYAH MOVEMENT IN A CENTRAL JAVANESE TOWN, c. 1910S-2010 (2d ed. 2012).

reject the authority of *fiqh*, describe themselves as *sans madhhab* (non-*mazhab*).²⁷

The labels for the two approaches as well as the terms describing their essential methodologies would seem to locate them firmly on opposite ends of the spectrum of social and political conservatives versus social and political progressives.²⁸ One would think that an approach premised on adherence to tradition in the form of emulation of the jurists of the past would promote rigidity, cultural/religious exclusivity, and authoritarianism. The creation of new, modern interpretations of Islam's foundational texts would seem to be conducive to adaptability, pluralism, and democracy. That is not how things have worked out, however. As the anthropologist Clifford Geertz said of Islamic modernism, "Stepping backward in order better to leap is an established principle of cultural change But in the Islamic case the stepping backward seems often to have been taken for the leap itself, and what began as a rediscovery of the scriptures ended as a kind of deification of them."²⁹ And while the modernist approach has often led to dogmatism and exclusivity, approaches grounded in the *fiqh* tradition have in some cases defied expectations in generating understandings of Islam characterized by tolerance and a commitment to humanistic values of freedom and equality.

27. Another factor contributing to the continued salience of the distinction between modernists and traditionalists in Indonesia is the fact that the two approaches are represented by two large mass organizations. Muhammadiyah, the modernist organization founded in 1912, and Nahdlatul Ulama, the traditionalist organization, both run thousands of schools that teach and perpetuate their respective understandings of Islamic law.

28. In a Foreword to a collection of essays on the traditionalist organization Nahdlatul Ulama, Abdurrahman Wahid summed up the conventional stereotype of traditionalist Islam in Indonesia:

Traditionalists are widely supposed to be rather backward in orientation and ossified in their understanding of Islamic society and thought. It is held that their persistence in upholding orthodox Islamic law (i.e., the Sunni *mazhab* or legal schools) leads them to reject modernity and a rational approach to life. Similarly, in matters of theology, their determined adherence to the scholasticism of al-Asy'ari and al-Maturidi is said to have resulted in a fatalistic understanding of submission to God's will and a disregard for the exercise of free-will and independent thinking. Traditionalists are furthermore accused of being too other-worldly in their practice of ritual Islamic mysticism (*tasawuf*). Their activities within the Sufi orders (*tarekat*) give the appearance of forsaking the present world in the hope of gaining eternal happiness in heaven. Thus, the commonly held view of traditionalists is that they are a wholly passive community unable to cope with the dynamic challenges of modernisation, the sort of community that scholars regard as belonging to a dying tradition. Abdurrahman Wahid, *Forward to NAHDLATUL ULAMA, TRADITIONAL ISLAM AND MODERNITY IN INDONESIA* xiii (Greg Barton & Greg Fealy eds., 1996).

29. CLIFFORD GEERTZ, *ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA* 69 (1968).

THE NEO-TRADITIONALIST MOVEMENT IN INDONESIA

The line between modernists who engage in *ijtihad* and traditionalists who remain tied to *taqlid* is not as absolute as it once was. When I first began researching Islamic legal institutions in Indonesia in the 1980s, modernist educational institutions focused exclusively on the study of the Quran and *hadith*; *fiqh* was not part of the curriculum. The curriculum in traditionalist institutions, by contrast, consisted almost exclusively of *fiqh*; for the most part, students encountered *hadith* only insofar as they were discussed by jurists in connection with specific points of law. In recent decades, the difference between the two positions has become somewhat less stark. As discussed below, some in the traditionalist camp now accept the permissibility of a form of legal reasoning referred to as *istinbath*, and modernists generally give greater recognition to the relevance of *fiqh* than was true in the past.³⁰ However, the method of *istinbath* that is practiced by traditionalists is not the same as the method of *ijtihad* practiced by modernists, and the *fiqh* tradition retains an importance for traditionalists that it does not have for modernists.

It is a fundamental premise of traditionalist legal thought that the law (or the closest possible approximation of the law) is to be found in the writings of the great jurists of the past.³¹ *Fiqh* is law, and the study of law is the study of *fiqh*. The prevailing view, moreover, is that the interpretations of the first generations of scholars are superior to the efforts of all those who came afterwards.³² By the beginning of the tenth century, according to standard Sunni belief, the gates of *ijtihad* had swung closed, and “from that time onwards no one might be deemed to have qualifications for independent reasoning in law, and that all future activity be confined to the

30. There is another difference between modernists and traditionalists that has not significantly diminished with the passage of time that reinforces the continued relevance of the categories as a heuristic for understanding Indonesian Islamic law. In addition to its reverence for *fiqh*, a second characteristic feature of traditionalist Islam in Indonesia is its embrace of Islamic mysticism or Sufism. Traditionalist religious practice includes a variety of rituals directed at honoring the dead. Islamic modernism in Indonesia, like reformist movements elsewhere in the Muslim world, condemns these practices as a form of idolatry in which mundane matters are associated with the divine. For a discussion of the continued relevance of the traditionalist-modernist divide in Indonesian Islam, see ROBIN BUSH, NAHDLATUL ULAMA AND THE STRUGGLE FOR POWER WITHIN ISLAM AND POLITICS IN INDONESIA (2009).

31. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 70-71 (1964).

32. This is based on a belief that the qualifications of the formative era jurists to practice *ijtihad* exceeded the qualifications of all subsequent generations, and thus presuming to improve on their efforts can only be a result of either ignorance or arrogance. See Martin van Bruinessen, *Traditions for the Future: The Reconstruction of Traditionalist Discourse within NU*, in NAHDLATUL ULAMA, TRADITIONAL ISLAM AND MODERNITY IN INDONESIA 163-189 (Greg Barton & Greg Fealy eds., 1996).

explanation, application, and, at the most, interpretation as it had been laid down once and for all.”³³

Historically, the obligation of adherence to the law of the *madhhab* was universally understood to mean abiding by the *fiqh* rulings of one’s *madhhab*. However, some contemporary Indonesian traditionalists, referred to here as “neo-traditionalists,” have embraced a different understanding of the meaning of *taqlid*. Rather than following the *rulings* of the *madhhab*—which means adopting the conclusions of the jurists of the past—these scholars understand the obligation of *taqlid* to require following the *methodology* of the *madhhab*.³⁴ *Fiqh* is understood not as a body of rules but as a hermeneutic.³⁵ There is an important difference between the methodology of *fiqh* and the *ijtihad* practiced by formative era jurists and contemporary modernists. *Ijtihad* involves deriving rules from the Quran and *hadith* directly, while *fiqh* methodology requires adherence to the approved conventions and modes of analysis of the classical tradition and respectful consideration of the views of the great jurists of the past. Ronald Dworkin famously likened the work of a common law judge to a contributor to a chain novel; the next new chapter can take the story in a different direction, but it must do so in a way that is consistent with the novel’s existing plot, characters, tone, etc.³⁶ The basic point Dworkin makes about common law judging is also applicable to working within the *madhhab*; the *fiqh* tradition guides, informs, and constrains the analysis. The use of the term *istinbath*, which means “inference,” to refer to the type of reasoning involved reflects the relatively more modest contribution of the human decision maker in producing the result.

It is not my intention to try to explain the manner in which the approach of *taqlid* to *madhhab* methodology is practiced. But there is one

33. SCHACHT, *supra* note 31, at 70-71.

34. The Indonesian phrase used to refer to this approach uses the Arabic word “*manhaj*” which is from a root meaning “open way; road; method, procedure, manner.” *Bermazhab manhaji* (following the methodology of the *madhhab*) is contrasted with *bermazhab qawli* (following the opinions of the *madhhab*). See MARTIN VAN BRUINSEN, NU; TRADISI, RELASI-RELASI KUASA, PENCARIAN WACANA BARU [NU: TRADITION, POWER RELATIONS, AND THE SEARCH FOR A NEW DISCOURSE] 226 (1994).

35. See Nelly van Doorn-Harder, *Reconsidering Authority: Indonesian Fiqh Texts about Women*, in ISLAMIC LAW IN MODERN INDONESIA: IDEAS AND INSTITUTIONS 33 (R. Michael Feener & Mark E. Cammack eds., 2007) (“*fiqh* [is considered] to be a hermeneutic tool that has the potential to manage a plurality of truths,” citing K.H. MA SAHAL MAHFUD, NUANSA FIQH SOSIAL [Nuances of Social Fiqh] viii (1994)). See also DJOHAN EFFENDI, PEMBARUAN TANPA MEMBONKAR TRADISI: WACANA KEAGAMAAN DI KALANGAN GENERASI MUDA NU DI MASA KEMIMPINAN GUS DUR [PURSUING RENEWAL WITHOUT DISMANTLING TRADITION: RELIGIOUS DISCOURSE OF NU’S YOUNG GENERATION DURING THE LEADERSHIP OF GUS DUR] (2010).

36. RONALD DWORKIN, LAW’S EMPIRE 228-38 (1986).

question raised by the concept that must be addressed. Why would it be thought necessary or useful to carry out a reexamination of issues that have been thoroughly analyzed by jurists of the past if the second analysis employs the same interpretive approach that was used in the first analysis? Is there any reason to believe that the conclusions of twenty-first century jurists will differ from those reached by the scholars of the ninth century? This question is important because it calls attention to a central element of neo-traditionalist thought. The necessity for revisiting questions for which the *fiqh* literature provides clear answers arises from the fact the classical era *fiqh* was produced by jurists who inhabited a social world that was vastly different from the social world of today. This is important because, according to neo-traditionalist scholars, the process of interpretation is invariably shaped by the assumptions and conceptual categories of interpreters. Knowledge is to some degree a product of context and experience, and the interpretations of the sources of Islamic law rendered by jurists living on the Arabian Peninsula more than 1000 years ago might very well differ from those of contemporary jurists who live in Indonesia.

A particularly clear and engaging illustration of the use of a contextualist approach to the interpretation of the sources of Islamic law can be found in a book on inheritance by the late Sayuti Thalib.³⁷ Thalib, who was a modernist but also a believer in contextualism, argued that scholars living in different times and places can arrive at differing conclusions about the meaning of the Quran and *hadith* both of which are equally “true” or “objective.” The Islamic law of inheritance is, for the jurists who produced it, an objective interpretation of the indications contained in the sources.³⁸ For an interpreter from the Minangkabau region of Sumatra, however, that same interpretation is not objective. The problem is not that the Arabs of the Hijaz and the Minangkabau of Sumatra give different interpretations to what they see. The problem, if we can call it that, is that these interpretations are based on having seen different things.

The treatment of inheritance in the Quran is more thorough and more detailed than any other legal subject.³⁹ Even so, there are significant gaps in the scheme described in the Quran that had to be filled through interpretation. The system of inheritance that resulted has a decidedly patrilineal cast. Females are entitled to inherit, and there are some circumstances when a person related to the decedent through a female is

37. See generally SAJUTI THALIB, S.H., HUKUM KEWARISAN ISLAM DI INDONESIA [ISLAMIC INHERITANCE LAW IN INDONESIA] (1981).

38. *Id.* at 156.

39. On the Islamic law of inheritance see generally N. J. COULSON, SUCCESSION IN THE MUSLIM FAMILY (1971).

entitled to inherit. The largest share of inheritance, however, belongs to male relations who are related to the decedent through other males. The category of persons related to the decedent through female blood lines are last in line to inherit. They are “distant kindred.”⁴⁰

The territory that now constitutes Indonesia is home to a variety of different kinship systems with a variety of inheritance schemes. The most common kinship system is bilateral in which relations linked to the deceased through females have the same inheritance rights as similarly situated relations linked through males. There are also systems that favor males and male bloodlines, and the region is home to the world’s largest matrilineal society. Among the Minangkabau from West Sumatra, clan membership is based on female blood lines.⁴¹ Thus, children belong to the clan of their mother and remain in their mother’s clan even after they are married. Property is inherited through one’s mother, and the primary male authority figure in a child’s life is his mother’s brother (because he is a member of the same clan as the child but the child’s father is not).⁴²

Thalib explains that in their designation of family relationships the Minangkabau distinguish between a “child” (*an sich*) and what is referred to as a “banana child” (*anak pisang*).⁴³ The offspring of a woman is (in relation to his/her mother) simply a child, full stop, without qualification.⁴⁴ He (or she) is his mother’s child because s/he is from and belongs to the mother’s family. The offspring of a man, however, is (in relation to his father) a “banana child.”⁴⁵ Every person is, therefore, the “child” of his mother but the “banana child” of his father.

Thalib does not purport to know the origin of the term *anak pisang*, but he suggests that it may have come into use because banana trees reproduce differently from other fruit trees, and for that reason the relationship between a new banana tree, the “child” of another banana tree, and the parent tree is different from the relationship between, for example, the

40. *Id.* at 31. This is in fact a mistranslation of the Arabic term *dhu al-arham*, which means “possessors of a uterine relationship.” Neither the Arabic term nor the English mistranslation is entirely accurate since the relatives included within this category are not necessarily “distant” and include persons related to the deceased through female blood lines.

41. Tsuyoshi Kato, *Change and Continuity in the Minangkabau Matrilineal System*, 25 *INDONESIA* 1, 3 (1978).

42. *Id.* at 4; *see also* FRANZ VON BENDA-BECKMANN & KEEBET VON BENDA-BECKMANN, *POLITICAL AND LEGAL TRANSFORMATIONS OF AN INDONESIAN POLITY: THE NAGARI FROM COLONISATION TO DECENTRALISATION* 52-53 (2011).

43. THALIB, *supra* note 37, at 157; *see also* FRANZ VON BENDA-BECKMAN, *PROPERTY IN SOCIAL CONTINUITY: CONTINUITY AND CHANGE IN THE MAINTENANCE OF PROPERTY RELATIONSHIPS THROUGH TIME IN MINANGKABAU, WEST SUMATRA* 97-98 (1979).

44. THALIB, *supra* note 37, at 157.

45. *Id.*

offspring of a mango tree and its parent.⁴⁶ Banana trees don't grow from bananas, like mango trees grow from mangos. Banana trees grow out "away from" or "at an angle to" the parent tree sprouting from the root of the parent.⁴⁷ This unusual, less "intrinsic," relationship between a new banana tree and its parent, Thalib suggests, may have been what led the Minangkabau to call children who are part of a different family than their parent banana children.⁴⁸

Whatever the explanation for the origin of the term *anak pisang*, the Minangkabau use of an adjective in reference to the child of its father reflects an understanding of social reality in which a father's offspring is not a "child" in the full sense of the word. To speak of children for the Minangkabau is to speak of the children of their mother. The children of a man are in a different category.

The jurists who constructed the law of inheritance inhabited a different social and conceptual reality from the people of Minangkabau.⁴⁹ For Arabs whose tribal affiliation is based on agnatic descent, it is descendants through male blood lines that are truly children.⁵⁰ Offspring who trace their descent through females—the grandchildren of their mother's parents—are, in Arab society, the equivalent of banana children.⁵¹ It stands to reason, therefore, that a person's uterine relations were considered distant. If, however, the Quran had been revealed and interpreted in West Sumatra, where it is agnatic relations that are distant, an objective interpretation of its provisions relating to inheritance would have looked very different.⁵²

One arena in which traditionalist-oriented Indonesian Muslims have been particularly active is in efforts to re-define the rights of Muslim women. The Quran introduced reforms that dramatically enhanced the position of women in society. However, rules that represented an improvement to the rights of women a millennium and a half ago are seriously out of touch with modern sensibilities and economic realities. Improving the status of women is a goal that is being pursued by groups and individuals holding a wide range of views on Islam. What distinguishes the work of traditionalist Muslim reformers in Indonesia is that they articulate their arguments using the concepts and methodologies of classical *fiqh*.

46. *Id.* at 157-58.

47. *Id.*

48. *Id.*

49. *Id.* at 158.

50. *Id.*

51. *Id.*

52. *Id.*

To give a flavor to the way contemporary Indonesian Muslims are employing the classical legal tradition to generate new Islamic understandings of the rights and role of women, I will briefly describe one initiative in which I was peripherally involved. The project was carried out by a non-governmental organization called the Fahmina Institute⁵³ that was established in 2000 in the City of Cirebon on the north coast of Java. The principal founder of the organization is Kiyai Haji Husein Muhammad.⁵⁴ The title “kiyai” used with Husein’s name indicates his status as a traditionalist-oriented religious scholar. As with most kiyai, Husein is also the head of a *pesantren*, a type of Islamic boarding school where traditionalist Islam is taught and perpetuated. Three other individuals who joined Husein in establishing the Fahmina are teachers in his *pesantren*.

Fahmina operates in a number of different program areas, but much of its work has been focused on issues of gender. In the mid-2000s, Fahmina created and implemented an educational program addressing Islamic doctrines on issues directly affecting the lives of women. The program proved so successful that Fahmina decided to publish a lesson manual that could be used by others wishing to use the course. The text titled, “Dawrah Fiqh Concerning Women,”⁵⁵ contains ten lessons or modules. For each lesson the facilitator is given a set of learning objectives, a list of points for discussion, and teaching techniques or group activities adapted to that particular lesson. Many of the lessons also include charts or other graphic representations of the material, and some include case studies addressing specific issues facing Muslim women as topics for discussion. Most of the lessons are also accompanied by a short reference article on the topic of the lesson prepared by one of the authors or another prominent Muslim scholar.

53. “Fahmina” is an Indonesianization of two Arabic words meaning “our understanding” or “our perspective.” This name was chosen to express an intention of “raising awareness that what is conventionally regarded as truth is in actuality limited to contextually-based human understanding.” See Fahmina, Profil Yayasan Fahmina, Fahmina Inst. (May 20, 2015), <https://fahmina.or.id/profil-yayasan-fahmina/>.

54. For an English language discussion of Husein Muhammad’s re-interpretation of key Quranic verses related to women, see Yusuf Rahman, *Feminist Kiyai, K.H. Husein Muhammad: The Feminist Interpretation of Gendered Verses and the Qur’an-Based Activism*, 55 AL-JAMIAH: J. OF ISLAMIC STUD. 293 (2017).

55. See K.H. HUSEIN MUHAMMAD ET AL., DAWRAH FIQH PEREMPUAN: MODUL KURSUS ISLAM DAN GENDER [Dawrah Fiqh Concerning Women: Manual for a Course on Islam and Gender] 1 (Marlene Indro Nugroho-Heins, trans., 1st ed. 2006). An English translation of the text was published as DAWRAH FIQH CONCERNING WOMEN: MANUAL FOR A COURSE ON ISLAM AND GENDER (2006). Page citations refer to the English version. In some cases, however, I have used my own translation of the Indonesian original. The text explains that *dawrah*, an Arabic word not in common use in Indonesia that means “turn” or “circle,” refers to training outside the context of a formal educational institution and was chosen for the title of the manual because the text employs pedagogical methods that differ from conventional schools. *Id.* at 5.

The first two lessons are relatively brief and are designed to introduce the themes and goals of the course and cultivate an atmosphere conducive to discussion and trust. I will focus on Lessons Three through Five that outline what is described as a gender equality-based methodology for investigating *fiqh*. Lessons Six through Nine apply these ideas to more concrete matters relating to the lives of women. These latter lessons address the socio-historical background of early Islamic society, *fiqh* from women's perspective and a strategy for reform, a woman's life cycle according to *fiqh*, and applied Islamic jurisprudence in Indonesia. Lesson Ten is an assessment of the course.

Lesson Three is titled "Basic Concepts in Islamic Teachings." The stated objective is to provide the students with an understanding of basic concepts in Islam and the connection between these basic concepts and the values of gender equality and social justice.⁵⁶ The lesson begins by dividing the participants into small groups and having them write down some of the most important terms from Islam or words that they hear used in discussions of Islam. The facilitator then leads a discussion relating topics identified by the students to what is presented as the three basic themes in Islam—the oneness of God, the mission of the Prophet Muhammad, and the obligation of humans as agents of God to establish justice, human solidarity, equality, and benevolence.⁵⁷

The second part of the lesson is a presentation by a guest speaker. The outline of points to be covered in the presentation begins with an explanation of the history and early days of Islam, the life of the Prophet Muhammad and the revelation of the Quran.⁵⁸ The speaker is also instructed to discuss Quranic texts that were revealed in the early days of Islam and the lives of some of the early converts to Islam who exemplify Islam's focus on the principles of social justice and equality. The text mentions, for example, Sumayyah, an African woman living in slavery to one of Mecca's most powerful tribes. Sumayyah was among the first to convert to Islam and was persecuted by the enemies of Islam who saw the Prophet's growing group of followers as a challenge to their privilege and authority.⁵⁹

Lesson Three includes a reference article written by Musdah Mulia, a prominent academic and gender activist who is best known for having led a team that prepared a proposed Islamic law of marriage and inheritance

56. *Id.* at 32.

57. *Id.* at 33.

58. *Id.* at 33-34.

59. *Id.* at 34.

premised on the complete equality of men and women.⁶⁰ The article is titled “Tauhid: A Source of Inspiration for Gender Justice.” Tauhid, which literally means “to fully appreciate oneness,”⁶¹ is the term used to describe Islam’s strong version of monotheism that condemns anything that in any way detracts from God’s absolute unity and indivisibility. Musdah observes that the principle of *tauhid* is often thought to be applicable solely to the relationship between God and humans—a doctrine regarding the attributes of God, the pillars of faith and similar matters. But a full appreciation of the principle of *tauhid* is inseparable from the everyday concerns of social relations among humans, including the relationship between men and women.

The conviction that no human equals Allah and that He has no offspring or incarnation has given rise to the principle of the equality of humankind, as all humans are Allah’s creatures. No human is superior to any other; all are fundamentally equal. No human may be deified in the sense of being made the source of guidance and support, to be feared, prayed to, and regarded as unquestionably correct. A king cannot be a god to his people, a husband cannot be a god to his wife.⁶²

Islam’s embrace of the values of equality and freedom grounded in the principle of *tauhid* is total and unqualified. The historical circumstances in which the Quran was revealed, however, prevented the immediate implementation of these values and necessitated a gradualist approach to their full realization. Slavery, for example, is plainly incompatible with the principle that all human beings are free and equal before God. However, because slavery was practiced and accepted at the time the Quran was revealed, it was not possible to abolish it immediately. The Quran introduces changes to make slavery more humane, but those changes were not intended to set rules for all time. Rather, the changes introduced in the Quran were intended as first steps toward the complete eradication of the practice.⁶³ Similarly, because of the social mores of seventh century Arabia, the full emancipation of women could only be achieved gradually. One example is the treatment of the rights of women to inheritance. In Arab society before Islam, women were regarded as property and were themselves objects of inheritance; with the arrival of Islam, women

60. For an English language summary of the proposal, see Siti Musdah Mulia & Mark E. Cammack, *Toward a Just Marriage Law: Empowering Indonesian Women through a Counter Legal Draft to the Indonesian Compilation of Islamic Law*, in ISLAMIC LAW IN MODERN INDONESIA: IDEAS AND INSTITUTIONS 128-45 (R. Michael Feener & Mark E. Cammack eds., 2007).

61. MUHAMMAD ET AL., *supra* note 55, at 39.

62. *See id.* at 41-42.

63. *Id.* at 46-47.

assumed their proper place as subjects having the same right to inherit as men. But to prevent social upheaval and in recognition of the existing social structure in which men bore the full burden of providing for the physical needs of the family, the inheritance portion of women was fixed at half that of men. This rule that is adapted to attitudes and conditions of seventh century Arabia is not appropriate for the twenty-first century. “In circumstances in which women play an important role in the economy, as they often do today, the rules regarding division of inheritance should be reconsidered to bring them into conformity with the fundamental aim of Islam, i.e., the welfare of humankind.”⁶⁴

Lesson Four is entitled “Interpreting the Quran.” The objectives for this lesson include: understanding the historical context in which the Quran was revealed; appreciating the connection between seventh century Arab society and Islam’s mission of liberating humankind in general and women in particular; becoming familiar with Quranic texts relating to women and texts given in response to questions from women; appreciating the existence of different methods of interpreting the Quran and the relationship between those methods and commonly accepted interpretations; understanding the way socio-historical factors influenced the interpretation of texts relating to women; and gaining an understanding of the principle of gender equality in the Quran and learning the methodology for arriving at gender-just interpretations of the Quran.⁶⁵

The lesson begins with small group discussions of texts related to women designed to convey an appreciation for the way subjective factors shape how the texts can be understood. This is to be followed by a presentation by a guest speaker demonstrating the possibility of applying a gender-friendly (or non-gender-biased) interpretation of Quranic texts related to women. The outline of points to be made in the presentation instructs the speaker to describe the conditions of Arab society at the time the Quran was revealed; explain and illustrate the essentially casuistic character of much of the legal content of the Quran which consists of texts revealed in response to specific circumstances or in answer to specific questions; explain the various factors that result in differing interpretations and provide illustrations of the way specific texts have been interpreted differently and the wide variety of interpretations even within the classical tradition; present alternative modes of interpretation grounded in an understanding of Islam’s central mission of liberating humankind and supporting women; outline some of the issues related to women

64. *Id.* at 48.

65. *Id.* at 64.

addressed in the Quran, such as physical violence against women, divorce, sexuality, and independence; and demonstrate how Quranic texts related to those issues have been given both gender-biased and gender-friendly interpretations in both the classical tradition and modern writings.⁶⁶

The points to be made by the speaker are elaborated in a reference article by Husein Muhammad. Quoting a prominent twelfth century legal scholar, Husein explains that in interpreting the Quran it is “necessary to understand its historical background,” the state of the Arabic language at the time the Quran was revealed, and “the traditions and customs of the Middle Eastern communities regarding their language, behavior, and patterns of interaction at the time the Quran’s texts appeared.”⁶⁷ It is also important in interpreting specific Quranic texts to distinguish between verses that were revealed during the earliest years of Islam when Muhammad and the community of Muslims were in Mecca, and verses revealed during the later period after the community had migrated to Medina. The verses in the two periods have a different character because of differing needs and purposes. The texts revealed in Mecca laid out principles that were to serve as the foundations of a new social structure, while the texts from the Medinan period put those principles into practice in giving form and shape to the new structures. As a result, the texts revealed in Mecca “are mostly concerned with describing and defining *tauhid* and various universal human values, such as equality, justice, freedom, pluralism, and human dignity.”⁶⁸ The texts from the Medinan period were addressed to those who had already accepted Islam and state more concrete and detailed rules for the governance of the community. In establishing rules for the new community, “[t]he Quran needed to address social reality as it actually existed, including the discriminatory attitudes toward women.” Because the Meccan verses state universal values that form the basis of Islam, verses stating specific rules must be interpreted in light of those values. Husein points out that this principle can be found in the writings of the classical era jurists: “General rules or legal universals are certain, while particular or specific rules are relative/probable [and t]herefore the general or universal norms ought to prevail.”⁶⁹

After examining the social position of women in seventh century Arabia and summarizing some of the Quranic texts regarding women, Husein addresses two specific texts regarding men’s authority over women. He writes, “[w]hen read literally, without an awareness of their context or

66. *Id.* at 66-68.

67. *See id.* at 81 (quoting Abu Ishaq al-Shatibi).

68. *Id.* at 82.

69. *See id.* at 91 (quoting Abu Ishaq al-Shatibi).

connection to other texts, it is easy to conclude that God made men the leader, authority, controller and teacher of women, while women are to be led, restrained, controlled and taught.”⁷⁰ Husein then argues—based on other Quranic texts and *hadith*, information about the circumstances in which these verses were revealed, the views of various scholars, and principles of Quranic exegesis—that the specific rules in these texts regarding men’s exercise of authority over women should be interpreted as exceptions to the general principle of human equality expressed elsewhere in the Quran. The rules represent an improvement over the existing practice, but they should be understood as incremental steps toward the ideal of full human equality rather than timeless standards for the relations between the sexes.⁷¹

Lesson Five is about interpreting *hadith*. *Hadith* is the term used to refer to specific reports of the words or actions of Muhammad that comprise the *Sunnah*, the second primary source for discovering the law. The learning objectives for the lesson include learning the terminology used in the study of *hadith*; understanding the system of classifying *hadith* and how the classification of a *hadith* affects its use as a source of legal rules; understanding the methods used to interpret *hadith* and the relationship of methodology to the development of different schools of thought; and learning the method used to interpret *hadith* from the perspective of gender.⁷²

The lesson begins with an exercise that illustrates some of the problems of using *hadith* as a basis for formulating normative rules. The participants are divided into groups of sixteen, and each person in the group is assigned to one of five “levels.” There is only one person in Level One. Level Two has two people, Level Three has four people, Level Four has eight people and Level Five has one person. The individual in Level One is provided with a message which she communicates separately to the two individuals in Level Two. The members of Level Two each transmit the message to the members of Level Three. The transmission of the message should also include the names of the persons earlier in the chain, e.g., “A told me that B told her that” The same process is used to transmit the message from Level Three to Level Four. The eight individuals in Level Four then each report the message they received, together with the chain of transmission linking the message to its origin, to the person in Level Five. This last person in the chain then writes down each of the eight reports she

70. *Id.* at 87-88.

71. *Id.* at 88-89.

72. *Id.* at 100.

has received and is instructed to decide which among the eight is most authentic.⁷³

The outline of the expert presentation on *hadith* instructs the speaker to explain the two parts of a *hadith*—the *matn* or material content of the message—and the *sanad*—the chain of persons who transmitted the *hadith* from the Prophet to its being recorded⁷⁴—and then introduce one of the more well-known *hadith* relating to women to illustrate how the circumstances of the original transmission of a *hadith* and the audience to whom the statement was made can result in varied understandings of its meaning.⁷⁵ Other points to be made in the presentation include an explanation of the categorization of *hadith* as “legally valid,” “good,” or “weak” according to their likely authenticity; the necessity to consider whether the statement attributed to Muhammad was made in his capacity as a prophet, a political authority, or a husband; the existence of different opinions among both classical and contemporary scholars on the function of *hadith* in relation to the Quran; and an explanation of how a critical evaluation of both the *sanad* and *matn* of *hadith* by classical era jurists shaped their interpretation, and how those same methods can be used to undertake a reinterpretation of *hadith*.⁷⁶

The author of the reference guide for Lesson Five is Faqihuddin Abdul Kodir, who is also one of the authors of the manual.⁷⁷ Faqihuddin explains the difficulties and uncertainties inherent in the project of evaluating the authenticity of a narrative passed down orally through several generations before being recorded.⁷⁸ One problem is determining the historical accuracy of the chain of transmission.⁷⁹ In addition to examining the *sanad*, *hadith* scholars also conducted a critical evaluation of the *matn* as a part assessing the authenticity of *hadith*.⁸⁰ The content of the *matn* can cast doubt on authenticity if there exist two or more versions of the same *hadith* that are inconsistent with each other.⁸¹ Other factors considered as indicators of possible unreliability include an inconsistency between the *matn* of a *hadith* and a text in the Quran, the existence of two inconsistent *hadith*, and an

73. *See id.* at 107.

74. *See id.* at 102-103.

75. *Id.* at 103.

76. *Id.* at 100-103.

77. *Id.* at 111.

78. *See id.* at 111-13.

79. *See id.* at 113-16.

80. *Id.*

81. *Id.*

inconsistency between the narrative contained in a *hadith* and historical fact. Each of these problems is illustrated with examples.⁸²

The first step in determining the value or meaning of a *hadith* as the basis for a legal rule is an inquiry into its authenticity. Then comes the problem of interpretation. The first obstacle to arriving at a correct interpretation lies in the nature of language. Arabic, like all languages, is the product of and functions against a cultural background. Uncertainty and diversity with respect to the meaning of a *hadith* is inescapable because “[t]he communication of ideas by means of linguistic symbols and the interpretation of those symbols by readers carries an inevitable risk of diverse, incompatible, and even reductionist or distorted understanding.”⁸³ Faqihuddin gives examples of *hadith* in which the same words generate different interpretations and examples of divergent interpretations resulting from differences in the wording of two versions of the same *hadith*. He also illustrates the use of a literalist approach to interpretation and an approach that takes account of contextual factors.⁸⁴

In the last section of the paper, Faqihuddin shows how interpretive approaches recognized as valid by classical era scholars can be used to produce new understandings of *hadith* compatible with contemporary social realities. “*Hadith* texts regarding ‘relations between men and women’ are a portrait of a particular-social cultural reality” and should be “understood based on the logic of their historical role of furthering a process of transformation in the direction of justice and the general welfare.”⁸⁵ *Hadith* describe responses to particular circumstances, and “[a]s records of particular cases, they might seem to be supportive of a social reality characterized by gender bias.”⁸⁶ While some *hadith* use language “that in a literal sense places women in an inferior position [those *hadith*] should be understood in their context and assimilated to the broader transformative spirit that characterizes the Quran and other *hadith*.”⁸⁷

A thorough analysis of the reasons traditionalist Islam has produced many of Indonesia’s best and most progressive thinkers is beyond the scope of this essay. I will briefly touch on just two aspects of the matter. The first concerns the educational system that produces them. The scholars I am calling neo-traditionalist were almost all educated in *pesantren*. They are properly classified as traditional because they are trained in the “religious

82. *See id.* at 116-21.

83. *Id.* at 121.

84. *See id.* at 123-24.

85. *Id.* at 125-26.

86. *Id.* at 126.

87. *Id.*

sciences” that comprise the Islamic scholarly tradition. This includes, among other subjects, theology, Quranic interpretation, *hadith* studies, and Arabic grammar. But the queen of Islamic sciences, at least in Indonesia, is the study of *fiqh*.⁸⁸

Pesantren education is not designed to develop critical thinking skills. Quite the opposite. The early stages of the process consist of a laborious line-by-line translation of dense Arabic-language legal treatises. The objective is simply to comprehend the meaning of the text. Some extraordinary students commit the text to memory. As *pesantren* students, called “*santri*,” gain facility with the language and literary form of the *fiqh* literature, they proceed more quickly. But the goal of the process remains the same—to “learn” the text. It is in one respect similar to the case method of legal education in the common law. American law students learn to “think like a lawyer” by having the techniques of common law legal analysis and argument modeled for them in judicial opinions. Similarly, students of *fiqh* learn to “think within the *madhhab*” by digesting the works of the great masters of the discipline. The two systems differ in that American law students study the common law method in order to practice it themselves, while students of *fiqh*, for the most part, remain in the position of passive observers. Nevertheless, those *santri* who spend years immersed in study, who, to paraphrase Karl Llewellyn, “pickle” themselves in *fiqh*,⁸⁹ eventually become socialized in the vocabulary and techniques of a rich and complex tradition of intellectual and moral inquiry.

Pesantren education, in addition to training *santri* in the methodologies of *fiqh*, equips students with two important scholarly competencies: an appreciation for rigorous and disciplined thinking and an acceptance of the inevitability of intellectual and moral ambiguity. Historically, however, it did not encourage dissent or critique. Until the emergence of the neo-traditionalist movement, the universal message was one of unquestioned acceptance of the authority of *fiqh*. What happened, then, that enabled Husein Muhammad and others like him to set aside the taboo against independent thinking and begin to view the tradition critically?

I will not attempt to give a full answer to that question, but one critical part of the story concerns the example of a group of extraordinary intellectual pioneers who emerged beginning in the 1970s. The most influential figure is Abdurrahman Wahid, a charismatic personality of

88. VAN BRUINESSEN, *supra* note 34, at 163-89.

89. Llewellyn counseled first year law students to “Immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in law—it is your only hope.” See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 96 (1930).

prodigious intellect and scion of Indonesia's most prominent traditionalist Muslim family who became head of the country's largest Islamic organization and served a brief and undistinguished stint as Indonesia's president.⁹⁰ Wahid had no formal training outside the Islamic sciences, but he was a passionate autodidact of catholic interests who spoke English, French, Dutch, and German (in addition Indonesian, Javanese, and Arabic). As with traditionalist Indonesian Muslims generally, Wahid's religious beliefs and practices included significant elements of Islamic mysticism or Sufism. This, together with a Javanese cultural sensibility rooted in Java's pantheistic Hindu-Buddhist past, instilled in Wahid a deep appreciation for the values of tolerance and pluralism. Most importantly, Abdurrahman Wahid was a visionary who imagined and evangelized an understanding of Islam that synthesized its rich tradition of religious inquiry with the critical approaches of the Western intellectual tradition.

Abdurrahman Wahid presented young Indonesian Muslims with a vision of Islam that was both relevant to their experience and possessed the poetry and heft of its long history. Because of his position as head of the Nahdlatul Ulama, the main organization of traditionalist Indonesian Islam with more than 50 million members,⁹¹ Wahid's example signaled permission for thoughtful Muslims to view the faith not through the paradigm of religious conviction but as a part of history.⁹² This occurred at a time when conditions in Indonesia offered unprecedented access to the world of critical scholarship. Economic prosperity made it possible for larger numbers of *santri* to continue their education after graduation from the *pesantren*. Most attended one of the country's state Islamic institutes (Institut Agama Islam Negeri; IAIN). The faculties of the IAIN included a new cohort of Western-trained scholars, beneficiaries of increased funding to study abroad, who introduced their students to the critical scholarship of Muslim thinkers that was often banned in other parts of the Muslim world.⁹³ The Suharto government's policy of promoting cultural and

90. For an excellent biography of Abdurrahman Wahid, see GREG BARTON, *ABDURRAHMAN WAHID: MUSLIM DEMOCRAT, INDONESIAN PRESIDENT* (2002).

91. See BUSH, *supra* note 30, at 2. Nahdlatul Ulama was founded in 1926 by Abdurrahman's grandfather to counter the growing influence of reformism in Indonesia. See HARRY J. BENDA, *THE CRESCENT AND THE RISING SUN: INDONESIAN ISLAM UNDER THE JAPANESE OCCUPATION, 1942-1945* 50 (1958); see also M.C. RICKLEFS, *A HISTORY OF MODERN INDONESIA SINCE C. 1200* 212 (4th ed. 2008).

92. This change in attitude is often described as a shift from a posture of *pengajian*, which means "recitation," to one of *pengkajian*, which means "investigation." See VAN BRUINSEN *supra* note 34, at 221.

93. The list of scholars whose writings have been influential in Indonesia includes Nasr Hamid Abu Zayd (Egypt), Muhammad Arkoun (Algeria), Mohammad Abed Al Jabri (Morocco), Asghar Ali Engineer (India), and Fazlur Rahman (Pakistan).

devotional expressions of Islam while repressing all forms of political Islam created a space for organizing and dialogue among like-minded scholars.

CONCLUSION

The significant achievement of the neo-traditionalist movement has been to articulate the Islamic legal tradition in terms that are compatible with the epistemological assumptions of modernity. Adherence to the methodologies of *usul al-fiqh* gives discipline and rigor to their analysis. And while many (but not all) modernists tend to address the challenges of modern life using the reductionist modeling techniques of the applied sciences, neo-traditionalist thinkers, with perspective gained from a deep and sympathetic engagement with the interpretative efforts of past generations of jurists, approach contemporary problems with an appreciation for the complexity of social life and a tolerance for ambiguity and disagreement in seeking solutions to those problems.

When I first began studying Islamic law in Indonesia, I found it puzzling that so many of Indonesia's best and most progressive thinkers come from a traditionalist background. I have now come to realize that what once struck me as a paradox in fact makes perfect sense. My initial confusion resulted from a failure adequately to appreciate that the Islamic legal tradition is not a compendium of rules but rather "a methodology for a reflective life that searches for the Divine, and ... a process of weighing and balancing the core values of Shariah in pursuit of a moral life."⁹⁴ The neo-traditionalist movement (in which Zezen Mutaqin is a rising star) aspires to make this methodology relevant to the lives of contemporary Indonesian Muslims. I wish them success in their efforts.

94. EL FADL, *supra* note 12, at 268.

HIDING IN PLAIN SIGHT: CORPORATE LEGAL RESPONSIBILITY

Ronit Donyets-Kedar* & Ofer Sitbon**

Abstract

The purpose of the corporation is contested. The heart of the debate is whether corporations ought to maximize shareholder value, or rather balance shareholder gains against the welfare of other constituencies. Lawyers and policymakers alike commonly hold that most corporations rightly regard the interests of shareholders as their highest priority. Even after repeated challenges from scholars,¹ high-profile statements from corporate executives,² and the promise of ESG investments,³ the common view is that maximizing shareholder value is the law. And while other non-corporate legal fields such as labor law, tax law, consumer laws and environmental laws may strive to protect the interests of stakeholders, corporate law instructs officers and directors to prioritize shareholders.

The paper challenges this interpretation of corporate law. It argues that even without any changes to current regulation, a constituency-oriented obligation to consider the social and economic impact of corporate conduct on corporate stakeholders exists within current corporate law.

* Associate Professor of Law, College of Law & Business, Israel; Global Affiliated Faculty, Emory Law School; Co-Founder, Corporate Social Responsibility Institute, College of Law and Business, Israel.

** Associate Professor of Law, Zefat College, Israel; Co-Founder, Corporate Social Responsibility Institute, College of Law and Business, Israel.

1. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. REV. 164, 164 (2008); LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH* (2012) [hereinafter STOUT, MYTH].

2. *Statement on the Purpose of a Corporation*, THE BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf>.

3. ESG, an acronym for “Environmental, Social and Governance,” is a term used to describe the ethical impact of financial investments. See Stuart L. Gillian, et al., *Firms and social responsibility: A review of ESG and CSR research in corporate finance*, 66 J. OF CORP. FIN. 1, 1 (Feb. 2021).

By analyzing the legal framework of corporate law in Israel, the U.S., and the UK, it is possible to show that corporate law itself is capable of a broader interpretation; and that such interpretation—one that considers the impact of corporate behavior on social welfare—is necessary for a sustainable society. With unprecedented corporate power, and the threats it poses to the environment and to democratic principles, its reinforcement of structures of privilege and its role in deepening inequality, the interpretation of corporate law needs to re-conceptualize corporate purpose. After a series of global crises has exacerbated and exposed the frailty of our social structures, a new interpretation of corporate law is required, one which identifies the duty to consider the wellbeing of the corporate constituencies. We argue that this duty is already embodied in current regulation. The law of corporations in all three jurisdictions allows for such a reading.

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INTRODUCTION

On February 24, 2022, Russia launched a full-scale invasion to Ukraine.⁴ A coordinated response by the West followed; many countries sent military and humanitarian aid,⁵ and a unified front of the U.S., the EU,

4. *Ukraine Under Attack: Documenting the Russian Invasion*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/article/russia-ukraine-war-photos.html>.

5. The U.S., UK, Canada, Australia, the EU and other countries have sent military equipment, either in the form of weapons and ammunition, or as “unspecified” military gear.

and the UK implemented a series of economic sanctions against Russia. The U.S. banned Russian oil imports, and the UK joined in freezing the assets of Russia's central bank and in seizing assets of the oligarchs of Putin's inner circle. The objective of these sanctions was to cut Russian economy off from the global markets. Interestingly, the role of transnational corporations in Russia's isolation was vital. After only a few days of war, large multinational corporations have pulled out of the Russian economy. Oil and gas companies such as *BP*, *Shell*, and *ExxonMobil* cut their investments in Russian energy companies;⁶ finance companies such as *Visa*, *MasterCard*, *American Express*, and *PayPal* suspended their business dealings in Russia;⁷ tech giants *Samsung* and *Sony* suspended shipments to Russia, and *Apple* has restricted its Apple Pay services.⁸ The most significant blow to Russian economy was its partial disconnection from SWIFT, the global messaging system for financial transactions. SWIFT is a non-state international cooperative of banks, linking more than 11,000 institutions in over 200 countries,⁹ founded as a member-owned cooperative society under Belgian law, and is controlled and owned by its members.¹⁰ While some central banks are also members of SWIFT, its governing structure guarantees that the control of the organization is proportional to the volume of usage of its services. As an organization comprised mostly of private banks, it is regarded as a "neutral third party" and in previous political crises, such as that of Iran in 2012, it was very late to respond to an international campaign pressing it to join the sanctions against Iran. In its attempt to stay neutral in 2012, SWIFT initially insisted that the system is

Many others, including Turkey and Israel, have sent humanitarian aid. The American government has authorized \$13.6 billion dollars as emergency aid. See David E. Sanger, et al., *Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps*, N.Y. TIMES (Mar. 6, 2022), <https://www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html>; Steven Erlanger, *NATO Countries Pour Weapons into Ukraine, Risking Conflict with Russia*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/world/europe/nato-weapons-ukraine-russia.html>; Catie Edmondson, *House Approves \$13.6 Billion in Emergency Aid for Ukraine*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/us/politics/house-emergency-aid-ukraine.html>; Steve Hermon, *Ukraine Set to Get More Military, Humanitarian Aid from US*, VOA (Mar. 6, 2022), <https://www.voanews.com/a/6472487.html>.

6. *BP to offload stake in Rosneft amid Ukraine conflict*, BBC NEWS (Feb. 28, 2022), <https://www.bbc.com/news/business-60548382>; *Shell to sell Russian investments due to Ukraine conflict*, BBC NEWS (Feb. 28, 2022), <https://www.bbc.com/news/business-60564265>.

7. *Visa and Mastercard suspend Russian operations*, BBC NEWS (Mar. 6, 2022), <https://www.bbc.com/news/business-60637429>.

8. Beth Timmins, *Apple, Nike and Google join brands limiting service*, BBC NEWS (Mar. 2, 2022), <https://www.bbc.com/news/technology-60579641>.

9. *Swift History*, SWIFT, <https://www.swift.com/about-us/history> (last visited Oct. 21, 2022).

10. SUSAN SCOTT & MARKOS ZACHARIADIS, THE SOCIETY FOR WORLDWIDE INTERBANK FINANCIAL TELECOMMUNICATION (SWIFT) 16, 29-30 (2013).

“only a secure messaging service,” and that its activities fell “beyond the remit of current law.”¹¹ A press release from February of 2012 by SWIFT, along the same lines, stated that it was “committed in maintaining its role as a neutral global financial communications network.”¹² It wasn’t until the U.S. Senate Banking Committee proposed legislation to permit the sanctioning of SWIFT that it reluctantly joined the effort to cut off Iranian finance. On this occasion, however, SWIFT has joined the sanctions against Russia.

The significance of the private sector’s cooperation with the embargo on Russia in 2022, illustrates the extent to which corporate discretion and conduct impacts geopolitical, economic, and social issues. While the majority of transnational corporations chose to join the opposition against Russia’s aggression on this occasion, it seems that things might have turned out very differently had they acted only in accordance with their financial interests and refrained from acting on ethical grounds. In the past, more often than not, they turned a blind eye. The very same companies that withdrew from Russia have not only ignored, but have also, at times, benefitted from atrocities taking place in other parts of the world. *Boeing*, for instance, which suspended its operations in Russia in March of 2022,¹³ has made huge profits from the war in Yemen,¹⁴ a war that, according to the UN, has placed over 20 million people in need of humanitarian aid.¹⁵ *Shell*, quick to divest from Russian oil and gas companies, has been accused of complicity in horrific crimes committed by the Nigerian military in the 1990s.¹⁶ *BP* was responsible for the single largest environmental disaster ever, the oil spill in the Gulf of Mexico in 2010.¹⁷ Other examples abound.¹⁸

11. *Swift Sanctions on Iran*, WALL ST. J. (Feb. 12, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10001424052970203718504577178902535754464>.

12. SCOTT & ZACHARIADIS *supra* note 10, at 134.

13. *Ukraine conflict: Airbus, ExxonMobil and Boeing take action over Russia ties*, BBC NEWS (Mar. 2, 2022), <https://www.bbc.com/news/business-60582367>.

14. Since the war in Yemen broke out, in March 2015, in addition to Billions of dollars in profit Boeing’s stock price has risen from about \$150 to \$360. See Alex Kane, *Here’s Exactly Who’s Profiting from the War on Yemen*, In These Times (May 20, 2019), <https://inthesetimes.com/features/us-saudi-arabia-yemen-war-arms-sales.html>.

15. UN OCHA, *Global Humanitarian Overview: Yemen*, <https://gho.unocha.org/yemen> (last visited Oct. 14, 2022).

16. *Investigate Shell for Complicity in Rape Murder and Torture*, AMNESTY INT’L (Nov. 28, 2017), <https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/>.

17. Campbell Robertson & Clifford Kraus, *Gulf Spill Is the Largest of Its Kind Scientists Say*, N.Y. TIMES (Aug. 2, 2010), <https://www.nytimes.com/2010/08/03/us/03spill.html>.

18. For corporate role in the Israeli-Palestinian conflict, see Ofer Sitbon, *Human Rights, Normative Pressure and Corporate Social Responsibility in the Israeli-Palestinian Conflict*, 52 GEO. J. OF INT’L LAW 215, 215 (2020).

For better or worse, corporate impact far exceeds an imagined neutral and detached marketplace.

It is our contention that law does not do enough to hold private power responsible for undermining human well-being. The reason, however, lies not in law itself, but in its cultural environment.¹⁹ This is true not only in the face of wars, a global pandemic, or the imminent climate crisis, but also in what may seem the most mundane of circumstances, that in fact shape our public sphere, communities, and lives.

Indeed, corporate power is everywhere. From *Google*, *Amazon*, and *Meta*, to *Pfizer* and *Moderna*, state regulators and legal scholars alike express growing concerns with the overwhelming power of corporations.²⁰ But while countless articles and books are written on corporate excessive power, and while high-profile declarations by corporate leaders promise to “ensure a more inclusive prosperity” through corporate action,²¹ not much real change is in evidence. Corporations rarely consider the detrimental impact of their conduct on other constituencies and focus on share value as the (almost) exclusive measure of their success. The law of corporations, as currently understood, is failing to respond. We argue that the reason for this is that corporate culture pushes the interpretation of law towards an assumption of shareholder primacy. But that this is neither the only possible interpretation of the law, nor a desirable one.

The paper challenges the conservative, dominant, interpretation of corporate law in the U.S., the UK, and Israel. It argues that the multifold, and growing, power of corporations, and the threats it poses to democratic principles and environmental issues, its reinforcement of structures of privilege and its role in deepening inequality, mandates the adoption of a different, constituency-oriented, reading of the law. We will show that the law in all three jurisdictions already allows for such a reading and argue that adopting a constituency-oriented interpretation reflects an

19. Lund and Pollman term this culture “the corporate governance machine” and point to a system of institutional players who orient corporations toward shareholder interests through law, culture, and markets. See Dorothy Lund & Elizabeth Pollman, *The Governance Machine*, 121 COLUM. L. REV. 2653, 2565-68, 2578, 2602 (2021).

20. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM*, (2019); Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV., 1623, 1628 (2017) (arguing that Uber “can monitor and channel the behavior of all users” and that “their position as all-knowing intermediaries also presents unique opportunities for market manipulation”); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP., 239, 250 (2013) (“[P]erhaps the most oft-cited example of the potential of big data analytics lies within the massive data silos maintained by the online tech giants: Google, Facebook, Microsoft, Apple, and Amazon.”).

21. *Statement on the Purpose of a Corporation*, *supra* note 2.

understanding of the corporate entity which is better fitted for today's challenges.

The paper proceeds as follows. It starts, in the first part, with a depiction of the growing corporate power, through the lens of a series of global crises that have both exacerbated and exposed much of the frailty of our social structures; it then moves to discuss the changing equilibrium between corporations and states, mainly through privatization in its many forms; the last section of the first part focuses on the rise of the CSR discourse and the changing social expectations from corporations, which have led, in part, to growing doubts about the dominant paradigm of shareholder value maximization. Special attention will be devoted to the web platform corporations, the global impact of which on people's lives has become unparalleled. The purpose of this part is to present the overwhelming increase of corporate power in the past few decades, in both magnitude and reach. This, we argue, mandates re-thinking the role of corporations that can be facilitated through a broader reading of corporate law.

The most urgent change, we believe, is to re-conceptualize corporate purpose. Corporations are not neutral economic spheres but social institutions, embedded within society. This must lead to recognizing their legal responsibility. The integration of a standard of responsibility into corporate regulation will naturally result in the rejection of the shareholder primacy norm as a legal imperative.

We will not engage with the economic case for rejecting the shareholder primacy norm. Rather, we will build on it, and focus our attention on highlighting the urgency of pushing back on corporate power by re-interpreting current law, and re-conceptualizing corporate purpose. We show that this transformation does not require any legislative amendments, as current law already includes a latent requirement for corporate responsibility and already allows for a broader reading of corporate purpose. What needs to change is the doctrines that coddle corporate interests.

The second part of the paper will analyze the legal status of corporations in Israel, the UK and the U.S. It will show that while much has been written about the purpose of the corporation as more than just a vehicle to enable investment or produce profits, and while the laws prescribing its status allow for a broader understanding than the shareholder primacy norm, these broader interpretations have not been applied.

Against this backdrop, the third part of the paper will offer a different perspective on corporate law. Its essence is a re-conceptualization of the place of corporations in society, one that denies their standing as a private

entity operating in an allegedly neutral economic sphere, but rather highlights their status as socio-economic enterprises, inseparable from the broader social context in which they operate.

I. CORPORATE POWER

In 1995, when the Israeli Corporate Law Reform bill was introduced in Parliament, Larry Page and Sergey Brin had only just met, and the *Google* corporation was, at best, a vague idea. *Facebook* was founded as an open social network just two months prior to the enactment of the UK Companies Act of 2006, and *Apple*'s iPhone had not yet been released. The world we live in today, in which the total market value of the five big tech companies is at 7 trillion USD,²² is different from any world the legislators of both company laws could have even imagined. The transformation in corporate power, its ubiquity and countless-manifestations, translates into an ever-growing impact on both global and local social realities. Corporate power, and its potential to cause harm, requires a more suitable legal perception of the corporate entity. Dethroning the shareholder primacy paradigm as the overarching interpretive norm of corporate law is a necessary first step, as it impedes such change.

Corporate power, however, is only one aspect of the new global reality. The changing equilibrium between transnational corporations and states should be considered as well, as it exposes the diminishing power of people around the world to take part in shaping their own environment. The globalization process, which in many ways was only emerging when the Israeli corporate law reform bill was introduced, played a crucial role in these two parallel processes: on one hand, the boosting of corporate power—legally, economically and politically;²³ and on the other hand, the retreat of the state, and the erosion of its sovereignty in shaping

22. J. Clement, *Google, Amazon, Meta, Apple, and Microsoft (GAMAM), statistics & facts*, STATISTA (July 18, 2022), <https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam/#dossierKeyfigures>; see also *Market capitalization of the largest internet companies worldwide as of June 2022*, STATISTA, (July 27, 2022), <https://www.statista.com/statistics/277483/market-value-of-the-largest-internet-companies-worldwide/>.

23. For a discussion of corporate power, see Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law*, in *PRIVATIZATION, VULNERABILITY AND SOCIAL RESPONSIBILITY* (Martha A. Fineman et al., eds., 2016); NOREENA HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY* (2002); GEORGE MONBIOT, *CAPTIVE STATE: THE CORPORATE TAKEOVER OF BRITAIN* (2000); Sharon Beder, *The Corporate Assault on Democracy*, 4 *INT'L J. OF INCLUSIVE DEMOCRACY*, Jan. 2008, at 1, 1; DAVID ROTHKOPF, *POWER INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD* (2012).

independent socio-economic policies, especially in fiscal and monetary aspects, and, in turn, in terms of the robustness of welfare policies.²⁴ Globalization affects the power balance between corporations and governments in various ways: first, the global mobility of corporations induces a “race to the bottom,” reflected in tax breaks and trade agreements, intended to draw corporate investment. Corporate global mobility also allows corporations to make use of tax havens and financial secrecy agreements and regulations. Both practices, in turn, reduce tax revenues for hosting states, and diminish the scale and quality of the social services it can offer.²⁵ In addition, aggressive tax planning allows further wealth accumulation by corporations, fortifying their economic power. This too works in their favor *vis-à-vis* states. Finally, trade agreements and regulatory contracts that corporations take a major role in drafting, and which are only loosely overseen by parliaments, leads to light, nontransparent regulation that usually serves the interests of capital, rather than those of the public.²⁶

Another aspect of the effects of globalization on the erosion in state sovereignty is the impact of international institutions, such as the world bank and the IMF on the economic policies of many states. These have advanced a neoliberal agenda that has led many poor countries to eliminate trade barriers, as well as reducing subsidies in support of their local agriculture or industry. The direct beneficiaries were banks and transnational corporations.²⁷

Yet another aspect of the weakening of the state is the privatization of public services. Under the neoliberal philosophy, “government is not the solution to our problem; government is the problem,” as President Reagan famously declared.²⁸ The implications are setting the “small government” as an objective, strengthening the private sector, and the recommodifications of goods and services. The culmination of this process

24. *See generally* JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

25. For further reading on tax evasion, see TAX JUSTICE NETWORK, *THE TAX GAMES: ON TAX PLANNING, TAX EVASION, AND EVERYTHING IN BETWEEN* (2014); see also the “global minimum tax” proposal.

26. An example for this is that the majority of trade agreements between states and private investors include an arbitration clause, determining that governments must respond to any claims brought against them by their corporate counter parties, before an international private tribunal (known as “investor-state dispute settlement” mechanism). These tribunals typically provide investors with comprehensive legal protection and possess the authority to rule hefty compensation, in case they find that state regulation had a negative effect on profits. *See The Arbitration Game*, *THE ECONOMIST* (Oct. 11, 2014), <https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game>.

27. STIGLITZ, *supra* note 24, at 6-8.

28. Inaugural Address of President Ronald Reagan, 1 *PUB. PAPERS* 1, 1 (Jan. 20, 1981).

is the privatization of services that are traditionally thought of as distinctively public, such as defense, incarceration, and policing.²⁹

The assumption of superior private efficiency, and the quest for international economic competitiveness are important contributors to the retreat of the state from a variety of economic activities. The natural beneficiaries are corporations, who correspondingly acquire a more central position in the social and economic sphere.

The implications of these processes for the public interest are not encouraging. The IMF, in itself an agent of globalization for many years, published in 2017 a comprehensive study concluding that the mobility of capital and labor, coupled with the small government agenda, are a major cause of the rapid growth in inequality.³⁰ Research also shows that when governments are more involved in public services, inequality decreases, and economic growth is enhanced.

One of the most significant aspects of corporate dominance is the growth of the tech platform giants (*Google, Meta, Apple, Amazon, etc.*), who have become, in the past two decades or so, major actors in the global economy. The “Big Data” age, and the unprecedented monitoring of every aspect of human activity, has turned cyberspace into the most salient locus of the changing equilibrium between states and corporations. The platform corporations have become the gate keepers of the vast content available on the web. Through search engines, social networks, e-commerce and more, these platform corporations control, via nontransparent algorithms, the way information is presented, used, interpreted, and exposed to billions of users around the world. Their advantage in dictating the terms of agreement with individual clients, and the ability to take down, promote or block content or users, endows the platform corporations with de facto control over knowledge, its hierarchy, its traffic, focus, and ultimately over public opinion, and its perception of reality—actual or imagined.³¹

Under the current interpretation of corporate law, these companies strive to maximize shareholder value, which often leads to harmful business

29. Private incarceration in Israel was deemed unconstitutional, after the High Court of Justice struck down an attempt by the government to privatize. See LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 185 (2017).

30. Prakash Loungani & Jonathan D. Ostry, *The IMF's Work on Inequality: Bridging Research and Reality*, IMF BLOG (Feb. 22, 2017), <https://www.imf.org/en/Blogs/Articles/2017/02/22/the-imfs-work-on-inequality-bridging-research-and-reality>.

31. See Shelly Kreiczer-Levy & Ronit Donyets-Kedar, *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power*, 84 BROOK. L. REV. 703, 706, 722 (2019), for a discussion of the power of the platform corporations on shaping memory through their post-mortem profile management policies.

strategies affecting personal autonomy, democracy, mental wellbeing, etc.³² An example is *Facebook's* exploitation of user information without their consent or knowledge in the Cambridge Analytica scandal to support Trump's presidential campaign.³³ In this sense, the power of these corporations transcends that of governments, and reflects the potential danger they pose to human rights and wellbeing. This new reality challenges the classic theory that considers the state as the major threat in this regard.

It is not surprising, therefore, that new attempts to better regulate these aspects of private power—in both antitrust and privacy³⁴—are slowly becoming more common. As we will argue below, however, these specific regulatory additions are not enough. What is required instead is a new interpretive paradigm for corporate law—one that is not guided by the shareholder primacy norm but rather takes into account the broad implications of corporate conduct on society at large.³⁵

We have thus far described the shift in power relations between states and corporations, especially as a result of the globalization and privatization processes, and with a focus on the unique position of platform corporations as significant agents of this change. These have resulted in the rise of the corporate social responsibility movement and the changing expectations from corporations.

Since the end of the 1990s and especially following the uncovering of harmful practices by transnational corporations, the discussion of corporate social responsibility has made progress, especially among civil society organizations, but also among the general public. Stakeholder discourse is becoming more demanding and various civil-society campaigns are trying to rein in corporate conduct. As the private sphere expands into the public

32. See also Evan Greer, *Mark Zuckerberg Has to Go. Here are 25 Reasons Why*, THE GUARDIAN (May 8, 2019), <https://www.theguardian.com/commentisfree/2019/may/08/mark-zuckerberg-has-to-go>; The WSJ published a series of articles on Facebook and Instagram's conscience decision to increase traffic for the benefit of the business model, at the expense of harming young children. See generally Georgia Wells & Jeff Horwitz, *Facebook's Effort to Attract Preteens Goes Beyond Instagram Kids, Documents Show*, WALL ST. J. (Sept. 28, 2021, 1:24 PM), <https://www.wsj.com/articles/facebook-instagram-kids-tweens-attract-11632849667>.

33. The business model of these companies, and especially Google and Facebook, is based on gathering as much information on the users of their platform, selling it to whoever is willing to pay—from other companies to politicians. For a comprehensive discussion, see ZUBOFF, *supra* note 20.

34. See 2016 O.J. (L 119) 87.

35. See Donyets-Kedar, *supra* note 23, for a suggestion to consider platform corporations as legal institutions with public characteristics, rather than as conventional private entities. See also K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 234-35 (2018), for a similar line of argument.

domain, the interest of the public in the private sphere grows. This includes a deeper scrutiny of harmful corporate practices, production conditions, employment terms, detrimental impact on the climate and human rights breaches. Civil society organizations push corporations to meet higher normative standards. Using consumer boycotts, urging divestments, fair trade campaigns, class actions, etc., these demands may resonate in corporate boardrooms.³⁶

Another aspect of the same phenomenon is the “business and human rights” discourse that has also developed in recent years with an impact on social expectations from corporations. The business and human rights movement argues that human rights law, mostly restricted to states, should be extended to transnational corporations.³⁷ Its efforts are bearing fruit, and in 2011, the UN Human Rights Council published guiding principles on Business and Human Rights, asserting that corporations, in addition to states, must also respect human rights.³⁸ While this is not a legally binding document, the UN principles enjoy wide support from leading corporations as well. In 2019, the UN Human Rights Council issued a draft-treaty aimed specifically at corporations in relation to human rights.³⁹ While there is still a long way to go before, and if, it is ratified, the draft is yet another signal for the growing understanding that private power must be restrained, and that managing the company to maximize shareholder value is no longer viable (if indeed it ever was).

In response, corporations themselves and especially those in the public eye, have started to voluntarily adopt a range of socially responsible practices,⁴⁰ which in turn further stimulated social expectations of

36. See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998); see generally Tim Bartley & Curtis Child, *Shaming the Corporation: The Social Production of Targets and the Anti-Sweatshop Movement*, 79 AM. SOCIO. REV. 653, 653-654 (2014).

37. See generally *UN Global Compact Strategy 2021-2023*, UNITED NATIONS GLOB. COMPACT, https://ungc-communications-assets.s3.amazonaws.com/docs/about_the_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf (the Global Compact, a UN initiative that calls for corporations to respect human rights, and not to cooperate with their infringements, is an example); see generally OECD Guidelines for Multinational Enterprises (2011), <https://www.oecd.org/daf/inv/mne/48004323.pdf> (in 2000 the OECD published a parallel code of conduct for multinational enterprises).

38. John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNITED NATIONS HUM. RTS. COUNCIL (Mar. 21, 2011), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

39. United Nations Human Rights Council Res. 26/9 (July 16, 2019).

40. A growing number of corporations, especially transnational ones, invest considerable capital and attention in socially beneficial projects, and leading businesses have become increasingly involved in various multi-stakeholder initiatives. Virtually all of the Fortune 500

responsible behavior. The academic managerial discourse, especially in Europe,⁴¹ has also begun to focus more on questions of business ethics, corporate social responsibility, sustainability, and business-and-community relations, reflecting a shift from the contractual-corporate paradigm to a stakeholder model. It seems fair to say, then, the debate today no longer questions the necessity of corporate social responsibility, but rather considers its proper scope.

As will be shown below, however, these changes have not permeated into law itself, or, more accurately, have not informed a broader interpretation of equivocal legal concepts. Corporate and legal actors throughout are still prioritizing shareholder value.⁴²

The first part of the paper focused on the profound transformation in the power relations between states and corporations, showing that globalization, privatization, and the rise of platform corporations have brought about an urgent need to review the overarching principles that inform corporate purpose. A change in public opinion, more aware of the problems of the unregulated power of large corporations and its potential to cause harm, have made possible a normative shift in which corporate social responsibility is now expected. In terms of law, this shift should translate into a new perception of corporate purpose.

It is impossible to discuss the role of corporations in society without mentioning the crises the world has gone through over the past few years—some of which are linked directly to corporate conduct. Most urgent is the

companies have a CSR policy that commands compliance with human rights and environmental standards. Among the companies that have adopted some type of CSR guidelines, or have joined CSR initiatives, are *Intel*, *General Electric* and *Kimberly-Clark* (who are signatories to the Global Compact, The UN CSR guidelines initiative). For more information of Fortune 500 companies, see Kelly Seiz, *CSR: How Fortune 500 Companies Measure Up*, CSRHUB BLOG (Mar. 29, 2017), <https://blog.csrhub.com/csr-how-fortune-500-companies-measure-up>; for the Fortune 500 rankings of 2019, see *Fortune 500*, FORTUNE, <https://fortune.com/fortune500/2019/search/>; for a list of companies that have signed the Global Compact, see *See Who's Involved: Our Participants*, UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants/search?search%5Binitiatives%5D%5B%5D=121>; another illustration of the prevalence of CSR among top corporations. Companies on the list are judged on a number of indicators, among which are the corporation's attitude towards customers, employees, the local community, minorities (including women), the environment and shareholders. See *100 Best Corporate Citizens*, CR MAG. (2019), https://100best.3blmedia.com/wp-content/uploads/2020/04/100BestCorporateCitizens_2019.pdf.

41. ANDREW CRANE & DIRK MATTEN, *BUSINESS ETHICS: A EUROPEAN PERSPECTIVE* (2004).

42. See generally Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 652 (2020) (arguing that "Once corporations go public, the securities laws effectively require that corporations maximize share price at the expense of all other goals.").

climate crisis, defined by the UN as the “defining crisis of our time.”⁴³ Human activity, mostly carried out by corporations, is responsible for the emission of greenhouse gas into the atmosphere. Mining, production, and use of coal, oil and gas releases billions of tons of CO₂ causing an unprecedented, and dangerous, rise in temperatures. The consequences are, and will become, devastating.⁴⁴ The arctic is melting, causing sea levels to rise, threatening the flooding of inhabited lands and cities across the globe; extreme weather conditions, natural disasters and non-perishable human trash lead to soil degradation and desertification. Hyper consumerism leads to reckless deforestation. Business as usual has, literally, devastating implications. However, the fossil fuel industry is still on course to invest billions of dollars into new infrastructure, and to further extract coal, oil and natural gas in both Europe and North America.⁴⁵ In Europe, it was only following the Russian invasion to Ukraine in February of 2022 that the Nord stream project, owned and led by a consortium of European energy companies, was re-considered. The Nord Stream gas pipeline, described as a climate disaster,⁴⁶ is one of the largest energy infrastructures in Europe. In addition to its detrimental effect on gas emissions when put to use by consumers, it is also putting the Baltic ecosystem in danger.⁴⁷ Energy corporations are making huge profits while we edge closer to an ecological disaster. A 2019 study shows that only twenty corporations are responsible for 35% of the total CO₂ emissions since 1965, when the dangers of fossil fuel were already known.⁴⁸

Corporations are accelerating the climate crisis by blocking regulatory initiatives. The hyper consumerist culture corporations strive to foster and spread drives societies across the globe to an excessive use of natural resources. The paradigm of maximizing shareholder value and short-term

43. *The Climate Crisis: A Race We Can Win*, UNITED NATIONS, <https://www.un.org/en/un75/climate-crisis-race-we-can-win>.

44. NAOMI KLEIN, *ON FIRE: THE BURNING CASE FOR A GREEN NEW DEAL* 25 (2019).

45. *Id.* at 76.

46. The Nord Stream is a consortium of energy companies, headed by the former German Chancellor Gerhard Schroeder, a position he took immediately after retiring from his public role, raising serious suspicions of conflict of interests. *See Former German Chancellor Gerhard Schroeder Becomes Chairman of Russian State-Controlled Nord Stream Pipeline Company Directly After Leaving Office*, ALLIANCE FOR SECURING DEMOCRACY, <https://securingdemocracy.gmfus.org/incident/former-german-chancellor-gerhard-schra%C2%B6der-becomes-chairman-of-russian-state-controlled-nord-stream-pipeline-company-directly-after-leaving-office/>.

47. *See* David Langlet, *Nord Stream, the Environment and the Law*, 59 SCANDINAVIAN STUD. IN L. 79, 92 (2014).

48. *See generally* 1965 President’s Science Advisory Committee Report on Atmospheric Carbon Dioxide, CLIMATE FILES (1965), <https://www.climatefiles.com/climate-change-evidence/presidents-report-atmospher-carbon-dioxide/>.

growth leads these corporations to externalize the costs to society and the environment. As the next part will show, current law allows a much-needed paradigm change. It is up to legal actors to apply a different interpretation to the law, one that corresponds better to the challenges.

II. A COMPARATIVE PERSPECTIVE: CORPORATE PURPOSE IN ISRAEL, UK, USA

1. *Corporate Law in Israel*

Two decades ago, the Israeli Companies Law was revised to include a new statement on the purpose of the corporation.⁴⁹ Its progressive language, allowing companies to consider the interests of its creditors, its employees, or the public in their business dealings, promised to reflect a new understanding of the purpose of the modern corporation, and legal room for corporate leaders to mitigate some of the detrimental effects of maximizing shareholder value. This opportunity was frustrated. Not only was it hardly ever applied in support of stakeholder interests, but it was also referred to by judges as the legal source of the shareholder primacy norm in Israeli law.

Article 11 reads as follows:

“11 (a) The purpose of a company shall be to operate in accordance with business considerations in maximizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public may be taken into account; similarly, the company may donate a reasonable sum for a proper objective, even if such donation is not within the scope of business consideration as aforesaid, if a provision for such is prescribed in its articles of association.

(b) Section 11 (a) shall not be applied to a company incorporated for the benefit of the public.”

Parliament’s annotations for the bill stated that alongside the approach that mandates maximizing shareholder value, Article 11 should be interpreted in an “enlightened” manner, allowing the company and its directors, even if not imposing such a duty, to consider stakeholder interests in their considerations. According to the drafters, then, the legislative intention was to strike a balance between the shareholder primacy norm as the sole purpose of the corporate entity, and a broader view, suggesting that other stakeholders, affected by the company’s conduct, can and should be considered.

49. Companies Law, 5759-1999, § 11, 44 (Isr.).

The Israeli academic legal community was, at first, preoccupied with Article 11. While some scholars criticized it as a misguided departure from the Anglo-American shareholder primacy view, others thought it was not going far enough towards a stakeholder approach.⁵⁰ Goshen, a prominent corporate scholar, working within a law and economic analysis framework, argued that allowing corporate managers to consider the interests of different communities while these interests diverge from those of the company's shareholders reduces the aggregate social welfare achieved by maximizing shareholder wealth. This, he claimed, is the guiding principle of corporate law. Reiterating the conservative view of corporate purpose, Goshen claims that the shareholders, being the residual claimants, are best positioned to be viewed as the company owners, and that their ability and willingness to bear the risks involved in its activity ensure an efficient management of the company. The conclusion, he argues, is that the managers' discretion should be applied exclusively for shareholders' gain.⁵¹ Goshen's view is informed by the principal-agent model of corporate law, which sees the role of corporate law as being to minimize "agency costs": the shareholders are seen as principals and are therefore exposed to agency costs by their agents, the managers. The opposite view, propounded by Stern, considers the company as its own entity. Building on the language of Article 11—"the purpose of a company shall be to operate in accordance with business considerations in maximizing *its* profits"—Stern stresses that the Israeli legislature distinguishes between the company and its shareholders. In this sense, claims Stern, the firm has no owners. Its various constituencies all contribute their unique input, and their interests should therefore be taken into account when directing the firm. Yet another view claims that the disagreement does not revolve around the question of the company's purpose: it is clear that its purpose is to act to enhance the financial value of the company by applying business considerations. The real question is what is the proper measure to assess the company's value. While the orthodox view is that the worth of the company is captured by shareholder value, Article 11 allows for a broader evaluation, one that includes the interests of other constituencies.⁵²

While the academic debate was heated (as far as academic debates go) the Israeli judiciary remained indifferent. At no time did the courts attempt

50. Yehiel Bahat, *The Purpose of the Corporation and its goals in the Corporate Law Bill, 1995*, 1(2) SHAARE MISHPAT, 277 (1998) (In Hebrew); ELI BUKSPAN, *THE SOCIAL TRANSFORMATION OF BUSINESS LAW* (2007).

51. Z. GOSHEN, *A Critical View of the New Corporate Law: the Purpose of the Firm, Acquisitions and Class Action*, 32 MISHPATIM L. REV. 81, 383-95 (2001).

52. YOSSI RAHAMIM, *CORPORATE RESPONSIBILITY FOR WORKERS* (2019).

to interpret the meaning of the phrase allowing the corporation to consider “the interests of its creditors, its employees and the public.” Furthermore, courts have continued to interpret the Israeli companies’ law within the pre-legislative framework of shareholder primacy—sometimes even referring to Article 11, without even mentioning its language. This is especially puzzling as Israel is a mixed legal jurisdiction of both Anglo-American and Continental tradition. Accordingly, statutes, rather than case law, are generally considered as the first in the hierarchy of sources of law.

Despite the academic controversy over the desirable interpretation of Article 11, there seems to be no disagreement about the potential to regard it as a departure from the Anglo-American view. However, as shown below, neither the judiciary nor potential claimants have made use of this potential. The next part will discuss the language of Article 11, focusing on its progressive possibilities. While recognizing that the language may also support a narrow, conservative interpretation, we argue that it naturally allows for an inclusive one as well. Keeping the structural power of corporations in mind, the progressive interpretation was, and is, vital. In Israeli law however, thus far, it is the road not taken.

As noted above, the language of Article 11 evidently supports an inclusive, constituency-oriented interpretation. While there are indeed some indications to the contrary,⁵³ we believe that the weight of numerous linguistic indications to support a progressive approach, together with the importance of the normative issue, outweigh them, and should have made an impact on the interpretation of the law.

The first indication for the (at least partial) abandonment of the shareholder primacy norm is the unequivocal statement that the interests of various constituencies are relevant to the decision-making process of managers. It would have easily been enough for the legislator to make do with the first part of Article 11, namely that “[t]he purpose of a company shall be to operate in accordance with business considerations in maximizing its profits.” The choice to add the possibility that “within the scope of such considerations the interests of its creditors, its employees and the public” may be considered cannot be ignored.

Second, and contrary to the Anglo-American view that identifies the interests of the company with those of the shareholders, the Article clearly distinguishes between the two. Stating that “[t]he purpose of a company shall be to operate in accordance with business considerations in

53. Those include the use of the term “business considerations,” not mentioning “social or environmental ones; and the mentioning of the possibility to donate a reasonable sum for a worthy cause, which may indicate that this is not allowed with regard to day-to-day business. Companies Law § 11.

maximizing *its profits*,” rather than those of its shareholders, is a meaningful departure from the “residual claimants” position of the orthodox view. Indeed, even without any further linguistic anchors to sustain the inclusive position, this statement alone should have served as legal authorization for managers to take account of other stakeholders in their deliberations.

A third indication for the broad interpretation is that the language of Article 11 makes a clear distinction between the daily business dealings of the company, where constituencies may be considered, and its philanthropic agenda, mentioned separately (stating that “the company may donate a reasonable sum for a proper objective, even if such donation is not within the scope of business consideration as aforesaid”). Philanthropy, then, does not in itself constitute corporate social responsibility, which should be carried out routinely in the course of day-to-day business.

Importantly, the use of “*may* be taken into account” rather than “*should*” be taken into account, expresses a choice not to mandate such consideration. However, it is clear that such considerations are part and parcel of the discretionary scope granted to managers. In addition, Israeli case law has more than once read the phrase “*may*” as “*should*” in some circumstances, stating that certain contexts impose a duty to act, rather than providing legal permission to do so. Context, the courts stress, outweighs the formal linguistic attributes of the authority granted by law.⁵⁴

Despite these interpretive possibilities and the need of many stakeholders for protection from rising corporate power, which could have found some relief in a progressive and updated corporate purpose, neither the courts nor potential claimants have put Article 11 to use, to require more responsible conduct from corporations. A comprehensive review of Israeli case law demonstrates that while courts mention Article 11 in numerous cases, an in-depth discussion of its proper interpretation and the potential changes it has made to corporate law have never taken place. The same is true for other sections of the Israeli corporate law, which could have anchored a duty of responsibility for stakeholders in more specific contexts.⁵⁵

54. JUST. YITZHAK ZAMIR, *THE ADMINISTRATIVE AUTHORITY*, 225 (vol. A 1996) (“the court states that while the language of the law grants authority to act, rather than sets a duty to do so, in some circumstances the said body must exercise its authority. The emphasis is on the circumstances at hand, and not on its linguistic characterization”).

55. *See* Companies Law § 6 (focusing on Article 11, as it deals directly with corporate purpose. However, a similar argument could be made for several other clauses that mention the corporate purpose. One such clause is Article 6 (a)(b)(1), which deals with piercing the corporate veil, stating that “piercing the veil would be allowed in the case where the separate corporate

One of the earliest mentions of corporate purpose in Israeli law is that of Justice Shamgar in *Penidar v. Castro*⁵⁶ in the early 1980s, prior to the enactment of Article 11. The case deals with the duty to act in good faith in contract negotiations, a duty the breach of which may generate an obligation to compensate the harmed party. In this case, the question was whether the manager of the appellant company was liable for such compensation while negotiating on the company's behalf. The question of the purpose of the corporation wasn't imminent for the court's decision. However, Justice Shamgar opined, in an *obiter dictum*, that "recent developments in corporate law teach us that the company and its managers, acting on its behalf, must take into account not only the interests of its shareholders [...] but also that of the company's employees, customers, and the general public."⁵⁷ Cited by over 800 cases, and coupled with the subsequent enactment of Article 11, this statement by Justice Shamgar could have opened the door for a broad conception of corporate purpose. This, however, was not the case. Although Israeli legislation and early case law do not fully espouse a shareholder primacy view (we argue that the contrary is true), Israeli courts in recent years continually take it for granted that it does. Without any discussion, thorough explanations, or analysis, courts simply presume that the shareholder value view is the governing paradigm in Israeli corporate law. Here are a few examples.

In 2012, the Tel-Aviv District Court heard a case regarding dividend distribution in the amount of 3 billion ILS.⁵⁸ The appellant raised concerns that the defendant, *Bezeq Inc.*, does not meet the required profit criterion,⁵⁹ and that it should therefore not be allowed to go ahead with the distribution. Interestingly, the appellants' advocate argued that the profits criterion whether to allow or deny dividend distribution signals that the legislator's aim was to make sure the company does not act solely in the interest of its shareholders and disregards other stakeholders. She also invoked Article 11, arguing that it should serve as a guiding principle as to the proper balance between shareholder value and the interests of other constituencies. The decision to distribute dividends in this case does not strike the proper balance and is likely to lead to the company's inability to pay its existing and anticipated debts. The court rejected these arguments, stating that Israeli law has adopted the Anglo-American approach to corporate purpose:

entity doctrine was misused, so as to harm the corporate purpose." Courts have never discussed the meaning of the phrase "corporate purpose" in this context).

56. CA 7/81 *Penidar Inv. & Dev. Co. v. Castro*, 37(4) PD 673 (1983) (Isr.).

57. *Id.*

58. CA (TA) 48067-01-11, *A.L.A.N. Spa v. Bezeq Inc.*, PM (2012) (Isr.).

59. *See* Companies Law §§ 302(a)(2), 303(a).

“[i]n the Anglo-American world it is accepted that the main purpose of the corporation is to maximize shareholder gains. The company’s profits are in fact derived from the profits of shareholders, who are the residual claimants of the company. The company must therefore focus on maximizing shareholder gains. ...[Israeli] law, then, adopts the fundamental approach that governs English law regarding maximizing the company’s profits.”⁶⁰

When trying to square this interpretation with the language of Article 11, the court states that “Article 11 is a declarative norm,” and that the only relevant criteria to decide whether dividend distribution is allowed is the one set forth by clause 302(a)(2), which states that “the ability to pay its existing and anticipated debts when the time comes for so paying.”⁶¹

We find the statement that Article 11 is merely declarative both questionable and unconvincing. First, there is nothing declarative about Article 11; it is the source of legal authority to act while running a company, determining, among other things, the legal scope of the considerations directors are allowed to take into account. Second, even if it were “merely declarative,” its purpose would be exactly that—to guide legal actors, as well as courts, towards the proper interpretation of corporate purpose. The opportunity to consider Article 11 as a guiding principle for a balanced approach, one that takes into account the broad range of the communities influenced by the company’s conduct, was passed over.

Liechtenstein v. AIG Holdings (2010),⁶² heard before the Supreme Court, is another illuminating example of the courts’ abstention from conducting an in-depth discussion of corporate purpose, avoiding the opportunity to challenge the narrow approach of maximizing shareholder value. In this case, the minority shareholders requested that their dispute with the majority shareholders should not be referred to arbitration, arguing, among other things, that since their claim against the majority shareholders touched on the latter’s actions contrary to the “benefit of the company,” such a claim could not be a matter for arbitration. Their argument relied on Article 3 of the Arbitration Law, stating that an issue cannot be referred to arbitration if it cannot be the subject of an agreement between the parties.⁶³ Article 11, claimed the appellants, was cogent, and could not be overridden by an agreement between the parties. Since it could not be the subject of an agreement, it could not be subject to arbitration. This case provided an opportunity for the court to discuss the status and interpretation of Article

60. *A.L.A.N.*, 48067-01-11 (Isr.).

61. *See* Companies Law § 302(a)(2).

62. CA 9542/06 *Liechtenstein v. AIG Holdings*, PD (Jan. 14, 2010) (Isr.).

63. *Id.*

11, and to clarify whether it is indeed *jus cogens*. It was also an opportunity to determine the scope of the company's directors' discretion. However, as in many other cases, this opportunity too was missed. In a single paragraph, Justice Procaccia discusses Article 11:

“[Article 11...] is a guiding norm of sorts, intended to direct the consideration and actions of a corporation. It isn't, in and of itself, a source to draw rights from.”⁶⁴

The meaning of this short statement by the court, again, is that Article 11 cannot be the source of claims brought against the company's decision-making process by any of its constituencies. However, even as a declaratory piece of legislation, it is unclear why it isn't a valid source for rights and duties. This decision reflects yet again a tacit adherence to the narrow view of the corporate purpose, barring stakeholders from claim standing in corporate deliberations processes.

Other cases follow suit. In some cases, the court wrongfully equates between the interests of the company and those of the shareholders, despite the clear distinction the law itself makes between the two;⁶⁵ it misquotes Article 11, simplistically stating that “the purpose of the corporation is to maximize shareholder gains (article 11)”;⁶⁶ and opines that the question of the purpose of the corporation should be discussed as part of the desired law, but that current law grants shareholders a special status, and mandates the court to apply the shareholder wealth maximization approach.⁶⁷

To sum up, we have shown that the language of Article 11 reflects a tension between the shareholder primacy norm and the stakeholder approach. However, it unarguably allows for, and possibly even invites, broadening the deliberative spectrum of the company's directors and officers, as well as the re-configuration of corporate purpose in such a way that would equip both claimants and courts with tools to push back on corporate power. Israeli courts, unfortunately, have not allowed this prospective change to take place.

2. *Corporate law in the UK*

Two landmark judgments, *Hutton v West Cork Railway Co.* (1883)⁶⁸ and *Parke v. Daily News* (1962),⁶⁹ have long reflected the primacy of the

64. *Id.* ¶ 15.

65. CA 1240/00 Assessor Tel-Aviv v. Sivan 59(4) 558 (2005) (Isr.).

66. CA (CT) 32223-03 Levite v. Wine-Growers Coop., PD (Nov. 3, 2015) (Isr.).

67. CA 9636/06 Boganer v. SofaWare Tech. PD (Nov. 18, 2009) (Isr.).

68. *Hutton v. West Cork Railway Co.* [1883] 23 Ch D 654 at 674 (UK).

69. *Parke v. Daily News Ltd.* [1962] Ch 927 (Eng.).

interests of shareholders over those of other stakeholders, mainly employees, in the daily management of the British company.⁷⁰ In *Hutton*, the Court of Appeal ruled invalid a shareholders' meeting resolution to compensate employees who lost their jobs after the company had transferred its business to another company. Money belonging to the company could be spent, the court said, only if it was "reasonably incidental to the carrying on of the company's business for the company's benefit."⁷¹ In this case, in which the company was no longer carrying on business, the generosity towards the employees, to whom the directors held no duty, could have no prospect of a future benefit to the company. In a similar way, in *Parke*, the use of the proceeds of sale of two newspapers to compensate redundant employees (though, unlike *Hutton*, not by liquidating the entire business of the company) was declared ultra vires as it was not made in "the best interests of the company."⁷²

The continuous focus of courts on the "best interests" was generally understood by leading company law scholars as referring essentially to the duty of directors to maximize the benefits of shareholders (or "members") as a whole, despite the separate personality of the company.⁷³ However, *Hutton* and *Parke* were much criticized and seen as increasingly out of touch with contemporary values.⁷⁴ Ultimately, they were reversed by the Companies Act of 1980, and, later, the Companies Act of 1985. Section 719 of the Companies Act of 1985 provided that companies had the power to make gratuitous provisions for employees on the cessation or transfer of business, even if it was not in the best interests of the company.⁷⁵ It is notable that section 247(2) of the Companies Act of 2006 maintained this rule.⁷⁶

70. See, for example, *In Re Lee, Behrens & Co. Ltd.*, [1932] 2 Ch 46 (UK), which invalidated a directors' decision to grant an annual pension to a widow of a former director, as it was taken without a shareholders' resolution and was not for the benefit and promotion of the company's prosperity.

71. See *Hutton*, 23 Ch D at 673 ("[T]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.").

72. See *Parke*, Ch 927 (Eng.).

73. See, e.g., YEDIDIA STERN, CORPORATE GOAL 28 n.14, 31 n.21 (2009) (citing JOHN BIRDS ET AL., *BOYLE & BIRDS' COMPANY LAW* 192-93 (Anthony Boyle et al. eds., 2nd ed. 1987); ROBERT R. PENNINGTON, *COMPANY LAW* 789 (7th ed. 1995); PAUL L. DAVIES, *GOWER'S PRINCIPLES OF MODERN COMPANY LAW* 602 (6th ed. 1998).

74. LEN S. SEALY & SARAH WORTHINGTON, *CASES AND MATERIALS IN COMPANY LAW* 275 (8th ed. 2007).

75. See Companies Act 1985, c. 6, § 719 (Eng.).

76. See Companies Act 2006, c. 46, § 247(2) (Eng.).

Courts' use of the ultra vires doctrine with regard to various notions of corporate charity was criticized and gradually abandoned. Back in 1921, the court in *Evans v. Brunner, Mond and Co. Ltd.*⁷⁷ dismissed a shareholder's challenge to a chemical company's general meeting resolution to donate £100,000 to universities for general scientific research. But only in *Re Horsley & Weight Ltd.* (1982) case,⁷⁸ in which the Court of Appeal approved a memorandum's clause which granted pensions to employees, it was stated that the making of gratuitous payments could be considered as a substantive objective of the company if the memorandum was framed in sufficiently explicit terms.

In 1985, the Companies Act was ratified to include for the first time, in section 309(1), the obligation of directors to consider the interests of the company's employees in the performance of their functions. In 2006, company law underwent a major overhaul, "the most extensive of its kind since the modern foundations of company law were established in the middle of the nineteenth century."⁷⁹ At its heart stood the introduction of an "enlightened shareholder value" approach through the wording of section 172, relating to the duties of directors. According to the new section, directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for "the benefit of its members as a whole." In doing so, they must have regard to a non-exhaustive range of factors. These focus mostly on stakeholders-oriented issues such as the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers, and others; the impact of the company operations on the community and the environment; and the desirability of the company maintaining a reputation for high standards of business conduct.

The legal and practical consequences of section 172 have been analyzed at length by many scholarly articles.⁸⁰ Their discussion oscillated,

77. *Evans v. Brunner, Mond, & Co.* [1921] 1 Ch 359 at 360 (UK).

78. *Re Horsley & Weight* [1982] Ch 442 (Eng.).

79. Robert Goddard, "Modernising Company Law": *The Government's White Paper*, 66 MOD. L. REV. 402, 403 (2003).

80. See, e.g., Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reforms in the U.K.*, 31 WM. & MARY ENV'T L. & POL'Y REV. 317, 330 (2007); Alan Dignam, *Capturing Corporate Governance: The End of the UK Self-Regulating System*, 4 INT'L J. OF DISCLOSURE AND GOVERNANCE, 24 (2007); Lady Justice Mary Harden, *Companies Act 2006 (UK): A New Approach to Directors' Duties*, 81 AUSTL. L. J. 162 (2007); Andrew R. Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577 (2011); Charles Wynn-Evans, *The Companies Act 2006 and the Interests of Employees*, 36 INDUS. L.J. 188 (2007); Joan M. Loughrey et al., *Legal Practitioners, Enlightened Shareholder Value and the*

in general, between two poles: on the one hand, the introduction of section 172, a new mandatory norm, into a field traditionally characterized by voluntarism and self-regulation was of great significance, as it was a recognition that the company's interests could be harmed also by negative social—and not only financial—impacts. By the same token, the emergence of normative claims related to the societal role of companies and their evolving moral, and legal, duties created an environment in which directors could make decisions with reference to social and environmental concerns with greater certainty that they would not be sued for doing so.

However, the Companies Act of 2006 was clearly not accepted as a radical piece of legislation. Very much like the Israeli case, “stakeholding” was the road not taken. The mentioning of different constituencies that have to be taken into consideration still left them outside the company, whose “members” remain, exclusively, the shareholders, and whose interests prevail in case of a conflict with the stakeholders’ interests. The introduction of the “Enlightened Shareholders Value” concept that allowed directors to consider the interests of stakeholders did not truly contest the primacy of shareholders’ interests in the daily life of the firm and the continuous pressures of short-termism. It also did not include enforcement tools, nor complementary moves in fields such as tax policy or the regulation of the labour market.

Shaping of Corporate Governance, 8 J. OF CORP. L. STUD. 79 (2008); Gordon L. Clark & Eric R. W. Knight, *Implications of the UK Companies Act 2006 for Institutional Investors and the Corporate Social Responsibility Movement*, 11 UNIV. PA J. BUS. L., 259, 281 (2009); Deryn Fisher, *The Enlightened Shareholder—Leaving Stakeholders in the Dark: Will Section 172 (1) of the Companies Act 2006 make Directors Consider the Impact of their Decisions on Third Parties*, INT’L CO. & COM. L. REV. 10 (2009); Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a for-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT’L & COMP. L. REV. 271, 293-94 (2009); Clifford Chance, *Corporate Law Tools Project*, SRSRG (2009); Andrew R. Keay, *The Duty to Promote the Success of the Company: is it Fit for Purpose?*, UNIV. LEEDS, CTR. FOR BUS. L. AND PRAC. WORKING PAPER 1, 4 (2010); John K.S. Ho, *Is Section 172 of the Companies Act 2006 the Guidance for CSR?*, 31 CO. LAW. 207, 212 (2010); Ji Lian Yap, *Considering the Enlightened Shareholder Value Principle*, 31 CO. LAW. 35 (2010); Andrew R. Keay, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado About Little?*, 22 EUR. BUS. L. REV. 1 (2011); David Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law*, WASH. & LEE PUB. LEGAL STUD. RSCH. SERIES (2010); Ngozi Okoye, *The BIS review and section 172 of the Companies Act 2006: what manner of clarity is needed?*, 33 CO. LAW. 15 (2012); Elaine Lynch, *Section 172: a ground-breaking reform of directors’ duties, or the emperor’s new clothes?*, 33 CO. LAW. 196 (2012); Nicholas Grier, *Enlightened shareholder value: did directors deliver?*, 95 JURID. REV. (2014); Andrew Johnston, *The Shrinking Scope of CSR in UK Corporate Law*, 74 WASH. & LEE L. REV. 1001 (2017); GEORGINA TSAGAS, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures*, in SHAPING THE CORPORATE LANDSCAPE: TOWARDS CORPORATE REFORM AND ENTERPRISE DIVERSITY 131 (Nina Boerger & Charlotte Villiers eds., 2018).

The few references to section 172 among UK courts generally stated that the section did not alter the pre-existing duties of directors. Thus, for example, in *Re West Coast Capital (LIOS) Ltd.*, the court argued that section 172 (with regard to the need to act fairly as between members of the company) did “little more than set out the pre-existing law on the subject.”⁸¹

In *R (on the application of People & Planet) v HM Treasury*,⁸² the Court stated that shareholders can use the section only in order to influence the board’s decision-making process to have regard to the various factors mentioned in section 172(1), such as environment and human rights considerations, but not in order to force it to do so, as it might lead to litigation by minority shareholders. In a recent case, however, the Court of Appeal ruled that where a company’s directors know or ought to know a company is insolvent or is likely to become insolvent, section 172(3) imposes on them a duty to act in the best interests of the company’s creditors.⁸³

Following the Government’s demand, in its 2017 response to the Corporate Governance Green Paper, to strengthen reporting requirements on how company directors are having regard to stakeholders,⁸⁴ the Financial Reporting Council published in 2018 its new UK Corporate Governance Code,⁸⁵ which applies to “companies with a premium listing.” This “soft law” tool addresses, among other things, section 172: it requires boards to understand the views of other key stakeholders and to describe in the annual report how their interests and the matters set out in section 172 have been considered in board discussions and in decision-making. With regard to its workforce, boards should dialogue with a director appointed from the workforce; a formal workforce advisory panel; or a designated non-executive director. In addition, it should provide information that enables shareholders to assess how the directors have performed their duty to promote the success of the company. Davies views this new requirement as

81. *West Coast Capital (LIOS) [2008] CSOH 72, [21] (Scot.)*, <https://www.scotcourts.gov.uk/search-judgments/judgment?id=5caf8aa6-8980-69d2-b500-ff0000d74aa7>.

82. *R (on the application of People & Planet) v. HM Treasury [2009] EWHC (QB) 3020, [34] (Admin) (Eng.)*.

83. *BTI 2014 LLC v. Sequana SA [2019] EWCA (Civ) 112 [169] (Eng.)*.

84. Department for Business, Energy, & Industrial Strategy, *Corporate Governance Reform—The government response to the green paper consultation, 2017*, BEIS, at 1, 4-6, 20, 28 (Eng.).

85. FIN. REPORTING COUNCIL, *THE UK CORPORATE GOVERNANCE CODE 3 (2018)*.

a method to “nudge” large corporations towards the adoption of a more stakeholders-oriented approach.⁸⁶

Finally, it is worth mentioning the “Better Business Act,”⁸⁷ a coalition of nearly 1,000 British companies, which campaigns for the amendment of section 172, so that the focus of the director’s duty will change from being a duty to promote “the success of the company” to being a duty to advance “the purpose of the company.” This purpose shall be to benefit the members of the company as a whole, “whilst operating in a manner that also (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs.”

While section 172 of the Company’s Act of 2006 allows for a broad spectrum of communities to be considered, courts in the UK have done little to revolutionize corporate conduct. With new initiatives pushing for a more robust stakeholder-oriented model, through amendments to the law to allow it, we believe that it already does just that. Hiding in plain sight, the stakeholder approach is already enacted in current law. All it needs is to be extracted, recognized, and applied.

3. *Corporate Law in the United States*

In the U.S., perhaps more actively than anywhere else, the debate on corporate purpose is persistent. Yet even as scholars write on the need to move away from the shareholder primacy model,⁸⁸ corporate leaders pronounce to the same effect,⁸⁹ and the ESG investment market is growing, the dominance of the shareholder primacy norm remains intact.

This, however, is not a consequence of law. As is the case in Israel and the UK, U.S. corporate law itself does not bind company officials and directors to consider shareholder value as their ultimate aim, at the expense of broader social values. Rather, and again as in Israel and the UK, this priority arises from inertia, myopia and conservatively-inclined corporate legal culture.⁹⁰ In all three jurisdictions, shareholder primacy is an

86. PAUL DAVIES, *INTRODUCTION TO COMPANY LAW* 50 (3d ed. 2020).

87. See *Business Campaign Act*, BETTER BUSINESS ACT (2022), <https://betterbusinessact.org/wp-content/uploads/2022/04/Better-Business-Act-Campaign-Overview.pdf>.

88. Stout, *supra* note 1, at 163; STOUT, MYTH, *supra* note 1, at 1; Lund & Pollman, *supra* note 19, at 2565.

89. *Statement on the Purpose of a Corporation*, *supra* note 2.

90. See generally Lund & Pollman, *supra* note 19.

interpretive choice made by corporate and legal actors rather than a legally prescribed duty.

The complex framework of U.S. law requires an examination of several different sources: case-law driven doctrines, mostly those of the Delaware legal system, the most influential jurisdiction for corporate law;⁹¹ relevant federal laws such as the Dodd-Frank and the Sarbanes-Oxley Acts; the guidelines of regulatory agencies, such as the SEC (the Securities and Exchange Commission); general American case law that deals with corporate purpose; and state legislation. We will show in what comes next that it is very difficult to find an unequivocal legal statement *mandating* primacy to shareholders. As in Israel and the UK, U.S. law itself can be read to accommodate both the shareholder primacy norm and the broader, stakeholder-oriented model. Thus, it is an active interpretive choice by legal and corporate actors to read the shareholder primacy norm into the law, rather than allow a broader view.

The high point for the doctrine of shareholder primacy in American academia can be traced back to the 1970s, when the perception of the corporation in terms of principal-agent relations was gaining ground.⁹² Milton Friedman's renowned 1970 New York Times article, in which he referred to corporate social responsibility as "managers who illegitimately spend other people's (that is, 'shareholders') money,"⁹³ embodies this view. The influential article by Jensen and Meckling, *Theory of the Firm*, explained corporate structure in terms of agency relations between managers and shareholders.⁹⁴ Since the interests of the principal (shareholders) and those of the agent (managers) are likely to diverge, shareholders must protect their interests by way of monitoring and incentivizing managers to act on their behalf. In this view, the costs of aligning managers' interest with those of shareholders are termed "agency costs," which should be reduced to a minimum.⁹⁵ Corporate governance is required to achieve this goal, which is therefore taken to be the core of corporate law.⁹⁶

91. Approximately 68% of Fortune 500 companies are incorporated in Delaware. State of Del. Div. of Corp., *2020 Annual Report Statistics* (2020).

92. Michael J. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON., 305, 305, 308, 357 (1976); MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 1-2 (1976).

93. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

94. Jensen & Meckling, *supra* note 92.

95. *Id.* at 313.

96. Lund & Pollman, *supra* note 19.

The initial idea of the agent-principal model, and consequently of the shareholder primacy norm, then, was to prevent the rational pursuit of managerial interests from harming those of the shareholders. The problem, however, became the identification of protection from managerial self-seeking and maximizing shareholder value. A simple concept and relatively easy to apply, shareholder primacy—the proxy for keeping managers’ potential self-interest in check—became the primary objective of corporate law.⁹⁷

While the law does aim at keeping managerial conflict of interests at bay, it does not necessarily require that shareholder interest alone should be taken into account. As we demonstrate below, managerial discretion and duties, might very well take account of the interests of other constituencies.

i. Legal Doctrine

Shareholder primacy was the academic preference for decades to follow and even echoed in some statements by Delaware judges.⁹⁸ However, the very same courts refrained from holding directors legally accountable for failing to maximize shareholder wealth.⁹⁹ The reason is the long standing doctrine of the Business Judgment Rule, which states that as directors do not act primarily in their own self-interest, courts will not scrutinize their business decisions, including decisions that may eventually harm shareholder value.¹⁰⁰

This standard of judicial review for directors’ discretion is the best indication that the law does not mandate directors to maximize shareholder wealth: behind the veil of the business judgment rule, and as long as they are not acting exclusively for their own self-interest, directors can legally take account of the interests of other constituencies. They will not be legally liable for it. This is strong evidence for our claim that the concern of law was to protect shareholders from managerial self-interest. It was not, however, to prevent managers from taking into account the interests of the company as a whole, or to consider its constituencies in a balanced manner. The spectrum of considerations that is legally available for directors, then, is much broader than merely maximizing shareholder wealth.¹⁰¹

97. In practice, the solution was to turn managers into shareholders by paying them with stock.

98. STOUT, MYTH, *supra* note 1.

99. *Id.* at 3.

100. Shlensky v. Wrigley, 237 N.E.2d 776, 779-80 (1968).

101. Ann M. Lipton, *What We Talk about When We Talk about Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 865 (2019) (arguing that much of the literature on corporate purpose

ii. Federal Regulation

Federal legislation can be understood in the same vein. While the federal government does not frequently take an active role in regulating corporate purpose, it has shown a growing interest in better oversight of corporate governance, especially following the 2008 financial crises.¹⁰² The Dodd-Frank Act¹⁰³ introduced, among other constraints, the requirement that shareholders routinely vote on executive compensation (“say-on-pay”) at public corporations. By way of tying directors’ compensation to their performance, this mechanism was intended to better protect corporations from both excessive pay for directors, and to ensure that they were not motivated entirely by self-interest. The “say-on-pay” rule is usually interpreted as a “shareholder-friendly” regulation, “tilting the balance of power in favor of shareholders.”¹⁰⁴ The reason is that it provides shareholders with a means to monitor management and thus dials back the latter’s respective power. While indeed providing an incentive for managers to run the company in alignment with shareholder value, we believe that the conclusion that the Dodd-Frank Act re-asserts the shareholder primacy norm is an overstatement. Not a signal of shareholder primacy in the broad sense, it is yet another attempt to make sure that management self-interests are in check. Restricting management does not necessarily entail maximized shareholder wealth at any cost. While shareholders are granted legal standing to restrict management, it does not necessarily follow that shareholder wealth is the only available consideration for managers. A special position for shareholders does not necessarily imply shareholder wealth maximization, and value for shareholders could be broader than a short-term increase in the stock price. We will say more about the distinction between shareholder wealth maximization and shareholder value below.

In support of our claim that the Dodd-Frank Act does not prescribe shareholder wealth maximization, note that it also expanded the whistleblower program first introduced by the Sarbanes-Oxley Act of 2002. By expanding protection to employees of subsidiaries and affiliated

equates shareholder primacy with wealth maximization and claiming that shareholders, as a varied and heterogeneous class, can determine for itself what is its overall welfare).

102. See Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REG. 26 (2003) (arguing that as Congress and “market regulators” began implementing ideas of federal intervention in corporate governance, “[t]here has been a creeping—but steady—federalization of corporate law.”); see also Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors’ Risk Management Oversight Obligations*, 45 UNIV. MICH. J. L. REFORM 55 (2011).

103. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78n-1 (2018)).

104. Lund & Pollman, *supra* note 19, at 2582.

companies and creating a mandatory reward plan that allowed whistleblowers to receive a significant percentage of the proceeds of litigation,¹⁰⁵ employees too are given monitoring powers over management. This too signals that the primary focus of the legislation is improving oversight over management, rather than empowering shareholders to influence directors to maximize stock prices.

The Sarbanes-Oxley Act as well is thought to be shareholder-oriented, as it imposes various requirements on directors, thought to better position shareholders *vis-à-vis* managements. Among those are the obligation of corporate boards to have a majority of independent directors, and that an audit committee is to be made up solely of independent directors.¹⁰⁶ But again, while indeed placing a heavy onus on directors, the status of other constituencies is not directly affected. Here as well, restricting and monitoring management does not necessarily entail a duty to maximize shareholders wealth, and should not be considered as validating such a duty.¹⁰⁷

iii. The Securities and Exchange Commission (SEC)

SEC regulations are also thought to serve as a catalyst of the shareholder wealth maximization model.¹⁰⁸ Specifically, the disclosure requirements on boards and the way they are interpreted by both regulators and courts, are thought to nudge corporate actors into the shareholder primacy model.¹⁰⁹

The U.S. Securities and Exchange Commission requires all public corporations to supplement their financial statements with a report by the company's management, in which they are to disclose all "material" information. The main purpose of disclosure is to allow transparency for investors, issuers, and for the general public.¹¹⁰ The definition of

105. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010).

106. *Id.*

107. *Id.* (requiring that the audit committee must establish a system for employees to blow the whistle anonymously on accounting or auditing matters).

108. See Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652 (2020); Lund & Pollman, *supra* note 19, at 2602.

109. Lipton, *supra* note 101, at 867.

110. See Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1045 (2019) (noting that "although the structure is complicated, the premise is fairly simple. Corporate insiders know far more about the entity than those buying securities or those impacted by the sale of securities (a group, as we shall see, that is far larger than simply investors), resulting in an information asymmetry. Thus, requiring disclosures both before the sale of securities and on an ongoing basis can provide information to diminish those asymmetries."). For a different view, according to

“materiality” may go a long way in determining the legitimate considerations for corporate management: if material information is interpreted broadly, it may, for instance, include information on the carbon footprint of the company’s operations, or on its workplace diversity. These would signal the inclusion of other constituencies as having a legitimate interest in the report. If, on the other hand, interpreted narrowly, to include only financial data, it may indicate a restriction to investors only (or at least, their assumed interests). Courts have defined the “materiality” requirement rather narrowly, demanding a “substantial likelihood” that a “reasonable investor” would view the information as significant.¹¹¹ The SEC itself expressed a similar view, and its own definition of materiality pertains to matters of financial significance alone.¹¹² Lipton’s analysis of SEC’s enforcement of the materiality requirement shows not only that SEC’s staff states that “required disclosures must be ‘primarily addressed’ toward information relevant to earning a ‘satisfactory return’, but that it also fended-off pressure to require companies to include social performance as well.”¹¹³

By focusing on the financial aspects of the duty to include material information in the company’s report, the assumption of both courts and SEC officials is that disclosure is only intended for shareholders and that shareholders are only interested in the financial aspects of the company’s performance. Both assumptions are unwarranted and possibly even damaging. One example is that current global climate calls for corporate transparency. The public is increasingly aware of companies’ irresponsible behavior in that regard and is interested in holding companies accountable. Whether as investors, employees, consumers, or environmentally conscious citizens of the world, the public too may have an interest in “material” information on companies’ decision making, and the ethical trade-offs it engages in. The narrow interpretation currently adopted undercuts these aims, which, if acknowledged, might influence corporate behavior towards responsible choices. Importantly, the language of the law allows a broad interpretation, as “material information” could easily be interpreted to include all types of important data, for the benefit of a variety of corporate

which the main purpose of disclosure is for the benefit investors, see Lund & Pollman, *supra* note 19, at 2602.

111. TSC Industries, Inc. v. Northway, Inc. 426 U.S. 438, 449 (1976) (noting that “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”). See also Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988).

112. Lipton, *supra* note 101, at 873.

113. *Id.* at 873-74.

constituencies. The current, investor-oriented interpretation is an active choice—not a requirement of the law.

But even if we accept the primacy of investors in this respect, the assumption that investors are only interested in the financial aspects of the company's performance is not warranted. Ethical investments are steadily growing. Annual cash flow into sustainable funds, for instance, has more than doubled between 2019 and 2020.¹¹⁴ But this is not merely a matter of empirical evidence: it matters on a conceptual level as well. The notion that shareholders are only interested in share price increase is obsolete. More than 80% of investors are investing through pension and mutual funds.¹¹⁵ They are not risk-seeking day-traders. In the words of Chief Justice of the Delaware Supreme Court, Leo Strine, more often than not, these are “worker investors, who save for the long term, [and] often hold portfolios that are a proxy for the entire economy and depend on the economy's ability to generate good jobs and sustainable growth in order for them to be able to have economic security.”¹¹⁶ Indeed, the notion that “shareholder value” is a consistent idea, in the sense that shareholders are a consistent class, is difficult to justify. Shareholders, especially dispersed ones, wear many hats. When a company externalizes costs to maximize share price it does so at the expense of the very same shareholder who, as an actual living person and citizen, pays for those externalities through taxes, through breathing polluted air or drinking unhealthy water, or who endures climate change disasters. That shareholders are interested only in the financial aspects of the company's performance is no more than an assumption.

iv. Case law

A discussion of the law's stance on the purpose of the corporation — does it oblige management to maximize shareholder value, or does it allow a variety of socially-oriented considerations as well—is not complete without at least a mention of the most renowned case linked with shareholder primacy, *Dodge v. Ford*.¹¹⁷ In that case, the Michigan Supreme Court determined that assigning the company's revenues for philanthropic

114. Alicia Adamczyk, *Sustainable Investments Hit Record Highs in 2020—and They're Earning Good Returns*, CNBC (Feb. 11, 2021), <https://www.cnbc.com/2021/02/11/sustainable-investments-hit-record-highs-in-2020.html#:~:text=Sustainable%20funds%20reached%20record%20highs,newly%20invested%20money%20last%20year>.

115. *Id.*

116. Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 79 HAR. L. REV. 1022, 1022 (Nov. 2019).

117. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

purposes and restricting dividends payouts was illegal, and did not correspond with corporate purpose.¹¹⁸ The decision has been repeatedly cited by scholars in books, articles and textbooks as the source of the legal norm of shareholder primacy. The reliance on *Dodge v. Ford* as evidence that corporate law requires managers to maximize shareholder wealth, however, was heavily criticized. Lynn Stout, a prominent corporate scholar, argued first, that since not many modern cases have repeated the declaration that managers are to maximize shareholders value, and that no other purpose is legitimate, it makes little sense to rely on a century old case as setting the legal standard. Law is dynamic and changing, and if courts haven't found other instances where such a statement is relevant, it has lost its legal edge. Second, argues Stout, the Court's statement on corporate purpose was mere *dicta*. "The actual holding in the case, that Henry Ford had breached his fiduciary duty to the Dodge brothers and that the company should pay a special dividend, was justified on entirely different and far narrower legal grounds. Those grounds were that Henry Ford, as a controlling shareholder, had breached his fiduciary duty of good faith to his minority investors."¹¹⁹ The case, therefore, should be viewed not as a corporate purpose case, but rather as a case that deals with the relations between minority and majority shareholders, and the duty of the majority to refrain from minority oppression.¹²⁰

In her analysis of the body of Delaware corporate purpose case law, Stout concludes that only one case, *Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.*, is a significant enough decision by the Delaware court, to be considered as a modern-day statement in favor of shareholder primacy. In this case, the court found a board of directors liable for not maximizing shareholder value. A closer examination of the distinctive facts of *Revlon* shows, according to Stout, that "it is the exception that proves the rule."¹²¹ First, context is important: the legal climate of the 1980s, when the *Revlon* case was heard, was very different from previous times, when boards and executives had considerable autonomy, and were not vigilantly monitored for underperformance.¹²² The *Revlon* case was a link in a chain of hostile takeovers that took place in the 1980s, and helped encourage a shift back to a shareholder-friendly direction. As Cheffins notes, "the surge in the

118. *Id.* at 684 (ruling "there should be no confusion [...] a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end and does not extend to [...] other purposes").

119. Stout, *supra* note 1, at 167.

120. *Id.*

121. STOUT, MYTH, *supra* note 1, at 31.

122. BRIAN R. CHEFFINS, *THE PUBLIC COMPANY TRANSFORMED* 37 (2019).

number of hostile bids meant that the fate of publicly traded companies hinged on shareholder perceptions of the capabilities of the incumbent management team to an unprecedented extent.”¹²³ Unsolicited takeover bids targeted failing companies, and management had a strong incentive to focus on the bottom line.¹²⁴ It is within this market atmosphere that the directors of Revlon had decided to sell the company. This meant that the public shareholders of Revlon were to give up their Revlon shares in return for compensation. The Delaware Supreme Court held that, under these circumstances, the business judgment rule did not apply, and Revlon’s directors had violated their duty to secure the highest value for their stakeholders. “In other words,” claims Stout, “it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgment rule and must embrace shareholder wealth as their only goal. Subsequent Delaware cases have made clear that, so long as a public corporation intends to stay public, its directors have no Revlon duty to maximize shareholder wealth.”

To sum up: whether American case law mandates managers to maximize shareholder gains is at least controversial. A careful analysis of the cases that are usually cited as the legal source that binds directors’ discretion to maximize shareholder value can be contextualized to apply in very unique circumstances. In the face of contradicting evidence, the acceptance of shareholder primacy norm is a choice, not a legal imperative.¹²⁵

v. State Legislation

Interestingly, while the *Revlon* case is often cited as a source of legal authority for management’s duty to maximize shareholder gains, the “constituency laws,” enacted in the same legal and economic atmosphere of the 1980s takeover frenzy and the surge in hostile takeovers, are almost unnoticed in the literature. Constituency laws are state-level legislation that permits corporate directors to consider the interests of other groups linked with the corporation or impacted by it in their decision-making process.¹²⁶ While the language of constituency laws varies from state to state, their overall structure is the same, and, in many ways, resembles the language of

123. *Id.*

124. This has led many states to formulate constituency laws to protect companies from these situations. Lund & Pollman, *supra* note 19, at 2575.

125. *Id.* at 2602.

126. Constituency laws are sometimes referred to as “stakeholder statutes,” or “corporate constituency statutes.” See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO WASH. L. REV. 14, 16 (1992).

Israeli Article 11 and British Article 172 discussed previously, which allows directors to consider the interests of other groups. The Ohio State law is a representative example, stating, in § 1701.59 titled “Authority of directors; bylaws; standard of care,” that:

(E) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation’s shareholders and, in the director’s discretion, may consider any of the following:

- (1) The interests of the corporation’s employees, suppliers, creditors, and customers;
- (2) The economy of the state and nation;
- (3) Community and societal considerations;
- (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

The swift enactment of these statutes across the U.S. was received with both anticipation and criticism. Proponents hoped that these laws would help the usually unprotected groups associated with the corporation and impacted by it.¹²⁷ Opponents were concerned that the broad discretion afforded to directors might allow them to neglect their duties to the “corporate owners”—the shareholders. The hopes were disappointed: constituency laws never made their mark on American corporate law and cannot be relied upon as a source of corporate accountability for other constituencies.¹²⁸

The analysis of the legal foundation of the shareholder primacy norm in Israel, the UK, and the U.S., shows that the law in all three jurisdictions is far from conclusive. Rather, it allows, and sometimes even supports, a much broader theory of corporate purpose, one that invites managers and directors to consider the welfare of the corporation as a whole, as well as that of other groups tied to it, or impacted by its policies. In all three jurisdictions, however, legal and market actors as well as policy makers assume that the law mandates directors to focus on the interests of shareholders alone. This wide acceptance is not only unfounded on the legal status of directors’ duties but is also misguided in its purpose.

127. Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (1999).

128. *Id.*

III. FROM CORPORATE PURPOSE TO CORPORATE RESPONSIBILITY

i. Responsibility in Corporate Law

The discussion thus far demonstrates that the discourse on corporate purpose is unable to properly guide directors, judges, or regulators as to the appropriate deliberative process required by law when running the company. While shareholder primacy is widely accepted as the norm, others describe it as a mantra or ideology.¹²⁹ These commentators also suggest amendments to current law, in order for it accommodate broader duties. In the meantime, the legal status of corporate purpose remains indeterminate.¹³⁰

As we have shown, the law need not be changed in order to facilitate a broader reading of directors' duties. In Israel, the UK, and the U.S., the duties are already prescribed. It is, rather, the mantle of the law (culture, habit, conservatism, and social power-relations) that impedes its application. We suggest thinking about corporate purpose within the context of responsibility as a legal principle. Instead of the thin legal and economic foundation that currently dominates corporate purpose discourse, we believe a richer, more robust understanding of the corporation as a socially embedded institution is required to better inform corporate law. Responsibility as an overarching legal principle provides just that: effective, normative, and practical tools to deal with what has been the most important issue all along: the detrimental impact of corporate power on the public interest.

The concept of responsibility we offer here can serve as a benchmark for corporate directors' legal duties. It is a more extensive concept than the one currently employed in private law. Instead of the traditional minimal standards of "fair play" duties, the type of responsibility we have in mind rests on active, other-oriented principles. Our attention to responsibility stems from the understanding that focusing on individual freedoms alone, without a complementary concept of *obligations*, makes it difficult to ensure that all people in society are able to participate in shaping the public sphere and to thereby maintain an active and meaningful personal, social

129. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1953 (2017) ("corporate law scholars almost universally describe shareholder primacy as the norm, but rarely as law"); see also Lund & Pollman, *supra* note 19, at 2575; see also Eduardo Porter, *Motivating Corporations to Do Good*, N.Y. TIMES, (July 15, 2014) <https://www.nytimes.com/2014/07/16/business/the-do-good-corporation.html> ("Though legally dubious, the argument that it is an executive's fiduciary duty to maximize the company's share price became a mantra from the business school to the boardroom"), quoted in Lund & Pollman, *supra* note 19, at 2607 n.259.

130. Rhee, *supra* note 129, at 1953.

and political life. The capacity for such active and meaningful participation should be available to all in modern democracies. It is currently being threatened by unregulated corporate power. Unlike other forms of social power, that of corporations deserves special attention: since corporations are only an instrument to further human ends, their value is not intrinsic. They are not ends in themselves in the Kantian sense. There is therefore a reason to construct the law of corporations to align with this understanding. To do so, the concept of responsibility that is offered here is *constructive*: it is meant to reflect the social and civil partnership that grounds life in the public sphere. As Singer notes, “through both custom and law, our market system reconciles the pursuit of self-interest with the promotion of the public welfare by limiting our freedom of action to protect the legitimate interests of others. Corporations may be in the business of maximizing profits, but they are not and should not be in the business of undermining the social fabric by ignoring applicable law and legitimate moral limits on their conduct.”¹³¹

As the background principle of a democratic society, a filament woven through its laws, responsibility should not be construed as a soft, voluntary concept. Rather, we think of it as a binding legal norm, to be read into corporate law as an interpretive directive.

This is not a radical idea; private law is already saturated with principles that aim to guarantee the fairness of market activity. Such, for example, is the contractual duty to act in good faith, or the principles of equal treatment and non-discrimination in the workplace, education, or services.¹³² Responsibility should be recognized in corporate law in the same way. It is already there, already part of the moral code of the law. A corporation that fails to consider the impact of its activity on society, on the environment, and on those with whom it fosters mutual relations acts irresponsibly. It not only undermines the very conditions that make profit maximizing possible, but also “the social norms that underlie our way of life.”¹³³ Those values are already part of the principles that are woven into our laws. Responsibility is one of those principles.

ii. Implications for corporate purpose

The purpose of the corporation in all three jurisdictions is controversial and therefore indeterminate. Our proposal, of reading the principle of

131. Joseph Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031, 1033-34 (2008).

132. Contract Law, 5731-1970/71, §§ 12, 39, 25 (Isr.); see also Civil Rights Act of 1964, codified at 42 U.S.C. § 1971 et seq. (2006).

133. Singer, *supra* note 131, at 1033-34.

responsibility into corporate law as an overarching interpretive principle, would cast a different light on corporate purpose discourse, providing it with a much-needed normative framework to ensure that corporate power is kept in check.

How would that work? How would recognizing that the principle of acting in a responsible manner is a practical guide for directors on how to act, and which decision would be deemed the right ones? In which cases should management choose to prefer the interests of one group of stakeholders over those of shareholders? We propose a few indications as guidelines: *first*, the type of relationship between the corporation and its connected communities matters. The more central the corporation is to social life, the more interwoven into the social fabric and the more responsible it is for harm caused by its conduct. We call this the “type of relations” test. *Second*, is the corporation’s position in terms of preventing potential damage: the better the corporation is positioned to prevent potential harm that may be the result of its policies, the more responsible it is for its prevention. This will be referred to as the “best positioned to prevent harm” test; the *third* measure, is the “profits test”: the more the corporation profits from the harmful conduct, the more demanding its responsibility to mitigate it.

An example for the “type of relations” test is the profound influence that platform corporations have within society. For many around the world, these corporations (*Google, Facebook, Apple, Microsoft, etc.*) are the gate to knowledge, entertainment, livelihood, connection with other people, and more. This profound relation, actively sought after by the corporations, mandates broader consideration of the impact they have over their constituencies. Directors of such influential companies who do not consider the impact of their decisions on society at large, should be potentially liable for not exercising their discretion properly. When the actions of *Facebook*, for example, place the mental wellbeing of their teen-aged users at risk, or wrongfully presents fake news as truth, its managers should be viewed as violating their duty to consider these issues. Indeed, enhancing traffic on social media matters for share price and shareholder value, but the mental health of young adults, who engage with *Facebook* constantly, and are encouraged by the platform to do just that, matters as well. The profound impact *Facebook* has over those users’ self-identity, relations to others, body image, etc., demonstrates the importance of embedding responsibility as a legal principle, rather than a voluntary choice for the company.

The ability to prevent harm should be considered along the same lines: sometimes a single action by a multinational corporation can prevent more harm than an entire consumer campaign, substantial behavior, change by

individuals, etc. Going green, investing in renewable energy, refraining from deliberately making product changes to increase sales, but subsequently increasing electronic waste at the same time may be thought of as examples. Considering harm and being in a position to restrict or prevent it may already be mandated by the Israeli Article 11 or the U.S. constituency laws, and is not a corporate voluntary choice. Even if it causes short-term reductions in profits, it is likely to be in the long-term interests of corporate constituencies, and possibly those of the corporation as well. A corporation that makes socially detrimental choices should, under some circumstances, be held liable for breaching its duty to consider the welfare of all its stakeholders. An example for such a decision is KLM's policy to offer its customers a train ticket from Amsterdam to Brussels, as a greener alternative for a flight on the same route.¹³⁴ Despite the financial loss involved in cancelling one flight a day, KLM's decision reflects a better understanding of the term "value": the decision contributes a direct value for the environment and for society, and probably an indirect value for its shareholders.

The benefit test complements the legal architecture of responsibility: the more the corporation benefits from its detrimental policy, the more responsible it should be to mitigate it. An example is the food industry: adding sugar and sodium to food products increases consumption, as the products become more addictive.¹³⁵ Since these practices are detrimental to customers health it may be justified to demand that companies mark their products as unhealthy, or even have a duty to produce healthier choices of food.

CONCLUSION

Corporations bear multifold, growing, and often unrestrained power. In its current form, this power reinforces structures of privilege and inequality and poses a threat to the ability to cope with imminent environmental challenges around the world. Corporate law, as currently interpreted and applied through its legal and cultural environment, facilitates it. It does not do enough to hold private power responsible for undermining human well-being.

As we have illustrated in this paper, however, the reason lies not in law itself, but in its cultural environment. Having analyzed the legal framework

134. E. Leshem, *The airline that really doesn't want you to fly is offering train tickets*, HAARETZ, (Oct.10, 2019), www.haaretz.co.il/travel/1.7900704.

135. On the food industry and its irresponsible practices, see generally MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006).

of corporate law in Israel, the U.S., and the UK, we have shown that corporate law in all three jurisdictions is capable of a broader interpretation and that such interpretation, one that considers the impact of corporate behavior on social welfare, is necessary for a sustainable society.

In the face of a series of global crises that has exacerbated and exposed the frailty of our social structures, a paradigm shift for corporate law is required. The one we have offered here finds that the duty to consider the wellbeing of corporate constituencies is already embodied in current law. Even without any changes to current regulation, a constituency-oriented obligation to consider the social and economic impact of corporate conduct on corporate stakeholders is hiding in plain sight.

RETHINKING THE TALES OF THE SHARIE'A: GOD IS NOT A JURISTIC PERSON, BUT THE MOSQUE IS

Mohamed 'Arafa *

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I. INTRODUCTION

Corporate personality is understood to be a Western notion, but is it also Islamic? Responding to this question is a must for today given the ever-expanding and ever-growing number of Islamic financial, commercial, and business entities.¹ Today, one can argue that we are living in a corporate world. Companies, corporate law, corporate liability, corporate

* Professor of Law, Alexandria University Faculty of Law (Egypt); Adjunct Professor of Law & the Clarke Initiative Visiting Scholar, Cornell Law School, and Visitor -in-Law & the ELEOS Justice Visiting Scholar, Monash University Faculty of Law (Australia). The author extends his appreciation to Nicolas Gomez and Vivian Chen. Sydney Kadinger and Dane Foster provided excellent research assistance. Errors are all mine.

1. See generally IMRAN A. KHAN NYAZEE, *ISLAMIC LAW OF BUSINESS ORGANIZATION CORPORATIONS* (1998); NICHOLAS HEER, *ISLAMIC LAW AND JURISPRUDENCE* (1990).

taxation, corporate bankruptcy, to name a few, are everyday facts (common notions). Yet, do businesses have legal personality? Western jurisprudence resolved the matter in the affirmative nearly a century ago. What does Islamic *fiqh* (jurisprudence) have to say?

It is generally well-known that the presence of a right, without an individual, is an absolute, definite legal impossibility. Each right should always relate to a competent or presumed capable person to enjoy it. Thus, the Islamic *Fuqah'a* (scholars) described the theory of legal personality as a starting point for the legal capacity theory.² According to these jurists, an individual, whether natural or artificial, is an entity who is able to obtain the *Sharie'a* divine and legal aspects. Human beings, with a sane and sound mind, entirely recognize natural personality.³ However, moral, juristic, personality is bestowed only on those bodies recognized by law as having a legal personality.

While religious legal systems are often thought of as rigid, Islamic law has shown itself fully compatible with modern corporate needs. As such, the notion of corporate legal personality is compatible with Islamic law. This article will first discuss the Ottoman Code of Commerce of 1850 ("OCC"), and its introduction of the notion of corporate legal personality to a code based on the Islamic legal tradition. The OCC serves as a historical precedent where the concept of corporate legal personality was deemed compatible with Islamic jurisprudence. Then, this article will discuss the concept of *dhimmāh* (legal capacity/personality) and the split amongst various jurisprudential schools over whether corporations can possess it. Ultimately, this article argues that, under the *Hānāfi* and *Shāfi'i* schools of thought, corporations can be said to possess legal personality to satisfy the doctrine of *māslāhāh mursālāh* (public interest). Finally, this article will look to several instances in which Muslim scholars deemed certain Islamic institutions as possessing legal personality. Given that Muslim jurists have granted legal personality to other fictitious entities, it is logical to also grant legal personality to corporations. Upon the conclusion of this article, it should be clear that secular courts needing to apply Islamic law must recognize that Islamic law has fully incorporated modern notions of corporate legal personality.

2. See generally MAHOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS AND PRACTICE (2006).

3. AHMAD M. AL-ZARQA', AL-MADKHAL LIL AL-FIQHI AL'AM [INTRODUCTION TO THE GENERAL ISLAMIC JURISPRUDENCE] 743-747 (Azman Ismail & Ahmad Zaki Salleh eds., 2014).

II. HISTORICAL BACKGROUND: THE OTTOMAN CODE OF COMMERCE OF 1850

The Ottoman Code of Commerce of 1850 represents one of the first efforts to introduce the notion of corporate legal personality to the Islamic world. Before 1850, there existed a law of commercial code of sorts called the Ottoman *Mājāllā*.⁴ According to Chibli Mallat, the *Mājāllā* was the result of “a real effort introduced, both in terms of rules and in terms of legal categories, to produce a code inspired by the Islamic legal tradition.”⁵ The *Mājāllā* did not contain provisions for corporate legal personality distinct from the legal personalities of a group’s individual members.⁶ But the OCC represented a formal break with the *Mājāllā*; instead, it “was a direct transposition from the French tradition.”⁷ According to Mallat,

Since the attempts began in the 1850s for commercial codes to be introduced in the Middle East, the field of company law has been torn between the necessity of a faceless legal dimension which is represented by the independent moral personality of a company, and the recognition of known and fully liable individuals in the effective running of the trade.⁸

The OCC represents the introduction of non-Islamic commercial thought into Islamic governance, and one such foreign commercial thought was the idea of corporate personality. The OCC included articles, copied from the French commercial code, regarding *al-ghāyr musāmmāt* (translated to “*société*” in French, and translated to “corporation” in English). This legal term embodies the idea of a generic corporate identity, an identity separate from and independent of the individuals that make up the corporation.⁹ The specific nature of the corporate identity is “qualified by the designation of the object of the enterprise.”¹⁰ Then, it seems that corporate identity (or personality) under the OCC is derived from the corporation’s purpose. The corporation is “administered by time-bound

4. See Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMPAR. L. 81, 96 (2000).

5. *Id.* at 101-02.

6. “But for the arguable exceptions of wāqf (trusts), and bāyt al-māl [...] (the public treasury), partnerships in Islamic law were never recognized as ‘corporate entities’ which would be separate from the partners undertaking the trade.” *Id.* at 101.

7. *Id.* at 100. In 1984, a new Iranian law was passed that said all Iranian awqāfs were to be managed by the Pilgrimage, Endowment, and Charity Affairs Organization. Each wāqf was acknowledged as a legal entity, so it evaded the destiny of Ottoman cash awqāfs, which lost their legal personality in 1954. This law ensured that the trustee was the legal agent of the wāqf. But in Malaysia, the government is the mutāwālli rather than a mutāwālli appointed by the wāqif. *Id.*

8. *Id.* at 102.

9. *Id.* (citing Art. 20 of the Ottoman Code 1850).

10. *Id.* (citing Art. 21 of the Ottoman Code 1850).

agents who are revocable,” and these “administrators are [personally] liable only for the execution of the mandate they have received,” rather than for the corporation’s own rights and obligations.¹¹ The compatibility of Islamic law and the notion of corporate legal personality finds its historical precedent in the OCC.

III. *DHIMMĀH*: CORPORATE JURISTIC PERSONALITY UNDER ISLAMIC *FIQH*

Although the Ottoman Code of Commerce of 1850 suggests that the notion of corporate legal personality is compatible with Islamic law, it is important to understand that not all schools of Islamic jurisprudence would agree that corporations can possess legal personality. While all Islamic *fiqh* (jurisprudence) focuses on the legal rights and duties of individuals, not all schools of jurisprudential thought agree that corporations have the capacity to possess such rights or duties. Only through the interpretations proposed by the *Hānāfi* school and the *Shāfi’i* school can it be said that corporations have legal personality.

Similar to Western jurisprudence, the person is the central concept of Islamic legal theory. Islamic *fiqh* is a science of making laws from the *Sharie’a* sources. In this process, *mujtāhidūn* (high ranking Muslim jurists) create *ahkām shar’iyā* (legal rules) that define a person’s rights and duties, and these rules focus primarily on an individual’s acts.¹² In other words, personhood and rights or duties go hand in hand. In *Sharie’a*, a “person” is defined as someone who acquires *ahkām shari’yā* in the form of rights and obligations.

Furthermore, an individual’s capacity to be fit for such rights and obligations is called *dhimmāh* (legal capacity).¹³ Professor ‘Abd-Razzāq al-Sanhūrī, the Egyptian founder of the Civil Code of 1948, explains that *dhimmāh* is a “juristic description that is presumed by the legislator to exist in a human being and according with which [the person] is able to oblige and to be obliged.”¹⁴ Alternatively, *dhimmāh* can also be described as an

11. *Id.* at 103 (citing Art. 22 & 23 of the Ottoman Code 1850).

12. It does not involve knowledge of imān (faith), morals and mysticism, which are the subject matter of ‘ilm al-kalām (Islamic theology) and ‘ilm al-tasāwwuf (Islamic science of spirituality). *Id.*

13. See Judson A. Crane, *Uniform Partnership Act and Legal Personality*, 29 HARV. L. REV. 838, 839-842 (1916) (“A legal person is an entity treated by the law as the subject of rights and obligations. 7-There is considerable legislation, aside from attempts to codify the law of partnership, which treats the partnership as a legal person [...] it the subject.”). *Id.*

14. ‘ABD AL-RAZZĀQ AL-SANHŪRĪ, MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMĪ [THE SOURCES OF RIGHT IN ISLAMIC LAW] 20 (1997).

“imaginary container or vessel that holds both the capacity for acquisition [of rights and obligations] and the capacity for execution [of rights and obligations].”¹⁵ Hence, *dhimmāh* has two parts: *ahliyāt al-wujub*, which means the legal capacity for the attainment of rights and commitments, and *ahliyāt al-ādā'*, which means the capacity to exercise and to execute those rights and duties.¹⁶ Either way, one cannot possess legal personality, and thus be a person, in Islamic law without having *dhimmāh*.

Accordingly, it is entirely incorrect that *Sharie'a* does not acknowledge or accept the concept of the juristic (moral) person, although classical Muslim jurists did not use that precise term.¹⁷ The *dhimmāh* doctrine is a principle equivalent to the notion of a juristic person which paved a valid ground for the legal personality theory.¹⁸ However, the idea that a company or a partnership—as in civil law and Arab modern laws—may be considered a juristic person did not develop among Muslim scholars until recently under the influence of Western laws.¹⁹ Moreover, Islamic scholars are divided over the issue of corporate legal personality. The split in interpretation lies between the conservative view proposed by scholars and the adherents of seminal jurist Al-Sārākhsi, and the views proposed by the *Hānāfi* school and the *Shāfi'i* school.

According to the conservative view espoused by adherents of Al-Sārākhsi, the seminal Islamic jurist, artificial entities cannot possess

15. *Id.* From birth to death, a living natural human being is deemed an individual under the law if he/she can hold rights or obligations, and thus, a slave is not legally considered a person. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990); *see also Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (1977).

16. It is argued that *dhimmāh* is the reason for the application of legal rules (*shār'i ahkām*). A natural person becomes a legal person when they possess *dhimmāh*. *See, e.g., Airedale N.H.S. Trust v. Bland* [1993] AC 789 (HL) 804 (appeal taken from Eng.).

17. It is argued that *dhimmāh* is the reason for the application of legal rules (*shār'i ahkām*). A natural person becomes a legal person when they possess *dhimmāh*. *Id.*; Dawoud S. El-Alami, *Legal Capacity with Specific Reference to the Marriage Contract*, 6 ARAB L. Q. 190, 190-91 (1991).

18. El-Alami, *supra* note 17.

19. *See* Joseph Schacht, *Islamic Religious Law in THE LEGACY OF ISLAM* 398 (Joseph Schacht & Clifford Edmund Bosworth eds., 1974).; NABIL SALEH, *THE GENERAL PRINCIPLES OF SAUDI ARABIAN AND OMANI COMPANY LAWS* 79-80 (1981); *see, e.g., Ponce v. Roman Catholic Church*, 210 U.S. 296 (1908). In this regard, “[t]he Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris with Spain of 1898 and its property rights solemnly safeguarded. In so doing the treaty followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. The juristic personality of the Roman Catholic Church and its ownership of property was formally recognized by the concordats between Spain and the papacy and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.” *Id.*

dhimmāh. Al-Sārākhsi interprets *dhimmāh* as being related to *alāmānāh* (trust/obligations) per the following *Qur'ānic* text: “[w]e [*Allāh*] did indeed offer the Trust [obligations of *Sharie’a*] to the Heavens and the Earth and the Mountains; but they refused to undertake it, being afraid thereof: but man undertook it; he is indeed unjust and foolish.”²⁰ In other words, the attribution of religious rights and obligations to the concept of *dhimmāh* is related to human beings’ social mission and divine duty as viceregents of *Allāh*. Muslims accepted *Sharie’a* and its obligations as a combined legal and social system and became the *dhimmāh* (seat of obligations).²¹ Thus, Al-Sārākhsi’s outcome is that only a human being is a repository fit for *dhimmāh*.²² Other Muslim jurists echo this point of view, commenting:

(*Amānāh* [trust] refers to the capability of fulfilling the heavy responsibility placed by Divine injunctions, something that depends on a particular degree of reason and awareness and moving forward therein and deserving Divine vice-regency depends on this very capability. The species of the creation that do not have this capability, no matter how high or superior their placement, simply cannot advance from their given place²³

Consequently, Al-Sārākhsi’s adherents do not recognize artificial entities as having juristic legal personalities, reasoning that these entities lack the ability to recognize the communication between God and man, which creates the duties under *Sharie’a*.²⁴

However, neither this *Qur'ānic* verse nor any prophetic *Hadīth* (tradition) expressly forbids the provenance of *dhimmāh* to any artificial entity. Hence, one may believe that corporate legal personality is acceptable, based on the principle of Islamic jurisprudence (developed by

20. *Al-Qur’ān* 33:72. See Baber Johansen, *The Legal Personality (dhimma) and the Concept of Obligation in Islamic Law*, at http://www.econ.yale.edu/~egcenter/Johansen_paper.pdf (last visited Mar. 10, 2020).

21. IMRAN A. KHAN NYAZEE, *THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF LJTIHĀD* 21(2002).

22. This—inaccurate—denial in Islamic law of “communal legal personality” is a significant divergence from how the concept of non-human legal entities developed in English law. Robert L. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350 (1906); Amnon Cohen, *Communal Legal Entities in a Muslim Setting Theory and Practice the Jewish Community in Sixteenth-Century Jerusalem*, 3 ISLAMIC L. & SOC’Y 75, 75-77, 90 (1996).

23. MUHAMMAD TAQI USMANI, *AN INTRODUCTION TO ISLAMIC FIN.* 103-108 (2002) (citing MUHAMMAD SHAFI’I, MA’AARIF AL-QUR’ĀN (Eng. tr. Muhammad Shamim, 8:250)).

24. See generally Zainal A. Zuryati et al., *Separate Legal Entity Under Syariah Law and its Application on Islamic Banking in Malaysia: A Note*, 6 INT’L J. OF BANKING, ACCT. & FIN. (2009). It should be noted that this verse—historically—revealed and discussed an event of conferment of *Allāh’s* *Khilafah* (viceregency) on Adam.

the *Shāfi'i* school) that “*what is not prohibited is permitted.*”²⁵ Whether the notion of corporate personality is legitimate may also be answered by another Islamic norm designed by the *Hānāfi* school: “*everything is forbidden unless permitted by the Sharie'a.*”²⁶ Under the *Hānāfi* understanding, permissibility may first be pursued through unambiguous confirmations found in the *Qur'ān* or the *Hadīth*. In the absence of such authentic rules, recourse may be had to subordinate sources, such as, the doctrines of *qiyas* (analogy), *istihsān*, (juristic preference), and *māslāhah mursālāh* (public interest).²⁷

Māslāhah Mursālāh, the doctrine of public interest, allows for the State to make laws on any matter that is in the interest of society as long as there are no clear prohibitions against them in the *Qur'ān* or *Sunnah*.²⁸ This notion originates from the following *Qur'ānic* verses: “*Allāh wants ease and comfort and not hardship*”; “*God never intends to impose hardship upon you*”; “*We have sent you (O Prophet Muhammad) but as a mercy for all creatures*” and support comes from the Prophet Mohammad’s saying: “*No harm shall be inflicted or reciprocated in Islam.*”²⁹ *Māslāhah* has three categories: *darorriyāt* (essentials), *hajiyāt* (needs), and *tahsinivāt* (embellishments). Recognizing corporate legal personality would likely satisfy all three categories of *māslāhah*.

Recognizing that corporations have legal personality would likely meet the *māslāhah* doctrine’s mandate that a State’s legislation belong to the *darorriyāt*, *hajiyāt*, or *tahsinivāt* categories. Based on *māslāhah*’s *darourivāt* (essentials) classification, the State may consider it essential to the maintenance of economic necessity that it recognize the concept of corporate personality and thus permit the creation of corporations as

25. See generally RECEP DOĞAN, *USUL AL-FIQH: METHODOLOGY OF ISLAMIC JURISPRUDENCE* (2015).

26. *Id.*

27. RAJ BHALA, *UNDERSTANDING ISLAMIC LAW: SHARĪ'A 302-09* (2016).

28. *Id.*, at 358-59. See also Anowar Zahid & Kamal Halili, *Corporate Social Responsibility to Employees: Considering Common Law vis-à-vis Islamic Law Principles*, 20 PERTANIKA J. SOC. SCI. & HUM. 87-100 (2012).

29. *Al-Qur'ān* 2:185, 5:6, & 21:107; ‘ALĠMUHAMMAD JAMAĶ & AĦMAD IBN MUHAMMAD IBN HANBAL, *MUSNAD AL-SĦĀMĪYĪN MIN MUSNAD AL-IMĀM AĦMAD IBN HANBAL* (Dār al-Thaqāfah; Mu’assasat al-Kutub al-Thaqāfiyah, al-Dawḥah, Dawlat Qaṭar, Bayrūt, Lubnān, al-Ṭab’ah 1 1990). For instance, for the endurance and healthy development of human life, greening environment and the sustenance and ecological protection is important. Neither the *Qur'ān* nor *Sunnah* lays down any ban in this regard, but they rather endorse and promote their conservation. The *Qur'ān* says, “*There is not an animal on earth nor a creature flying on two wings, but they are nations like you*” and the Prophet advises protecting them when he says “*Show mercy and you will be shown mercy*” *Al-Qur'ān* 6:38; MUHAMMAD IMAM AL-BUKHARI, *AL-ADAB AL-MUFRAD* [PROPHETIC MORALS AND ETIQUETTES] 166 (Yusuf Talal Delorenzo trans., Dakwah Corner Publications Sdn. Bhd. 2014).

business organizations.³⁰ If the law concerning the establishment and management of a company is breached, the State must penalize the wrongdoers so that the common good and creation of wealth is not impeded.³¹ Penalizing wrongdoers is a fulfillment of the “safety” aspect of the *darouriyāt* classification. The second class of *maslāhāh* is the “needs” classification. This classification consists of concessions that grant basic things to allow the essentials of life to continue existing during difficult situations.³² For example, an Islamic State may mandate that shares of large corporations be listed in stock exchanges for trading, while, at the same time, exempting small and medium-sized enterprises (SMEs) from listing, thus enabling them to trade freely their securities in the over-the-counter market.³³ The *tashiniyāt* (embellishments) classification of *māslāhāh* is ancillary by importance, but complementary to the necessities classification in that the realization of the former enables the latter. For instance, the government may offer tax refunds for donations and charities and urge business organizations to voluntarily give charity to the needy and the poor (which is an embellishment).³⁴ So, in the absence of any authentic *qur’ānic* or *hadith* provisions, it is possible to recognize corporations as having *dhimmāh* (legal personality) by way of the *maslāhāh* doctrine under the *Hānāfi* school. This recognition might meet societal needs and bring economic growth and commercial progress to a given nation by managing the corporation’s rights and obligations through the stated three categories of *darroriyāt*, *hajiyyāt*, or *tahsiniyāt*.

However, questions remain as to when *dhimmāh* ends for fictitious entities, such as corporations. Generally, as *dhimmāh* exists in tandem with an individual, it starts when the individual is born alive and ends upon death.³⁵ However, fetuses and embryos can enjoy specific rights and therefore have a restricted *dhimmāh*.³⁶ Likewise, *dhimmāh* might continue existing after an individual’s death up to the time when all rights and obligations are resolved. In this domain, Muslim scholars offer three opinions regarding the end of *dhimmāh* for fictitious personalities under the

30. BHALA, *supra* note 27.

31. *See generally* MOHAMMAD HASHIM KAMALI, SHARIAH LAW: AN INTRODUCTION (2008).

32. *Id.*

33. KAMALI, *supra* note 31, at 356-60. If not, the economy might be deprived of their contribution to the wealth making. *Id.*

34. *Id.* In this manner, the poor may participate in economic interests with that charity money as an alternative of being.

35. AL-ZARQA’, *supra* note 3, at 743-46.

36. *Id.* at 747. Those rights are *nāsāb* (family name); *mirāth* (inheritance); *wāsiyyāh* (legal bequests), and *wāqf* (trust). *Id.*

Sharie'a. The *Mālikī* and some *Hānbālī* jurists believe that *dhimmāh* terminates upon the individual's death and the obligation to settle *dyun* (debts) becomes linked to properties if there are any. If there are no properties, duties to settle debts lapse.³⁷ On the other hand, *Shāfi'ī* and the rest of the *Hānbālī* scholars think that *dhimmāh* continues to exist after the person's death until debts and other duties are cleared (e.g., if someone is injured by being pushed into a hole by someone who subsequently dies, the liability for the injury will remain in the *dhimmāh* of the deceased).³⁸ However, *Hānāfi's* believe that *dhimmāh* does not end at the person's death but instead is only diminished, and the only way for the debt to continue is for there to be passed-on property to attach it to; otherwise, the debts lapse.³⁹ Thus, there is no clear theoretical answer for when *dhimmāh* ends for corporations.

Nevertheless, under the *maslāhāh* doctrine, the interests of the Muslim community (the public interest) take precedence over the individual (private) benefits based on the principle that "priority is given to preserving the universal interest over [the] particular interest." In other words, it means achieving and protecting the mutual interest of the general public based on *Sharie'a* law.⁴⁰ It is in furtherance of this principle that modern Muslim scholars accept that the presence of a fictitious personality forms the foundation of the existing socio-legal structure.⁴¹ These scholars gave a few Islamic institutions, such as *wāqf* (trust), *masjid* (mosque) and *beit al-māl* (public treasury), as well as schools, orphanages, and hospitals, a *dhimmāh*, a sort of moral personality.⁴² In granting legal personality to these institutions, these schools recognized the institutions' capacity to achieve

37. *Id.* at 748-749.

38. Al-Sanhūrī, *supra* note 14, at 21.

39. *Id.*

40. Mohamed A. 'Arafa, *Islamic Policy of Environmental Conservation: 1,500 Years Old – Yet Thoroughly Modern*, 16 EUR J. L. REFORM 456, 494–501 (2014) ("Social interests and public benefits are addressed according to their significance, actuality and certainty in this regard. Islamic law classifies interests into (a) *daruriyat* (necessities), or those things indispensable to the preservation of the *Al-adaruriat Al-khams* (five *Sharie'a* objectives of life, religion, lineage, property, and prosperity); (b) *hajiyyat* (needs), meaning those things whose absence leads to actual hardship and suffering; and (c) *tahsiyyat* (supplementary benefits), which means things that refine life and enhance ethical values."). *Id.*

41. See generally IMRAN NYAZEE, *ISLAMIC JURISPRUDENCE: USUL AL-FIQH*, (3d ed. 2016) (provides the foundation for any meaningful study of Islamic law).

42. *Dhimmāh* is the capability, a qualification, whereas capacity is the exercise of that capability, in which the person should have the degree of reason and awareness to receive such capability.

religious duties, such as the payment of *zākāh* (mandatory financial donations).⁴³

IV. LEGAL PERSONALITY OF ISLAMIC INSTITUTIONS: INNOVATIVE PRAGMATIC MODELS

The theory of *dhimmāh* (juristic legal personality) has been accepted by the Muslim world, especially in those countries that base their regulations on Islamic law rather than positive Western laws, such as Kuwait, Saudi Arabia, the United Arab Emirates, Oman, and Qatar. These nations acknowledge the concept of legal personality for artificial entities alongside, and in combination with, legal personality for natural people. Classic Islamic specialists, using institutions such as mosques, the State, and *wāqfs* (trusts and endowments), provide adequate case law to create a basis for the theory of legal personality for corporations.

A. *Māsjid (Mosque)’s Legal Personality*

The discourse on a mosque’s legal personhood has been dynamic over time. On one hand, some case law indicates that mosques have legal personality separate and apart from their congregants. *Jumā Mosque Congregation of Babu v. Azerbaijan* is a landmark case about church autonomy—the right of religious groups—to organize themselves as they see fit. This right includes the right of houses of worship to choose their leaders without government interference.⁴⁴ In 1937, the *Jumā* (Friday) Mosque was closed to the public. Under the Soviet Government, the mosque was converted into a carpet museum, and later, a new local community of Muslims took possession of the former mosque.⁴⁵ In 1992, following a formal request by that community, the Sabail District Executive Authority (SDEA) allowed the establishment of the *Jumā* Mosque Congregation as a religious organization and recommended that the Justice Department register it as a legal entity; a religious organization, capable of acquiring and enjoying rights and bearing legal obligations. The mosque thereby acquired legal personality.⁴⁶ However, it is not “legal personhood”

43. See NYAZEE, *supra* note 41.

44. *Jumā Mosque Congregation v. Azerbaijan* (admissibility) (15405/04), 57 Eur. Ct. H.R. (2013). *Jumā* Mosque, “Friday Mosque,” was used as a Muslim house of worship until Azerbaijan became part of the Soviet Union.

45. *Id.*

46. See, e.g., *Fatullayev v. Azerbaijan*, App. No. 40984/07, 623 Eur. Ct. H.R. (2010) (“[I]odged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...]”).

that gives the mosque its eternity (its perennial status as a mosque), but rather the eternity of its owner, *Allāh* (God).⁴⁷

On the other hand, the *Māsjid Shahid Gang v. Shiromani Gurdwara Parbandhak Committee* establishes that there is still uncertainty about whether a *māsjid* (mosque) may be classified as a juristic person. In *Māsjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, the relief sought was a declaration that a ruined building was a mosque in which all Muslims had a right to worship. The Muslim plaintiffs requested an injunction to restrain any improper use of the building and a mandatory injunction to reconstruct the building.⁴⁸ This suit was motivated by the notion that if the mosque could be labeled a “juristic person,” this would establish the precedent that a mosque remains a mosque forever and that limitation (adverse possession) cannot be applied.⁴⁹ The Lahore High Court determined “a mosque [to be] a juristic person,” but the Bombay High Court dismissed the appeal and did not accept the mosque as a juristic person. The Bombay High Court rejected the principle that “a Hindu idol is a juristic person and on the same principle a mosque as an institution should be considered as a juristic person.”⁵⁰ It was held that “there is no analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion . . . [on the basis of very sound reasons such as adverse possession, (Art. 144, Limitation Act), earlier decisions (S.11 CPC) and provision in the *Sikh Gurdwara Act*].”⁵¹ Ultimately, whether mosques have legal personality is an issue that has not been settled universally, but it is possible to answer in the affirmative if an approach is taken per the *Jumā Mosque* case.

47. It is generally agreed that no one can own a mosque because *Allāh* Himself owns it; ownership of a mosque would imply ownership of the Owner, which is impossible. See Halyani Hassan, Zuhairah Abd Ghadas, Nasarudin Abdul Rahman, *The Myth of Corporate Personality: A Comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws*, 6 AUSTL. J. BASIC & APPLIED SCI. 11 (2012).

48. *Sehajdhari Sikh Federation v. Union of India & Ors.* 2012 (1) RCR (Civil) 384.

49. *Gurleen Kaur and Others v. State of Punjab & Ors.* 2009 (3) RCR (Civil) 324.

50. See *Rajnarain Singh v. Chairman, Patna Administration Committee, Patna & Anr.*, AIR 1954 SC 569, ruled that “... the modification of the whole cannot be permitted to effect any essential change in the Act or an alteration in its policy, so also a modification of a part cannot be permitted to do that either.”

51. It should be noted that the Lahore High Court had accepted the mosque as a juristic person in many earlier decisions, which the Privy Council swept aside by saying that those decisions are limited to *Punjab* alone while there was no authority from any High Court on the other side, as *Rajasthan* and *Mādrās* High Courts. See, e.g., *Shankar Das v. Said Ahmad* (1884) 153 PR 59 (1914) (India); *Maula Bux v. Hafizuddin* (1926) 13 AIR Lah 372 AIR (1926) Lah 372.6 (India).

B. *Al-dwālāh (State) 's Legal Personality*

States, or individual nations, can be said to have legal personality under Islamic law separate and apart from that of its citizens. The pioneer of public international law in the Arab world, Professor Mohammad T. Al-Ghunāimi, argues that the *Qur'ān* demonstrates that States possess legal personality. For instance, the Holy Book says: “*and when we would destroy a township we send commandment to its folks who live at ease [meaning those responsible for the wellbeing of the nation and the heads of State], afterward they commit abomination therein, and so the Word [of doom] hath effect for it, and We annihilate it with complete annihilation.*”⁵² Professor Al-Ghunāimi interprets this text to mean that violation of God’s command by leaders (heads of State) results in His punishment for the whole nation. “This structure, necessarily, connotes the recognition of a legal personality for the State since an individual cannot be a legal organ except as a legal person.”⁵³ According to the Islamic *Qur'ānic* norm, “[a]nd no burdened soul bear another’s burden.” Therefore, accountability is initially inflicted on the State as a juristic person, and subsequently on the persons who created it.⁵⁴

Under the Islamic State, Prophet Mohammad adopted the *Mādīnāh* Charter (State Constitution), in which Article 1 reads: “[t]his [...] govern[s] the relations among all people [believers or not] across and from one *Ummāh* [nation].”⁵⁵ The term *Ummāh* is used to include Muslims and non-Muslims independently organized (in other words sovereign) within the terms of the Charter under Mohammad’s leadership (government) in the land of *Mādīnāh* (the territory). So, *Ummāh* fulfills the elements of a modern State; population, land, government, and independence.⁵⁶ As a legal personality, it held particular rights and owed certain obligations to the citizens.⁵⁷

52. Al-Qur’ān 17:16.

53. MOHAMMAD TALAAT AL-GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* 124 (Springer Dordrecht 1968).

54. *Id.* at 125. In this regard there might be a contradiction as another verse reads: “*And guard yourselves against a chastisement which cannot fall exclusively on those of you who are offenders, and know that God is severe in penalty*” which means that the torment for the wrongdoers’ actions will not only apply to them but also will be imposed on the whole community. Al-Qur’ān 8:25 & 35:18.

55. *Id.* at 54-55.

56. *Id.* at 62.

57. Yetkin Yildirim, *The Madīnā Charter: A Historical Case of Conflict Resolution*, 20 J. ISLAM & CHRISTIAN–MUSLIM REL. 439 (2010). For instance, it had the right of allegiance from the citizens, irrespective of faith. Article 20 cites: “No separate peace will be made by anyone in Mādīnāh when Believers are fighting in the Path of *Allāh*.” *Id.* In exchange for allegiance, citizens

C. *Wāqf's (Trusts and Endowments) Legal Personhood*

Wāqfs (trusts and endowments) are another clear example under Islamic law of entities possessing legal personality separate and apart from the legal personality of those who maintain them. “A *wāqf* is an unincorporated trust established under Islamic law by a living man or woman (*wāqif*) for the provision of a designated social service in perpetuity.”⁵⁸ Once the *wāqif* (settlor) establishes the trust, he/she stands legally separate from it and cannot exercise any rights of possession over it.⁵⁹ The *wāqif* may be appointed as *mutāwālli* (trustee/administrator) to act, as an agent or representative, on behalf of the *wāqf* for the benefit of the beneficiaries.⁶⁰ All the *mutāwālli*'s authorities, rights, and contractual obligations are intended for this purpose. Thus, whatsoever the *mutāwālli* does for the *wāqf* does not include his/her own *dhimmāh* unless an act leads to his/her personal liability.⁶¹ Accordingly, a *wāqf* has a distinct *dhimmāh* (legal personality) that may be recognized by the *mutāwālli*'s power to borrow loans for the *wāqf*—and with the *qādi* (judge)'s permission—use

were granted many kinds of protection. So, Article 16 reads: “[t]hose Jews who follow the Believers will be helped and will be treated with equality [social, legal and economic equality is promised to all loyal citizens of the State].” *Id.* It should be noted that the *khilāfāh* (leadership) was a *dhimmāh* (legal personality) which had rights and obligations which the *Cāliḥs* (leaders) exercised on behalf of the citizens. *Id.*

58. Timur Kuran, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations*, 35 L. & SOC'Y REV. 4, 842 (2001). In other words, (“*Wāqf* (inalienable properties or properties left in perpetuity) by definition is the act by which certain properties cease to be a subject of any transaction such as sale, rent, ownership, or inheritance, or to be used as a *rāhn* (deposit), or as a gift, provided that their products, advantages and benefits are devoted to a permanent.”); JAMAL J. NASIR, *ISLAMIC LAW OF PERSONAL STATUS* 247 (1986). Perpetuity is one of the fundamental conditions for the validity of the *wāqf* and its legal status posed an intricate juridical problem. *See generally* Muhammad A. Zubair, *The Classical Islamic Law of Waqf: A Concise Introduction*, 26 ARAB L.Q. 121 (2012). In other words, the problem of perpetuity is resolved via the legal fiction under which the *wāqf* property is vested in God. *Id.* Scholars unanimously identified the separation of the substance and usufruct in *wāqf* property. *Id.* Whereas the substance is reserved (either in the ownership of the founder or God), the usufruct belongs to the beneficiaries. *Id.*

59. Mahdi Zahraa, *Legal Personality in Islamic Law*, 10 ARAB L.Q. 193, 205 (1995) (“Such a juristic *dhimma* is a restricted concept to the extent that it enables the administrators of such entities to implement their functions and perform their office.”). *Id.*

60. *Id.* The rights and responsibilities carried out by an administrator also survive through transition of administrators, which indicates that the rights and responsibilities are truly held by the *wāqf* or *māsjid* as a distinct legal entity with its own *dhimmāh* rather than held within the *dhimmāh* of the administrator; if an administrator hires a service to clean the carpet of a mosque but is dismissed before he pays it, it does not remain the responsibility of the administrator to pay for the carpet service—it becomes the responsibility of the new administrator. *Id.*

61. In the classical Islamic *Fiqh*, it has been argued by Professor Mustafa al-Zarqā (1904-1999), For example, a *qādi* (judge) who has been appointed a *mutāwālli* of *wāqf* can decide a case concerning that *wāqf* unless it has been made in the judge's favor (as a beneficiary).

the money on behalf of the *wāqf* for maintenance purposes without any liability for the *mutāwālli*.⁶² Hence, *wāqf* has a permanent legal status, separate from and independent of the *wāqif*, any change in the *wāqif*'s or *mutāwālli*'s status (e.g. life/death) will not affect the *wāqf*.⁶³

Moreover, a *wāqf*, as a separate and legal entity, can own property, despite a split among jurists as to the possibility of the endowment of these juristic persons' properties.⁶⁴ The *Mālikī* and *Shāfi'ī* Schools allowing gifts or legacies made directly to a mosque.⁶⁵ The moderate *Hanāfi* school stated that "a property purchased with *wāqf*'s money does not form a part of it, rather it becomes its property [...], [and the] money donated to a mosque belongs to its proprietorship and does not merge with the mosque itself, as a *wāqf*."⁶⁶ Hence, a *wāqf* can own property and money as a natural person, buy and sell, borrow and lend, sue and be sued, and be assigned the attributes of an artificial person.⁶⁷ While the *wāqif* (settlor) thereby abandoned possession of the *wāqf* property, it was not acquired by any other person;

62. It has been argued that "[t]he proofs of loan against the *wāqf* stands without the intervention of the responsibility of the *mutāwālli*." Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841, 842 (2001). In other words, *Wāqf* (inalienable properties or properties left in perpetuity) by definition is the act by which certain properties cease to be a subject of any transaction such as sale, rent, ownership, or inheritance, or to be used as a deposit (*rāhn*), or as a gift, provided that their products, advantages and benefits are devoted as permanent. Zahraa, *supra* note 59, at 204 (citing NASIR, *supra* note 58, at 247). Perpetuity is one of the fundamental conditions for the validity of the *wāqf* and its legal status posed an intricate juridical problem. In other words, the problem of perpetuity is resolved via the legal fiction under which the *wāqf* property is vested in God. Scholars unanimously identified the separation of the substance and usufruct in *wāqf* property. Whereas the substance is reserved (either in the ownership of the founder or God), the usufruct belongs to the beneficiaries. Muhammad Zubair Abbasi, *The Classical Islamic Law of Waqf: A Concise Introduction*, 26 ARAB L.Q. 121, 124–26 (2012).

63. Yet, a *wāqf* shall not fail because there is no *mutawalli* appointed based on the principle "no trust shall fail for want of a trustee." See Zahraa, *supra* note 59, at 205 ("Otherwise, such entities will find immense obstacles in performing their rights and duties and become *de facto* redundant."). *Id.*

64. Paul Stibbard, David Russell QC & Blake Bromley, *Understanding the Waqf in the World of the Trust, Trusts & Trustees*, 18 OXFORD UNIV. PRESS 785, 785-810 (2012) (matters of administration are dealt with by the religious authorities or state-controlled boards, whose conduct of their affairs). *Id.* The difficulty will be to guarantee that the religious (or other charitable) aspects satisfy the needs of both Islamic jurisprudence and the concept of appropriate religious or charitable activity being entirely charitable under the law of the jurisdiction concerned. *Id.*

65. Timur Kuran, *The Absence of Corporation in the Islamic Law: Absence and Persistence*, 53 AM. J. COMP. L. 785, 785-815 (2005).

66. YAWER QAZALBASH, PRINCIPLES OF MUSLIM LAW 309-19 (2003).

67. MUFTI MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE 146 (1999). Same as rights, a *wāqf* has duties under *Sharie'a*, such as a *mutāwālli* is an employee of the *wāqf* and eligible to remuneration out of the *wāqf*'s income. *Id.*

rather, it was “arrested” or “detained.”⁶⁸ In *All India Imām Organization v. Union of India*, the Supreme Court of India treated the *Imāms* as the mosque’s employees and ruled that the *wāqf* boards are liable for their salaries, since the boards are the regulatory and administrative authorities for the *wāqfs* in India.⁶⁹ A *wāqf*’s ability to own property is characteristic of its having independent legal personality.

Nevertheless, there are some *fuqah’a* (scholars, or *Majlis ‘Ulama* in South Africa) who disagree with the above viewpoint, who nevertheless argue that a *wāqf* is not a juristic person because *Sharie’a* does not recognize artificial persons.⁷⁰ These scholars argue that a *wāqf* is a property whose ownership is vested in *Allāh* (God) after its creation. *Allāh* is the owner of the universe, including *wāqfs*. Any property bought for a *wāqf* does not merge with it as a property and is not endowed. It becomes separate from the donor and becomes *Allāh*’s property as well.⁷¹ Regarding the legal status of such property, generally all creation belongs to *Allāh*, including men, animals, and other beings, animate and inanimate.

Yet, for practical necessity—as a dynamic and practical life-oriented legal system—Islamic jurists generally recognize that not only human beings possess *dhimmāh*, but that *wāqfs* and similar entities possess

68. Monica M. Gaudiosi, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 4 1231, 1234 (1988). See Syed S. Hamid, *Influence of Western Jurisprudence over Islamic Jurisprudence: A Comparative Study*, 4 NORTHERN UNIV. J. L. 13, 16–17 (2013). The only significant distinction between the Islamic *wāqf* and English trust was (“the express or implied reversion of the *wāqf* to charitable purposes when its specific object has ceased to exist,” though this difference only applied to the *wāqf ahli* (Islamic family trust) rather than the *wāqf khāiri* (devoted to a charitable purpose from its inception.”).

69. The Court held: by Section 15 of the *Wāqf Act*, the *wāqf* Board is vested not only with supervisory and administrative powers over the *wāqf* but even the financial power vests in it. One of the primary duties is to ensure that the income from the *wāqf* spent on carrying out the purposes for which the *wāqf* was created. Mosques are *wāqf* and are required to be registered under the Act, over which the Board exercises control. Purpose of their creation is community worship. The principal functionary to undertake it is the *Imām*. It is the responsibility of the *wāqf* Board to ensure proper maintenance of religious service in a mosque. To say, therefore, that the Board has no control over the mosque or *imām* is not correct.

70. See, e.g., Malik M. Hafeez, *An Analysis of Corporate Governance in Islamic and Western Perspectives*, 2 INT’L J. BUS., ECON. & L. 3 (2016). One criticism that may be raised about the property endowment of commercial businesses is the departure from the object. In corporations, the company is stick by its object and though the company is the owner of its properties, the domain of the ownership and the capacity of the company is limited to its object expressed in the Statute (the operations and activities of trade and commerce), which is predicted in the law and cannot exceed its limits but to implement and accomplish the company’s goals and carry out its policies.

71. See Zahraa, *supra* note 59, at 205 (“The properties of the *wāqf* and other charitable institutes are now so large that almost all Islamic countries have to establish a ministry called *wāzārāt al’ wāqāf* [*wāqf* Ministry].”). *Id.*

dhimmāh as well. As scholar ‘Abdul Qādir ‘Audāh argues, “[t]he Islamic law has, since its dawn, recognized the existence of juristic persons. The jurists have discussed the state treasury and *wāqf* as juristic persons. Similarly, they have considered the schools, orphanages, hospitals, etc., as the juristic persons and competent to hold and exercise the rights.” *Wāqfs* carry out both religious and socio-legal or temporal obligations, such as business transactions. These obligations require the possession of legal personality in order to operate under Islamic law and for the sake of temporal accessibility. As *wāqfs* can retain financial rights and carry out duties, they should be given the status of having legal personality. If this is not recognized and *wāqf* are taken to be properties, their ownership would be dubious.

D. Icons and Idols in Customary Law: The Hindu Idol

Another example of an artificial entity possessing legal personality is the Hindu idol, under contemporary Indian law. The legal personality of Hindu idols in contemporary Indian law can be said to derive from ancient Hindu legal thinking, manifested in the English common law system and firmly rooted in the classical Indian legal tradition.⁷² In the landmark case, *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, the issue was whether a Hindu idol was merely movable property (an object) and subject to displacement by the *shebait* (priest), who would care for its worship or something/someone else.⁷³ The Judicial Committee, stated, “[a] Hindu idol is, according to long established authority, upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a ‘juristic entity.’” It has a juridical status with the power of suing and being sued [...] it is unnecessary to quote the authorities for this doctrine thus stated is firmly established.”⁷⁴ It is by tradition, therefore, that Hindu idols have the power to sue, to be sued, and to own property (as a logical prerequisite for

72. “The personality of the Hindu Idol is something of an oddity in the Indian legal system. It is essentially ancient Hindu legal philosophy juxtaposed with and given recognition by an alien legal system—the English common law.” Kartick Maheswari & Vishnu V. Shankar, *Stone Gods and Earthly Interests: The Jural Relations and Consequence of Attributing Legal Personality to Hindu Idols*, 16 STUDENT BAR REV. 46, 46-67 (2004).

73. *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 Ind. App. 245, 250 (P.C.) (per Lord Shaw) (The Court held “the will of the idol as to its location must be respected, and that accordingly the suit should be remitted in order that the idol might appear by a disinterested next friend to be appointed by the Court; that the female members of the family, having the right to participate in the worship, should be joined; and that a scheme for regulating the worship [of the idol as between the three brothers who were embroiled in this dispute] should be framed.”). *Id.*

74. *Id.*

the power to be sued).⁷⁵ One could read this case as recognizing a “legal fiction” which is no different by way of analogical deduction from considering a corporation as a “juristic entity” or “person” for purposes of the law.⁷⁶

The Hindu idol’s legal personality rests on the “spiritual purpose” that it embodies or represents.⁷⁷ Like in positive Roman law, where charitable endowments could be given legal personality through the will of the charitable donor, similarly, Hindu idols are considered to be granted legal personality by the worshippers’ will.⁷⁸ In recognizing that it is the faith of worshippers rather than the State that gives juristic personality to Hindu idols, the Indian Supreme Court said, “it is enough if the devotees or the pilgrims feel that there is some superhuman power which they should worship and invoke its blessings.”⁷⁹ However, an idol is a person only in its capacity as the representative and symbol of the particular purpose that is indicated by the worshipper.

Furthermore, being that Hindu idols can possess legal personality, they are legally capable of holding ownership rights. The *Yogendra Nath Naskar v. CIT* case confirmed the ownership right of idols or deities by bringing them under the ambit of taxation. Moreover, under Hindu law, property may also be charitably vested in Hindu idols.⁸⁰ In this case, the *devata* (deity) is distinct from the “debutter,” which is the property charitably endowed to that deity; the property itself does not become the juristic person, but rather the idol (which is supposed to embody the deity) becomes the juristic person.⁸¹ Still, similar to the will of the founder giving legal personality to charitable endowments under Roman law, the will of

75. Maheswari & Shankar, *supra* note 72, at 49-50. Accordingly, this case where the Privy Council does appear to have done justice to Hindu religious sensibilities, though only at great cost to the logical constancy of Anglo-Indian case law, for the case in question involved the attribution of agency to a thing.

76. *See, e.g.*, *Bank of New South Wales v Commonwealth* [1948] 76 CLR 1 (Austl.); *Body Corporate, Villa Edgewater CTS 23092 v. Federal Commissioner of Taxation* [2004] AATA 425 (Austl.) (“While all humans are legal persons, and all adults of sound mind have unlimited capacity to enter into contracts, *not* every legal person is a human [...] an abstraction or even an inanimate physical thing” as a juristic or legal person.”). *Id.* *See* BRUCE WELLING, *CORPORATE LAW IN CANADA: THE GOVERNING PRINCIPLES* (CANADIAN LEGAL TEXTBOOK SERIES) 100 (Scribblers Publishing, 1991).

77. “[T]he law as it stands now is in complete unanimity: the Idol as representing and embodying the spiritual purpose of the donor is a juristic person recognized by law and in this person, the dedicated property vests.” *Id.* at 51. *See* Maheswari & Shankar, *supra* note 72, at 55 (quoting *Ram Jankijee Deity v. State of Bihar*, 5 S.C.C. 50, 59 (1990)).

78. Maheswari & Shankar, *supra* note 72, at 49.

79. *Id.* at 55.

80. *Id.* at 54.

81. *Id.* at 49.

the worshipper is what gives Hindu idols personality. “[T]he law as it stands now is in complete unanimity: the Idol as representing and embodying the spiritual purpose of the donor is a juristic person recognized by law and in this person, the dedicated property vests.”⁸² Any kind of wealth may be donated—not just property.⁸³

V. CONCLUSION

The problem of recognizing corporate legal personality in Islamic law reflects a long-standing dilemma: how to reconcile foreign legal concepts and changing needs with the mandates of *Sharie’a*. For example, historically the Roman legal norms that pervaded into the Islamic *fiqh* could not be enforced from “above.” There could be no blanket “reception” of Roman law, and indeed, the form of political authority would have been antagonistic to such an incident, as the Roman legal values had to be integrated from “below.”⁸⁴ Jurists became the link between people’s traditional interactions and the written *qāwānin* (laws).⁸⁵ By *qiyas* and *ijtihad* (analogy and reasoning), the *mufti* justified actions to fit the general principles of *Sharie’a* law.

Later, when Islamic finance and banking arose, it became crucial to adopt a more precise interpretation of how exactly *Shārīe’ā* should be applied to a business (corporate model) that implicated prohibited activities (e.g., charging interest on loans). Financial products and services had to be constructed to be compatible with Islamic teachings and, by extension, the corporations that sold those services were required to be organized in a way which enabled supervision to guarantee compliance. At present, for a good corporate governance approach, companies must incorporate the principles of Islamic governance (consultation, transparency, accountability, ethical justice, equity, spiritual succession, and organizing for virtuous conduct and forbidding sin) to cover the gaps which the conventional Anglo-Saxon/US Codes do not address. It seems, therefore, that businesses have led the way in embracing constitutions and organizations which address the need to comply with Islamic law, as well as Western corporate law, regulations, and codes of corporate governance (e.g., OECD principles of good corporate governance). Muslim scholars or *Muftī*(s) give guidance or *fātwās* (rulings)

82. *Id.* at 51.

83. *Id.* at 49. Also, “[t]he other alternative for the donor was to create an institution or foundation himself. This would be a new juristic person that depended for its origin upon nothing else but the will of the founder, provided that it was directed to a charitable purpose.” *Id.* at 48.

84. Ayman Daher, *The Shar’ia: Is Roman Law Wearing an Islamic Veil?*, 3 HIRUNDO: THE MCGILL J. CLASSICAL STUD. 91, 95 (2005).

85. *Id.* at 105.

to companies on critical or dubious issues. A board of directors will seek a jurist who will provide a favorable interpretation of Islamic law and provide consistency within the *Shārīe'ā* edicts to support its planned strategy.

As the law stands now, there may not be a simple way to reconcile the foreign elements of corporate/artificial legal personality and Islamic law. In the end, either Hindu spiritual custom or the positive common law will have to give way to the edicts of *Shārīe'ā*. However, the example of Roman law's influence on Islamic law should illustrate how the concept of corporate legal personality could find its way into Islamic law. Roman influence on Islamic law, whether seen as a religious, philosophical, or a socio-political movement, managed foremost legal reform. Likewise, the Roman impact on Islamic law that did occur was a gradual combination of Roman ideas through the *Sharie'a* mechanisms. This impact pursued a pattern of legal evolution. Middle Eastern law has had a linear shape that goes from the *Hammurabi* Code, through Assyrian Law, Rabbinic Law, Greek Law, Roman Law, Byzantine Law and ultimately to Islamic Law. While the name of the legal regime that is in effect changes, the persons living under it do not. It is these folks that brought the rules from one tradition into another and basically resumed and continued to live their lives as they always had; they left it to the jurists to go through the mental gymnastics of resolving their acts with "the law." *A fortiori*, this use of legal regime is preferable to Western legal classes when this class may have the detrimental effect of altering the sense of Islamic theories, creating darkness over their autonomy and ingenuity.

The concept of corporate legal personality should be considered compatible with Islamic law for several reasons. First, the Ottoman Code of Commerce of 1850 established that the concept could be incorporated into a code based on Islamic law. Second, many countries which have based their laws on Islamic law have acknowledged the concept of artificial legal personality alongside natural personality, recognizing legal personality in institutions such as *wāwfs*, mosques, and States. These examples establish that *dhimmāh* (legal personality) may be given to artificial entities like companies, since there is no obvious proscription in the *Qur'ān* or *Sunnah*. Additionally, Hindu law's treatment of idols as juristic persons separate and apart from their worshippers stands as a good analogy as to how corporations can be juristic persons separate and apart from those who execute their operations. Third, if one is not persuaded to admit or accept this interpretation, permissibility may still be claimed by way of the *māslāhāh* (public interest) doctrine, Muslim jurists recognize the possibility of Islamic corporate personality, reasoning that the concept of *dhimmāh* evolved during the history of the *Sharie'a*. These jurists view *dhimmāh* as

an ethical concept bestowed on human beings to empower them to assume and carry their mission as viceregents, and further reason that it is vital to adhere to a moderate interpretation of the concept which encompasses entities like mosques, *wāqfs* and corporations. Adhering to such a moderate interpretation would facilitate economic activities that are vital to life.

However, corporate legal personality should not be accepted without limitation. Some Islamic rulings on the concept may change over place and time, depending on the needs of society; these differences would also maintain basic Islamic principles. As Nyazee mentioned:

The truth is that the concept of a fictitious person can only operate within the flexible sphere of the law [. . .] The fixed part of the law does not need this concept and will reject it. If this concept is thrust upon the fixed part, a number of inconsistencies may develop in the law. The case of flexible sphere is different. The *imām* (head of the State or the State) can introduce the concept of juristic person within the flexible sphere, but this should not affect the law operative in the fixed part.⁸⁶

Nevertheless, it can be established that corporate personality is compatible with Islamic jurisprudence, even if, as a doctrine, its contours become subject to future.

The problem is that while the personality of corporations can be settled in law, its theoretical justification still seems ambiguous. The problem reveals the existence of two, not always complementary, legal systems—the Roman system of positive law and the Islamic *fiqh* system. However, the problem of legal personality is not impassible. The path of logic on one side and religion and equity on the other is contradictory in several cases. Court jurisdictions have had to make hard choices between equity and logic. Nevertheless, it can be established that corporate personality is compatible with Islamic jurisprudence, even if its contours may be subject to reconfiguration.

86. NYAZEE, *supra* note 1.

DON'T BE SALTY: WHY THE UN SHOULD CREATE MODEL RULES AND A TASKFORCE FOR REGULATING DESALINATION

Jenna H. Whelan *

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* Jenna Whelan is a J.D. Candidate 2023 at Southwestern Law School. She received her B.A. in Communication Studies at California State University, Northridge. She wishes to thank her family for all their love, support, and encouragement. She would also like to thank Professor Natalia Anthony for providing her with research and editing support, as well as the Southwestern Law Journal Board and Staff for their hard work in editing this article.

I. INTRODUCTION

The United Nations Environment Assembly has recognized the environmental harm from desalination as a global concern and adopted a “resolution on the protection of the marine environment from land-based activities” (Resolution).¹ Member states agreed to “enhance the mainstreaming of the protection of coastal and marine ecosystems in policies, particularly those addressing environmental threats caused by increased nutrient, wastewater, marine litter and microplastics.”² Despite this resolution, however, it has largely been left to individual countries to determine the means by which they regulate their own desalination facilities.³ This approach gives deference to individual countries to determine the best way to regulate their own processes within their own capabilities but may lead to confusion about accepted practices and varying degrees of environmental protection between different member states.⁴ The United Nations should adopt model rules establishing minimum environmental requirements for desalination that combine obligations with an expectation for collaboration, and should establish a task force for enforcement, because only a mix of obligations and collaboration provides accountability along with considerations for diverse situations, and a treaty approach would aspire to too much and not move forward.

This paper will begin by discussing what seawater desalination is, why it is harmful to the environment, and why the United Nations should take an active role in regulating the desalination processes of its member states. Next, this paper will discuss the current models that are used for regulating desalination, as well as a “cap-and-trade” model proposed by Kenneth Korosi, and discuss why these models are not the best way to regulate desalination. These models, as well as a binding treaty approach, are not the most effective ways to regulate desalination, as they do not address all the issues presented by the seawater desalination problem. Finally, this paper proposes that the United Nations should adopt model rules considering the minimum environmental requirements for desalination regulation. The United Nations also needs a mechanism for the enforcement of these model rules, so it should create a task force comprised of government and non-

1. Env’t Assembly Res. 4/11 (Mar. 11, 2019).

2. *Towards Sustainable Desalination*, U.N. ENVIRONMENT PROGRAMME (May 2, 2019), <https://www.unep.org/news-and-stories/story/towards-sustainable-desalination>.

3. *Id.* at 2.

4. *Id.*

government agents who are experts in the desalination field; these agents would be required to visit desalination plants in all the applicable member states in order to ensure that they are complying with their environmental obligations. This paper concludes by examining some encouraging trends in making desalination a more environmentally friendly and sustainable practice.

II. BACKGROUND

Seawater desalination⁵ is the process of removing salt and impurities from seawater to create fresh, potable water.⁶ This is done primarily by one of two methods: boiling the water and recondensing it (thermal technology), or through reverse osmosis.⁷ Reverse osmosis is the process of pushing seawater under pressure through a semi-permeable membrane to filter out the salt and impurities.⁸ At their inception, desalination plants predominantly used thermal technologies for desalinating water.⁹ About 84% of all global desalinated water was produced using thermal technologies as late as into the 1980s.¹⁰ However, the development and utilization of reverse osmosis technology “gradually shifted the dominance away from thermal technologies,” so that, as of 2018, approximately 69% of the world’s desalinated water was produced using reverse osmosis.¹¹ Together, thermal technologies and reverse osmosis produce about 93% of the world’s desalinated water.¹²

In many countries where fresh water is an increasingly scarce resource, seawater desalination is a valuable tool for providing much needed potable

5. Desalination is also used on some other water sources, including river water, but this paper will focus on regulating seawater desalination, and the environmental consequences of seawater desalination processes.

6. *Desalination Overview*, POSEIDON WATER, <https://www.poseidonwater.com/desalination.html> (last visited Oct. 14, 2022).

7. *Id.*

8. *Id.*

9. Edward Jones et al., *The State of Desalination and Brine Production: A Global Outlook*, 657 SCI. OF THE TOTAL ENV'T 1343, 1346 (2019) (“With the aim of providing a global assessment of the research and practice around desalination, the objectives of this study are to: (1) share an insight into the historical development of desalination; (2) provide a state-of-the-art outlook on the status of desalination, considering the number of desalination facilities and their associated treatment capacity with regards to aspects such as geographical distribution, desalination technologies, feedwater types and water uses; and (3) assess brine production from desalination facilities and the management implications of the produced brine.”). *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

water to citizens.¹³ Seawater desalination is increasingly important for providing fresh water for drinking, cooking, and washing to people in water-scarce countries.¹⁴ Over time, desalination has come into greater and more prevalent use.¹⁵ This is because “reductions in the economic cost of desalination associated with technological advances, coupled with rising costs and the diminishing supply and security of ‘conventional’ water resources, have made desalination a cost-competitive and attractive water resources management option around the globe.”¹⁶ Also, improvements in desalination technology, such as improved membrane technologies and improved energy provision and recovery systems make desalination more economically feasible for many nations than in the past.¹⁷ Several countries, such as the Maldives, Malta and the Bahamas, meet all their water needs through desalination, and Saudi Arabia acquires 50% of its fresh water through desalination.¹⁸ A United Nations study (UN Study) found that, as of 2018, almost 16,000 desalination plants operated in 177 countries, producing a volume of freshwater equivalent to almost half the average flow over the Niagara Falls.¹⁹ But desalination is not a perfect solution.

The process of desalination can have dangerous environmental impacts. First, desalination is an energy-intensive process.²⁰ The energy needed to power desalination plants is typically acquired using fossil fuels, which contributes to global warming.²¹ Second, desalination creates a toxic brine byproduct that pollutes coastal ecosystems.²² With either boiling or reverse osmosis, about 1.5 liters of the liquid brine byproduct contaminated with chlorine and copper are produced.²³ This toxic brine is often pumped back into the ocean, where it depletes oxygen and impacts organisms along the food chain; creating massive die-offs of ocean life in the affected areas.²⁴ Approximately 80% of all desalinated water is produced within ten kilometers of a coastline, and “ocean disposal is assumed to be the dominant brine disposal worldwide.”²⁵ This disposal method is very

13. See *Towards Sustainable Desalination*, *supra* note 2, at 2.

14. *Id.* at 1.

15. Jones et al., *supra* note 9, at 1344.

16. *Id.*

17. *Id.*

18. *Towards Sustainable Desalination*, *supra* note 2.

19. *Id.*; see also Jones, *supra* note 9, at 1344.

20. *Towards Sustainable Desalination*, *supra* note 2.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. See Jones et al., *supra* note 9, at 1351.

economical, which is unfortunate because it also carries important environmental concerns.²⁶ Ocean disposal of brine byproduct introduces increased salinity, as well as toxic chemicals (used in pre-treatment of water to be desalinated) into the ocean's ecosystem.²⁷

The high salinity of brine causes elevated density in comparison to the salinity of the receiving waters, which can form "brine underflows" that deplete dissolved oxygen (DO) in the receiving waters. High salinity and reduced DO levels can have profound impacts on benthic organisms, which can translate into ecological effects observable throughout the food chain. A combination of these factors necessitates the development of new brine management strategies that are both economically feasible and environmentally sound.²⁸

Although not all countries use or rely on desalination, ocean health is a global problem, so desalination regulation requires a global solution.

A. ENVIRONMENTAL PROGRAMS WITHIN THE UNITED NATIONS

There are six principal organs of the UN: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice.²⁹ However, only three of these organs adopt resolutions: the General Assembly, the Security Council and the Economic and Social Council.³⁰ The most common form in which a conference expresses itself is by way of resolutions, like the Resolution for the Protection of the Marine Environment from Land-Based Activities, concerned herein.³¹

The UN Charter is the basic text for the organization, comparable to a Constitution of the organization.³² After the Charter, the resolutions adopted by the General Assembly essentially constitute the laws of the United Nations.³³ Unfortunately, the resolutions adopted by the General Assembly are not always entirely clear and may be obscure and even seem to be contradictory.³⁴ This is because, contrary to what happened in the early days when every draft resolution used to be put to a vote, in the

26. *Id.*

27. *Id.* at 1354.

28. *Id.*

29. MODEL UNITED NATIONS, DRAFTING RESOLUTIONS, <https://www.un.org/en/model-united-nations/drafting-resolutions> (last visited Oct. 27, 2022).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

present day, every draft resolution, is the result of informal consultations.³⁵ In the process, parties compromise and the final language of the text may sometimes be unclear.³⁶ This is indicative of the same type of trouble that would be caused by the collaborative and adaptive management model of regulation or trying to implement a binding treaty for the regulation of desalination, as discussed later in this paper.³⁷

In 2013, the Governing Council of the United Nations Environmental Program (UNEP) was replaced by the United Nations Environment Assembly (Environment Assembly).³⁸ While the Governing Council was comprised of fifty-eight members of the U.N. General Assembly, the new Environment Assembly automatically incorporated all 193 member states of the United Nations.³⁹ Universal membership eliminated the need for the General Assembly to elect members of UNEP's governing body, and essentially gave UNEP greater political clout.⁴⁰ The United Nations Environment Assembly now has the "elevated status of a plenary body,"⁴¹ similar to the plenary organs of other specialized agencies of the United Nations, thanks to the mandate by the UN General Assembly that, in addition to providing universal membership to the Environment Assembly, gave the Environment Assembly "a high-level ministerial segment to bolster decision making."⁴² Despite this seemingly independent status, the Environment Assembly remains a subsidiary organ of UNEP that is itself "a subsidiary organ of the General Assembly."⁴³ In effect, this means that the Environment Assembly must report its decisions to the General Assembly, a requirement that the other plenary organs of specialized UN agencies are not subject to.⁴⁴ The Environment Assembly meets once annually "with a ministerial segment."⁴⁵ The Security Council remains the only body of the UN with the authority to take disciplinary action and to compel member states to act, which is problematic because it renders many resolutions, such

35. *Id.*

36. *Id.*

37. *Id.*

38. Bharat H. Desai, *The Advent of the United Nations Environment Assembly*, AM. SOC'Y OF INT'L L. (Jan 15, 2015), <https://www.asil.org/insights/volume/19/issue/2/advent-united-nations-environment-assembly>.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

as the Resolution for the Protection of the Marine Environment from Land-Based Activities, essentially ineffective.⁴⁶

B. THE RESOLUTION ON THE PROTECTION OF THE MARINE ENVIRONMENT FROM LAND-BASED ACTIVITIES

In March 2019, the United Nations Environment Assembly adopted a resolution on the protection of the marine environment from land-based activities.⁴⁷ Member States agreed to

1. Enhance the mainstreaming of the protection of coastal and marine ecosystems in policies, particularly those addressing environmental threats caused by increased nutrient, wastewater, marine litter and microplastics in support of the 2030 Agenda as a framework for sustainable development,
2. Enhance capacity-building, know-how, lessons learned, knowledge sharing through collaboration and partnerships involving governments, financial institutions, private sector, civil society and experts at the regional and global levels in the protection of coastal and marine ecosystems from land-based activities and sources of pollution...
4. Encourage the exchange of information, practical experience and scientific and technical expertise cooperative and collaborative action and partnership among governmental institutions and organization, communities, the private sectors and non-governmental organizations which have relevant responsibilities and/or experience.⁴⁸

The Resolution recognizes the importance of cooperation between nations in order to effect actual and positive environmental change.⁴⁹ Seawater and the contaminants it contains as a result of desalination waste can naturally travel between jurisdictions, so the desalination activities of one nation may negatively impact the ecosystem of another.⁵⁰ Therefore, desalination regulation is a concern even for nations that do not rely on desalination themselves. The adoption of the Resolution is a significant achievement because it demonstrates the United Nations' and its member states' dedication to reducing the environmental harm to marine ecosystems from land-based pollution processes like seawater desalination.

While the Resolution is a significant achievement, it lacks important elements that would make it effective. The Resolution does not require any

46. *Id.*

47. *See Towards Sustainable Desalination, supra note 2.*

48. *See Environment Assembly Res., supra note 1.*

49. *Id.*

50. *See Towards Sustainable Desalination, supra note 2.*

action from member states; it merely “encourages”⁵¹ the exchange of information and “invites”⁵² member states to take initiative. The only body of the UN that has the authority to compel member states to act is the Security Council, which is not involved with the Environment Assembly.⁵³

III. APPROACHES TO REGULATING DESALINATION

There are currently two main models for viewing desalination regulation: the “rights-based adversarial model” (RAM) and the “collaborative and adaptive management model” (CAM).⁵⁴ RAM operates on the primary principles of the reasonable use of water, the duty to avoid harm, and the duty to cooperate.⁵⁵ Under this model, liability attaches to a nation that uses irresponsible and harmful desalination practices, compelling it to internalize the cost of pollution.⁵⁶ All three RAM principles—reasonable use of water, the duty to avoid harm, and the duty to cooperate—form a part of the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourse.⁵⁷ The right of reasonable use of water and the duty to avoid harm both stem from the principle of territorial integrity.⁵⁸ The reasonable use of water principle grants states sovereignty over natural resources within their own territory,⁵⁹ while the duty to avoid harm principle prohibits a ratifying-nation from causing environmental harm to its neighbors.⁶⁰ These two principles conflict with one another because the duty to avoid harm compels nations to avoid significant harm while still acting with “due regard” to the right of reasonable use.⁶¹

The third principle, the duty to cooperate, may also be called the obligation of “good neighborliness.”⁶² This duty compels cooperation with neighboring states when implementing national strategies that tend to have

51. See Environment Assembly Res., *supra* note 1.

52. *Id.*

53. See MODEL UNITED NATIONS, *supra* note 29.

54. Kenneth P. Korosi, *Without a Grain of Salt: Evaluating International Permitting Schemes in Light of Industrial-Grade Desalination*, 21 SW. J. Int'l L. 431, 431 (2015).

55. *Id.* at 444.

56. *Id.*; Rhett B. Larson, *Innovation and International Commons: The Case of Desalination under International Law*, 2012 Utah L. Rev. 759 (2012).

57. See Korosi, *supra* note 54, at 444.

58. *Id.*

59. *Id.*

60. *Id.* at 445.

61. *Id.*

62. *Id.*

environmental impacts at the international level.⁶³ All three principles are now prevalent features in customary international law.⁶⁴ The interwoven nature between the right to reasonable use and the duty to avoid harm causes significant confusion amongst conflicting nations because, as each nation seeks to meet its local needs while minimizing impact on its local ecosystem, each nation will assert different goals, either favoring desalination implementation or environmental protection.⁶⁵ The need to alleviate this confusion is precisely why the United Nations needs to step in and create model rules so that there are international standards for desalination regulation.

By contrast, the CAM uses collaborative governance to create a special unitary commission to oversee resources, like water, that move between jurisdictions.⁶⁶ Rather than compelling cost internalization to individual nations like the RAM, the CAM uses collaborative governance to create a special district or commission to oversee spillover goods, like water and air, that move between jurisdictions.⁶⁷ “By focusing governance at the basin level, neighboring nations would establish a joint-governance institution to regulate and manage water development, protection, and conservation.”⁶⁸ However, the success of these joint-governance institutions depends on their perceived legitimacy by neighboring states.⁶⁹ If nations do not see the institution as being legitimate or as having any efficacy, then they will be disinclined to cooperate and invest their own efforts and resources in the project.⁷⁰

The United Nations’ approach is somewhat an amalgam of both the RAM and the CAM. The Resolution calls for collaboration and cooperation between governments, as well as private institutions, for the development of sustainable desalination practices, which falls under the CAM.⁷¹ However, collaboration is merely encouraged, not required, and member states are ultimately left to their own devices for deciding how to manage and regulate their desalination processes, which falls under the RAM model.⁷² Neither the RAM nor the CAM approaches are perfect. One problem with

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 446.

67. *Id.* at 447.

68. *Id.*

69. *Id.*

70. *Id.*

71. Environment Assembly Res., *supra* note 1; Korosi, *supra* note 54, at 447.

72. *Towards Sustainable Desalination*, *supra* note 2. See Environment Assembly Res., *supra* note 1.

the RAM model is that it is a hindsight approach in which liability attaches to nations only after desalination has caused environmental damage.⁷³ A problem with the CAM model is that nations' divergent interests, including the amount of other freshwater available, the population to be served, and the impact on each region's ecosystem, make it difficult to reach consensus on proposed regulations.⁷⁴

A. WHY A BINDING TREATY WILL NOT WORK

In this case, a binding treaty is likely ineffective for many of the same reasons as why either the RAM or the CAM approaches would be ineffective on their own. As discussed, under RAM, as each nation seeks to meet its local needs while minimizing impact on its local ecosystem, each nation will assert different goals, either favoring desalination implementation or environmental protection.⁷⁵ "The CAM model [also] suffers an irreconcilable problem: Creating a collaborative government without the required unanimity for decisions would seldom occur, but creating a collaborative government requiring unanimity in decisions would consistently result in stalemates."⁷⁶ These problems that are present in the RAM and the CAM approaches are also present in the binding treaty approach.

Attempting to draft a treaty that is both fair, and yet meets the needs and capabilities of all individual nations, would be nearly impossible. Saudi Arabia meets approximately 50% of its fresh water needs through desalination and the Bahamas derive most of their fresh water from desalination, but these two countries have very different populations and different economic and technological capabilities.⁷⁷ Attempting to hold each country to strict standards of regulation as defined in a binding treaty aspires to too much and runs into the same problems of the RAM and the CAM approaches.⁷⁸ A binding treaty would either be too lenient overall, in order to accommodate the capabilities of nations with fewer economic and technological resources, or too strict, trying to regulate wealthier countries.

In addition, international environmental conventions and treaties have historically been ineffective.⁷⁹ In January of 2019, the UN released a global

73. Korosi, *supra* note 54, at 448.

74. *Id.* at 448.

75. *Id.* at 445.

76. *Id.* at 448.

77. *Towards Sustainable Desalination*, *supra* note 2.

78. Korosi, *supra* note 54, at 455.

79. De Vann Sago, *The Difficulties of Enforcing Global Environmental Law*, GEO. ENV'T L. REV. (Feb. 1, 2019), <https://www.law.georgetown.edu/environmental-law->

assessment on the environmental rule of law, the first ever report of this kind.⁸⁰ It found that, despite a substantial increase in the amount of environmental protection agencies and laws, widespread failure to adequately enforce regulations has impeded the international effort to combat numerous environmental threats.⁸¹ In other words, countries across the globe recognize the need for environmental protection but have failed to implement effective policies to achieve this end.⁸² “Lack of sufficient enforcement mechanisms is an issue that affects international bodies and agreements” across the globe and throughout the modern era.⁸³ This issue continues to complicate and undermine the international community’s efforts to implement effective global environmental policy today.⁸⁴ The UN report goes so far as to suggest that, although environmental laws have substantially multiplied in number in recent years, they nonetheless “exist mostly on paper” due to insufficient, inconsistent, or faulty implementation and enforcement.⁸⁵

This problem has two basic components that can be viewed as “layers.”⁸⁶ The first layer consists of international bodies like the UN, and the difficulties such international organizations face in enforcing international rules on individual member states.⁸⁷ The second layer of this issue is the individual states themselves.⁸⁸ While the individual states may “arguably suffer less from lack of ability to enforce environmental regulations,” they also suffer more from “a lack of motivation to implement potentially costly regulations with no guarantee that other states will follow suit.”⁸⁹ This is an illustration of the free-rider phenomenon; nations may assume that because others are implementing environmental regulations, there is no need to do so themselves. The international community’s lack of ability to enforce global environmental law partially comes from the

review/blog/214/#_ftnref2; School of International Service, *A Beginner’s Guide to Environmental Agreements*, AM. U. SCH. INT’L SERV. (Dec. 13, 2018), <https://ironline.american.edu/blog/beginners-guide-environmental-agreements/>; Science Safety Security, *International Agreements*, U.S. DEP’T HEALTH AND HUM. SERV. (Feb. 15, 2018), <https://www.phe.gov/s3/law/Pages/International.aspx>.

80. See Sago, *supra* note 79.

81. U.N. Env’t Programme [UNEP], *Environmental Rule of Law: First Global Report* (2019); Sago, *supra* note 79.

82. Sago, *supra* note 79.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

reluctance of individual states to surrender sovereignty to international organizations.⁹⁰ As a result of this reluctance, international environmental agreements, like the Paris Agreement,⁹¹ are often voluntary in nature. This means that, even if the treaty or agreement purports to be legally binding, the UN does not actually have the power or authority to compel individual signatories to comply with the terms.⁹²

Additionally, nations may sign the agreement, but it has no effect on the countries' laws until the countries' governments have ratified the agreement and incorporated it into their own codes of law.⁹³ Moreover, the governments of individual states who sign international environmental agreements may be reluctant to vigorously enforce their provisions knowing that there is no guarantee that all signatories will do the same.⁹⁴ This has essentially the same effect as the free-rider issue discussed above, but with a different rationale; nations feel that if other nation states will not uphold their end of the deals, then there is no need to do so themselves, either.⁹⁵ On top of this conundrum, "the cost of implementing rigorous environmental standards may be impracticable, or simply not worth it, to governments where noncompliance could save them substantial costs."⁹⁶ In other words, with the current state of environmental regulation enforcement, it is simply less costly for nations to be noncompliant than to bring themselves into compliance. "Lack of ability and, in some cases, motivation to effectively implement these policies on an individual state level, and lack of effective enforcement mechanisms on the international level both contribute to the global community's failure to enforce the environmental rule of law."⁹⁷ This is why an alternative solution is needed for the effective regulation of seawater desalination.

Also, a binding treaty would be difficult to change and adapt as more technological advancements are made. Technological innovations and innovative financial mechanisms to support the sustainability of

90. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 116 (2008).

91. The Paris Agreement is an international treaty that was adopted in 2015 and targeted climate change. The treaty's goal is to limit global warming and reduce global emissions of greenhouse gasses. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. See Sago, *supra* note 79.

92. Sago, *supra* note 79.

93. *A Beginner's Guide to International Agreements*, *supra* note 79; *International Agreements*, *supra* note 79.

94. *A Beginner's Guide to International Agreements*, *supra* note 79; Sago, *supra* note 79.

95. Sago, *supra* note 79.

96. *Id.*

97. *Id.*

desalination schemes are necessary for affordable and environmentally friendly systems to be rolled out in low-income and lower middle-income countries.⁹⁸ For this reason, the United Nations needs a more flexible approach that can match varying nations' capabilities.

B. CAP-AND-TRADE

One scholar, Kenneth Korosi has proposed a fourth option for regulating desalination: cap-and-trade.⁹⁹ Cap-and-trade has traditionally been used as a regulatory scheme for carbon dioxide emissions, and other greenhouse gasses.¹⁰⁰ Essentially, in a cap-and-trade system, governments issue a limited number of annual permits, called “allowances,” which allow companies to emit set amounts of carbon dioxide or other pollutive agent.¹⁰¹ The “cap” is the total amount of pollution allowed by the permit.¹⁰² If the company releases a greater amount of pollution than their cap, then the company is taxed at a higher level.¹⁰³ However, if the company creates less pollution than their cap, then the company can sell its unused permits to other companies.¹⁰⁴ This is the “trade” function of cap-and-trade. Companies are thus incentivized to reduce their emissions because they can profit from selling their unused permits.¹⁰⁵

In theory, each year, the issuing government reduces the number of permits available and consequently lowers the total emissions cap.¹⁰⁶ The scarcity of the allowances makes them more expensive, which in turn, gives companies an even greater incentive to invest in greener or cleaner technology because the green technology eventually becomes cheaper than buying the allowances.¹⁰⁷

In his paper, *Without A Grain Of Salt: Evaluating International Permitting Schemes In Light Of Industrial-Grade Desalination*,¹⁰⁸ Kenneth Korosi argues that a cap-and-trade system solves the problem of the RAM and the CAM approaches, and is the perfect vehicle for regulating

98. *Id.*

99. Korosi, *supra* note 54, at 449.

100. Will Kenton, *Cap and Trade*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/cap-and-trade.asp> (last updated Dec. 5, 2020).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Korosi, *supra* note 54, at 444.

desalination at the international level.¹⁰⁹ Cap-and-trade does address some of the key issues with RAM and CAM, as well as some of the problems associated with a treaty approach. Korosi acknowledges that the RAM approach is too reactive and not proactive enough and also acknowledges that it is nearly impossible for governing bodies to reach consensus under the CAM approach.¹¹⁰ In addition, he also recognizes that “treaties will not be enough”¹¹¹ because “forcing any standardized compliance on such a delicate market will smother its implementation and consequent innovation.”¹¹² Korosi, therefore, argues that cap-and-trade is the perfect solution to all of these issues because, by encouraging companies to reduce emissions at the cheapest price, cap-and-trade schemes “increase flexibility to local conditions.”¹¹³ Since the desalination needs of different nations and regions are diverse, establishing a system of allowances for the varying levels of desalination pollution produced by these nations is logical, at least on the surface.¹¹⁴ Korosi does acknowledge that “a seawater desalination plant’s isolated location would negate environmental concern from a neighboring country, making it unfair to limit its pollution under any cap-and-trade.”¹¹⁵ More broadly, a system of cap-and-trade may seem unfair when the environmental impacts of a desalination plant are not felt by other nations.¹¹⁶ Korosi’s solution is to establish cap-and-trades schemes regionally.¹¹⁷ This way, the scheme only includes desalination plants that pollute shared ecosystems.¹¹⁸ Negotiating nations would share the cost of the environmental impact studies needed to determine the particular geographic area to be protected.¹¹⁹ However, desalination plants outside this geographic and outside of the particular cap-and-trade scheme would not be subject to regulation.¹²⁰

In addition to establishing particularized geographic area and specific ecosystems for protection, the cap-and-trade scheme would allow nations to create yearly caps for “future environmental compliance”¹²¹ that could be

109. *Id.* at 449-54.

110. *Id.* at 444-48.

111. *Id.* at 455.

112. *Id.*

113. *Id.* at 448.

114. *Id.*

115. *Id.* at 450.

116. *Id.*

117. *Id.* at 451.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

modified annually to “respond to changing conditions.”¹²² This feature would eliminate the inflexibility of the RAM approach and incorporate the collaborative and flexible nature of the CAM approach.¹²³

Then, once cap-and-trade schemes have been established at the regional level, desalination regulation may be brought to the international level through linkages.¹²⁴ A linkage is essentially when one cap-and-trade scheme combines with another.¹²⁵ A linkage occurs when one government allows its “regulated entities,” in this case desalination plants, to use allowances from other schemes to meet their compliance obligations.¹²⁶ This linking can occur either directly, or indirectly.¹²⁷ With a direct linkage, one government’s scheme directly accepts another scheme’s allowances, whereas with an indirect linkage, two schemes are connected through a third, commonly shared scheme.¹²⁸

This series of linkages of schemes between nations is an interesting concept because it theoretically allows for desalination regulation at the regional level, where the harm from desalination is immediately felt, and at the international (and presumably global) level, where the harm from desalination is more abstract, and felt in the long-term.¹²⁹ As Korosi explains, with regard to the short-term and long-term benefits of linkages,

[s]hort-term results include opening the market and creating greater liquidity without harmonizing emerging and existing schemes, and long-term results might include a singular global scheme that regulates desalination or climate change as a whole or a large set of direct links that joins each regional scheme. Opening a regional scheme’s market for trading creates greater liquidity, efficient trading, and innovative compliance. These linkages, however, serve a greater purpose. They provide an international structure for overall pollution reduction. This may come from establishing multilateral links or from an international agreement regulating desalination.¹³⁰

Despite seeming like the best of all worlds, however, a series of cap-and-trade schemes and linkages ignores an obvious problem.

122. *Id.*

123. *Id.* at 444-55.

124. *Id.* at 449, 453.

125. *Id.*

126. *Id.*

127. *Id.* at 453.

128. *Id.*

129. *Id.* at 449, 453-54.

130. *Id.* at 453-54.

The ability to purchase allowances from other schemes is central to the cap-and-trade system.¹³¹ Allowances basically determine how much pollution a company is allowed to create/emit.¹³² A company or scheme may continue to release large amounts of pollution, as long as they can purchase enough allowances from other companies/schemes to accommodate their emissions.¹³³ In the desalination context, this means that a desalination plant could continue to devastate its surrounding environment, as long as it has purchased allowances from another company that enable it to meet its compliance obligations. This potential for continued devastation is particularly true regarding the release of the toxic brine byproduct. The harm resulting from the release of carbon emissions and other greenhouse gasses from desalination plants may not be immediately apparent but undeniably contributes to global warming.¹³⁴ A cap-and-trade system may make sense for regulating desalination in regard to greenhouse gas emissions, because pollution reduction of one scheme may make up for the continued emissions of another scheme, resulting in an overall, global decrease in greenhouse gas emission.¹³⁵

The release of toxic brine byproduct back into the ocean, on the other hand, has a direct and easily identifiable impact on the area's ocean health.¹³⁶ One desalination plant's reduction in the amount of toxic brine release cannot possibly make up for another plant's continued toxic brine release, because the marine ecosystem surrounding the second plant will just continue to be devastated. For this reason, I propose a fifth approach to desalination regulation: a system of UN model rules with a task force for their enforcement.

131. See Kenton, *supra* note 100.

132. *Id.*

133. *Id.*

134. *Towards Sustainable Desalination*, *supra* note 2. See also Atef Badr, *Desalination Sustainability: The Need to Think Again*, in *TOWARDS A SUSTAINABLE WATER FUTURE: PROCEEDINGS OF OMAN'S INTERNATIONAL CONFERENCE ON WATER ENGINEERING AND MANAGEMENT OF WATER RESOURCES* 171, 176-77 (Atef Badr & Jean Venables eds., 2021).

135. See Kenton, *supra* note 100.

136. See *Toward Sustainable Desalination*, *supra* note 2; see also Jones et al., *supra* note 9, at 1344.

IV. THE UN SHOULD ADOPT MODEL RULES THAT COMBINE THE RIGHTS-BASED ADVERSARIAL MODEL WITH THE COLLABORATIVE AND ADAPTIVE MANAGEMENT MODEL, AND CREATE A TASKFORCE FOR THE ENFORCEMENT OF THE MODEL RULES

Neither the RAM nor the CAM approaches are perfect on their own, and the cap-and-trade approach has its own drawbacks, as discussed. For this reason, a new approach is needed; one that will combine the best elements of other proposed approaches while eliminating the weaknesses of said approaches. To this end, Subsection A argues that the UN should adopt model rules that combine the RAM and the CAM approaches. In order to ensure that the model rules are effective, the UN needs a system of enforcement. Subsection B argues that the UN should establish a taskforce comprised of experts in the desalination field, who will visit nations' desalination facilities and ensure compliance with the model rules.

A. COMBINING THE RAM AND THE CAM TO CREATE MODEL RULES

To help solve these problems with both the rights-based adversarial model (RAM) and the collaborative and adaptive management model (CAM), the United Nations should adopt model rules regarding the minimum environmental considerations and requirements for desalination. These should include rules regarding the energy consumption of desalination plants, geographic placement of desalination plants, and disposal of the brine byproduct. Adopting such rules would alleviate the hindsight problem of the RAM model by informing nations of the practices they must follow to avoid liability in the first place. It would also ease the potential tensions caused by the CAM model because countries would have more uniform guidelines to follow, thus making it easier to reach consensus.

B. USING A TASKFORCE FOR THE ENFORCEMENT OF MODEL RULES

In this case, a binding treaty is out of reach. With desalination plants in 177 countries around the globe, it would be nearly impossible to reach consensus on terms for ratification because different countries have very different interests and economic capabilities when it comes to regulating

desalination.¹³⁷ A better approach is to adopt model rules as guidelines and establish a taskforce for enforcement. The Financial Action Taskforce can serve as a model for how the United Nations should structure its own task force.

For example, the Financial Action Task Force (FATF) is an unelected, inter-governmental body comprised of thirty-four countries and two regional organizations dedicated to ending money laundering around the world.¹³⁸ Each country adopts rules compatible with its economic circumstances and legal system, like the RAM approach.¹³⁹ The FATF uses a “soft” law approach to international law, as opposed to a “hard” law approach.¹⁴⁰ An international law instrument is hard when it “provides concrete prescriptions,” is “accompanied by a strong expectation of enforcement,” and is otherwise “highly authoritative.”¹⁴¹ Treaties are a classic example of a hard law approach.¹⁴² By contrast, an international law instrument that does not have these traits is considered “soft.”¹⁴³ The FATF uses soft law to address three challenges of international law: “(1) the demands for rapid responses to global financial crises; (2) the unwillingness of domestic legislatures, especially economically powerful ones, to cede control or sovereignty; and (3) the difficulty in reaching a consensus on technical issues, particularly when the outcomes may be subject to political tinkering as a condition of ratification.”¹⁴⁴ A soft law approach is more “flexible” and can be rolled out and employed more quickly than a hard law approach.¹⁴⁵ In addition, a soft law approach may better convince nations to uphold their agreements and fulfill their promises because it uses enforcement mechanisms that are more likely than traditional hard law approaches to incentivize nations to comply.¹⁴⁶

The FATF takes a risk-based approach to preventing money laundering, as opposed to a rules-based approach.¹⁴⁷ The two primary

137. See *Towards Sustainable Desalination*, *supra* note 2.

138. Jack P. Sahl, *Combating Threats to the International Financial System: The Financial Action Task Force: Lawyer Ethics and the Financial Action Task Force: A Call to Action*, 59 N.Y.L. SCH. L. REV. 457, 467 (2015).

139. *Id.* at 468; Korosi, *supra* note 54, at 444.

140. Nicholas W. Turner, *The Financial Action Task Force: International Regulatory Convergence Through Soft Law*, 59 N.Y. L. REV. 547, 548 (2014).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 549.

145. *Id.* at 558.

146. *Id.* at 558-59.

147. See Sahl, *supra* note 138, at 468.

benefits of the FATF's approach are that it allows members to *conserve* their limited resources with regard to combatting money laundering and terrorist financing activities, and it allows members to *focus* their limited resources on where they are most needed to reduce the risk of money laundering and terrorist financing.¹⁴⁸ The FATF has set Recommendations that outline risk-based preventative measures for financial institutions and, on a more limited basis, other professions, such as realtors and lawyers, to combat money laundering.¹⁴⁹ The Recommendations also apply to preventing terrorist financing.¹⁵⁰

Although the FATF purports not to use a rules-based approach, the Recommendations' preventative measures do become "de facto mandatory obligations"¹⁵¹ for FATF members who do not want to be labeled noncompliant. While being "obligations," the Recommendations are also generally flexible enough that a country can adopt and enact rules that are in line with its own governing systems, legal system, and economic circumstances.¹⁵² For example, one Recommendation provides that lawyers and other designated non-financial businesses and professions "should be required to report suspicious transactions when, on behalf of or for a client, they engage in financial transactions in relation to the activities" and provides a list covering a broad range of legal services including: "[the] buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities."¹⁵³

The United Nations should also incorporate a system of self and peer review, like the FATF does.¹⁵⁴ For the self-review portion, FATF members are required to complete an annual self-assessment questionnaire that covers the country's implementation of FATF policies.¹⁵⁵ The FATF then reviews country's answers to the questionnaire to check that the country is actually in compliance with the FATF's standards.¹⁵⁶ Next, FATF members also review each other through a peer-review process, like the CAM

148. *Id.* at 468-69.

149. *Id.* at 469.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 470.

155. *Id.*

156. *Id.*

approach.¹⁵⁷ Unlike a binding treaty, adopting a system of self and peer review of compliance with the model rules will allow flexibility for regulations that are within a country's capabilities and make it easier to adapt regulations in the event of future technological advances. The FATF's "Mutual Evaluation process" operates effectively because it "incentivizes member countries to become more proactive in enforcement through a higher level of participation and involvement."¹⁵⁸ Members of the FATF work to bring themselves into compliance with the Recommendations because, if they are found to be noncompliant, they will be identified on a publicly available list as a "noncooperative countr[y] and territor[y]," which would "jeopardize their governments' political standing both at home and abroad."¹⁵⁹ In addition, a noncooperative country risks having their FATF membership suspended, which encourages the country to work quickly to remedy its "deficiencies."¹⁶⁰ This threat gets its effectiveness mainly through the fear of shaming or sanctions.¹⁶¹ "Noncompliance adversely reflects on nations' reputations to honor their international obligations and potentially exposes them to a system of sanctions, such as 'blacklisting . . . accompanied by countermeasures.'"¹⁶² Often, even the mere threat of being blacklisted will encourage noncompliant countries to resolve the problems keeping them from adhering to the Recommendations, and incentivize them to "bring themselves into compliance."¹⁶³

The United Nations should take an approach that mirrors the Financial Action Task Force. The main problem with international environmental treaties is that they lack an enforcement mechanism, and therefore carry little weight. A task force like the FATF would help keep countries accountable for their desalination regulation processes.

The task force should be comprised of experts in the field, including those from both the public and private sectors. This directly aligns with the Resolution's stated goal of encouraging the exchange of information, practical experience, and scientific and technical expertise among governmental institutions and private sectors that have relevant responsibilities and experience. Gathering a group of people across multiple organizations will help create a task force that is the most representative of

157. *Id.*

158. *Id.* at 471.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 471-72.

163. *Id.* at 472.

all the companies, organizations, and people it monitors and regulates. It makes the most sense to have the people who understand the science of desalination and the workings of the industry regulate the desalination industry because they are in the best position to understand the capabilities of nations to regulate desalination within their own particular circumstances. They are also the best suited to know what regulations are physically possible, and what regulations will be possible in light of technological advancements in the field.

The UN model rules regarding desalination would serve as the guidelines or standards by which to judge a nation's regulatory efforts, similar to how the FATF's Recommendations function. The FATF purports not to use a rules-based approach, but their Recommendations essentially function as model rules, guiding countries' efforts in complying with industry and international standards or regulatory norms. Similarly, the UN's model rules should be flexible enough to allow members to conserve their resources for combatting harmful ecological effects from desalination and to allow members to focus their limited resources on situations and persons that pose the greatest risk to the environment.

In concurrence with these model rules, the UN should have a system of self- and peer-review like the FATF. First, member states will evaluate their own regulations and assess how well they conform to the model rules and how they compare with other members' desalination regulation efforts. Next, the task force will visit the various members' desalination facilities and review their implementation of regulatory schemes. Like with the FATF, member states wish to avoid being judged as noncompliant with the model rules to avoid being identified on a publicly available list as a noncooperative country or territory because it would "jeopardiz[e] their governments' political standing both at home and abroad."¹⁶⁴ Countries who are found not to be in compliance with the rules will be encouraged to make rapid progress to remedy their deficiencies, because noncompliant countries and territories would risk negative reflections on their reputations to honor their international obligations and be exposed to a system of sanctions, such as blacklisting accompanied by countermeasures.

Blacklisting is a soft law measure because it does not include official sanctions or binding legal decisions.¹⁶⁵ Some may argue that the lack of such hard law measures make blacklisting toothless because nations will have no incentive to comply.¹⁶⁶ However, this is not the case because, as of

164. *Id.* at 471.

165. J. C. Sharman, *The Bark is the Bite: International Organizations and Blacklisting*, 16 *REV. OF INT'L AND POL. ECON.* 573, 574 (2009).

166. *Id.*

2009, in all twenty-three cases where the FATF blacklisted or threatened to blacklist countries, “the actual or anticipated negative consequences of blacklisting have been sufficient to induce compliance with international organizations’ demands.”¹⁶⁷

Blacklisting works essentially by tarnishing a country’s reputation.¹⁶⁸ When the country’s name is placed on a blacklist, then other nations may be discouraged from doing business with or investing in that country.¹⁶⁹ Countries who suffer these consequences will enact reforms to bring themselves into compliance with the FATF’s regulations, or in this case, into compliance with the UN model rules for desalination regulation.¹⁷⁰ However, this approach does not only work in hindsight...it can also be proactive.¹⁷¹ Countries who are warned about the possibility that they will be blacklisted may enact anticipatory reforms to bring themselves into compliance and avoid being blacklisted in the first place.¹⁷²

V. HOPE FOR THE FUTURE

There is hope for the future of desalination technology. Today, most desalination plants use reverse osmosis technology.¹⁷³ Recent advancements in reverse osmosis technology may significantly reduce the amount of energy required to pressurize salt water and force it through membranes.¹⁷⁴ The development of nanostructured reverse osmosis membranes can provide more efficient water transport than the conventional membranes used by desalination plants.¹⁷⁵ The new nanostructured membranes

reportedly have much higher specific permeability than conventional [reverse osmosis] membranes at practically the same high salt rejection. In

167. *Id.*

168. *Id.* at 577, 588.

169. *Id.* at 577-79.

170. *Id.* at 574, 582.

171. *Id.*

172. *Id.* at 582, 584.

173. Ahmad Al Amoudi & Nikolay Voutchkov, *Innovation in Desalination—The Path Forward*, IDA GLOBAL CONNECTIONS 26, 27 (Fall 2021).

174. *Id.*; Robert Sanders, *Improved Desalination Process Also Removes Toxic Metals to Produce Clean Water*, BERKELEY NEWS (Apr. 15, 2021), <https://news.berkeley.edu/2021/04/15/improved-desalination-process-also-removes-toxic-metals-to-produce-clean-water/>; *Breakthrough In Reverse Osmosis May Lead to Most Energy-Efficient Seawater Desalination Ever*, PURDUE UNIV. NEWS (May 12, 2021), <https://www.purdue.edu/newsroom/releases/2021/Q2/breakthrough-in-reverse-osmosis-may-lead-to-most-energy-efficient-seawater-desalination-ever.html>.

175. Amoudi & Voutchkov, *supra* note 173.

addition, nanostructured membranes have comparable or lower fouling rate than conventional thin-film composite [reverse osmosis] membranes operating at the same conditions, and they can be designed for enhanced rejection selectivity of specific ions.¹⁷⁶

Membrane fouling occurs when substances accumulate on the membrane's surface or in its pores, thus diminishing the membrane's filtering performance.¹⁷⁷ As the membranes become clogged, more energy is expended to force the water through.¹⁷⁸ Essentially, the new nanostructured membranes are tailored to filter out specific substances, and since they filter out only the specified substances, they clog less quickly and less easily.¹⁷⁹ This means that less energy will be required overall.

Another encouraging trend is the use of renewable energy sources for powering desalination plants.¹⁸⁰ Solar energy offers a green alternative to the traditional fossil fuels used to power desalination plants.¹⁸¹ Saudi Arabia is a global leader in desalination technology and has recently invested in developing greener, solar-based technologies for seawater desalination.¹⁸² Saudi Arabian teams have united with Solar Water, a United Kingdom company, to design and build a new, planned city called Neom.¹⁸³ Neom is intended to be a “futuristic desert metropolis” that will meet all of its fresh water need from a desalination plant using “Solar Dome” technology.¹⁸⁴ The Solar Dome “uses concentrated solar power—technology which already exists—to evaporate seawater inside a giant dome, separating fresh, drinkable water from extremely saline brine.”¹⁸⁵

176. *Id.*

177. Norhan Nady et al., *Modification Methods for Poly(arylsulfone) Membranes: A Mini-Review Focusing on Surface Modification*, 275 *DESALINATION* 1, 1 (2011).

178. *Id.* at 2.

179. Amoudi & Voutchkov, *supra* note 173.

180. *See Towards Sustainable Desalination*, *supra* note 2.

181. *Id.*

182. Ben Flanagan, *What's Inside This Giant 'Solar Dome' Coming to Saudi Arabia*, *WIRED* (July 17, 2021), <https://wired.me/science/environment/desalination-solar-dome-saudi-arabia-neom/>; *Al Khafji Solar Saline Water Reverse Osmosis (Solar SWRO) Desalination Plant*, *WATER TECH.*, <https://www.water-technology.net/projects/al-khafji-solar-saline-water-reverse-osmosis-solar-swro-desalination-plant/> (last visited Oct. 27, 2022).

183. *Concentrated Solar Heat to Desalinate Seawater at Saudi Neom City*, *SOLARPACES* (Feb. 16, 2020), <https://www.solarpaces.org/concentrated-solar-heat-to-desalinate-seawater-at-saudi-neom-city/>.

184. *Id.*

185. *From Desert to Oasis: Saudi Arabia and the Global Revolution in Water Treatment*, *GULF MORNING NEWS* (Apr. 4, 2021), https://gulfmorningnews.com/from-desert-to-oasis-saudi-arabia-and-the-global-revolution-in-water-treatment/?utm_source=ReviveOldPost&utm_medium=social&utm_campaign=ReviveOldPost .

The plant's goal is to be carbon-neutral, and the Solar Dome technology can make this possible.¹⁸⁶

In addition to the recent progress in reducing energy consumption and carbon emissions in desalination, there has been progress regarding the production and disposal of the toxic brine byproduct.¹⁸⁷ For one thing, the new nanostructured membranes' improved filtering leads to less of the byproduct overall.¹⁸⁸ Also, it is now possible to manufacture "commercially valuable products" from the brine byproduct. Minerals, such as magnesium, lithium, and pure sodium chloride, can be extracted from the brine.¹⁸⁹ These minerals are highly valuable for production of other products, and extracting them from seawater is more environmentally friendly than traditional terrestrial mining.¹⁹⁰ There is also a recent trend in the desalination industry toward chemical-free desalination.¹⁹¹ Chemicals are typically used to treat the wastewater and clean the reverse osmosis membranes.¹⁹² These chemicals are used to "remove solids or other contaminants prior to being added to the desalination concentrate for discharge."¹⁹³ However, with the new nanostructured membranes, there are fewer solids and contaminants that need to be removed in the first place, so fewer chemicals will be needed to remove them.¹⁹⁴

These innovations are the type that a United Nations task force would keep in mind when determining how desalination plants across the globe can become more environmentally friendly. At this point in time, all countries may not have the resources to implement these technologies and practices. This is precisely why a task force comprised of experts in the field, as discussed in Part IV of this paper, is necessary and why it will be successful. It can help countries devise ways they can eventually employ and utilize these technologies. By working together with the various United Nations' member states to find ways to implement greener technologies, the harm from desalination practices can be greatly reduced.

186. Flanagan, *supra* note 182; *Concentrated Solar Heat to Desalinate Seawater at Saudi Neom City*, *supra* note 183.

187. *See* Amoudi & Voutchkov, *supra* note 173, at 27-28.

188. *Id.* at 27.

189. *Id.* at 27-28.

190. *Id.*

191. *Id.* at 28.

192. *Id.*

193. *Id.*

194. *Id.* at 27-28; *See* Sanders, *supra* note 174; *Breakthrough in Reverse Osmosis May Lead to Most Energy-Efficient Seawater Desalination Ever*, *supra* note 174.

VI. CONCLUSION

As freshwater becomes scarcer across the globe, and sea levels continue to rise due to climate change, seawater desalination is a more viable solution for providing fresh water. As nations employ seawater desalination more, the importance of regulating its environmental impacts increases. The United Nations has taken an important first step with its Resolution on the Protection of the Marine Environment from Land-Based Activities, but now it is time to take the next step and implement rules and establish a task force for their enforcement.

Model rules will provide much needed clarity by serving as standards by which nations can measure their own desalination regulations and against which the task force can evaluate their effectiveness. This avoids the problems with the rights-based adversarial model (RAM) and collaborative and adaptive management model (CAM) approaches. The implementation of the task force solves the problem posed by a treaty approach by providing enforcement mechanisms and enough flexibility to modify desalination regulations with technological advancements.

LET ME GET MY HUMAN FOR THAT: THE STRUGGLES OF A BROKEN PATENT SYSTEM FOR AI INVENTORS

*Jessica Smith**

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* Jessica is a 3L in the traditional day program at Southwestern Law School. She is a Lead Articles Editor for Southwestern’s Journal of International Law, the Editor-in-Chief for Southwestern’s Law Commentator, a Senior Writing Fellow, and a member of the Negotiations Honors Program. In addition to her education at Southwestern, Jessica is also pursuing her MBA at the Claremont Graduate University through Southwestern’s JD/MBA partnership. Currently, Jessica works for a real estate development company, Columbus Pacific, and she will pursue a career in real estate development after graduation while finishing her MBA.

I. INTRODUCTION

“Hey, Siri, what is artificial intelligence?” A quick question to Apple’s Siri elicits the Wikipedia definition stating that Artificial Intelligence (AI) is “intelligence demonstrated by machines, as opposed to the natural intelligence displayed by animals including humans.”¹ The idea of AI evokes a variety of images for different people. Some may think of robots; others may even envision Siri herself. Siri comes in many forms; someone may associate her with the floating, colorful orbital at the bottom of the iPhone screen, or he may have a full image of what she looks like from head to toe. Others thinking of AI will turn to the elusive Sophia, Hanson Robotics’ human-like robot who “personifies our dreams for the future of AI.”² Sophia is acclaimed for her talents and visited television sets worldwide, as she walked the stages of *The Tonight Show*³ and *Good Morning Britain*.⁴ Sophia demonstrated to the world how AI steps closer to possessing human-caliber intelligence every day and with every innovation.

While we once lived in a world in which humans created AI, and then humans coined the AI as their inventions, we now encounter far developed AI that creates its own inventions, absent human interaction. For example, Lucid.AI claims that its technology can make human-like qualitative deductions and can successfully solve the business world’s most complicated problems.⁵ As such, Lucid.AI worked on behalf of an investment banking client and saw “connections across long chains of relationships not detected by human compliance functions.”⁶ While impressive, Lucid.AI’s output falls short of ground-breaking for technology capabilities today. Intellectual Property (IP), which in Lucid.AI’s case is data, is the normal output for any research company or device. The human inventors who created Lucid.AI surely have armed their invention with lawful protection over its thirty-year conception period.⁷ However, Lucid.AI undoubtedly creates its own IP through its reasoning. Now, how can Lucid.AI protect its inventions? Should Lucid.AI file for its own patent

1. Artificial Intelligence, WIKIPEDIA (last visited Nov. 25, 2021), https://en.wikipedia.org/wiki/Artificial_intelligence.

2. Hanson Robotics, *Sophia* (last visited Nov. 25, 2021), <https://www.hansonrobotics.com/sophia/>.

3. Jimmy Fallon, *The Tonight Show* (NBC television broadcast Nov. 18, 2018).

4. Good Morning Britain (ITV June 17, 2017).

5. Lucid.AI, *Lucid Technology* (last visited Nov. 25, 2021), <https://lucid.ai/technology/>.

6. Lucid.AI, *Success Stories* (last visited Nov. 25, 2021), <https://lucid.ai/success-stories/>.

7. Lucid AI, *supra* note 5.

to protect its IP, or should the human inventors of the technology take the credit? Today, we face this long-winded debate about AI's lawful rights.

Given the technological advances of AI, courts must recognize the evolving role of AI in developing patents. However, the most effective system requires countries to develop a harmonized approach that allows a human co-inventor to be named on the patent with the AI.

The article proceeds as follows. Part II provides background information regarding the most prominent litigation regarding AI's rights to the patents in various countries. Part III explains that AI itself is only property and will never meet the human threshold needed to own property or to enter contracts; it would merely act as a shell for its owners. Part IV argues that because a fair trial to protect a patent requires that an inventor must testify in court, and AI legally cannot take an oath to testify, a human co-inventor must pair with an AI to explain the AI's processes in court; otherwise, AI could infringe on other patents and keep the evidence hidden. Part V offers a response to critics who are concerned that AI will not be properly credited for the mental conception of its intellectual property by arguing that trade secret law provides a good alternative because it does not require a human inventor. Part VI examines the patent system and explores the possibility of creating international harmonization among the patent laws. Finally, Part VII concludes with recommendations for the World Intellectual Property Organization to create a universal patent law.

II. BACKGROUND

Patents serve as a powerful protection for inventors to ensure that they receive credit for their IP and inventions. According to Cornell Law School, “[a] patent grants the patent holder the exclusive right to exclude others from making, using, importing, and selling the patented innovation for a limited period of time.”⁸ Patentable material must: (1) be of patentable subject matter, (2) have utility, (3) be novel, (4) be nonobvious, and (5) be enabled.⁹ Patent laws also prescribe how the patented material can be protected, utilized, and owned.

Perhaps surprisingly, each country enacted its own patent law to govern its territory. For example, the United States (U.S.) sets forth a foundation for patents in Article I, section 8 of the U.S. Constitution.¹⁰ The Article grants Congress the power to “promote the progress of science and

8. Cornell Law, *Patent* (last visited Nov. 25, 2021), <https://www.law.cornell.edu/wex/patent>.

9. *Id.*

10. *See* 35 U.S.C.

useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹¹ Further, the U.S. formed the Patent Act, 35 U.S. Code, to grant additional protections to inventors.¹² The Patent Act prohibits double patenting for the same invention, proscribes the subject matter eligibility, describes the utility necessary for the invention, and defines who may be named an inventor.¹³ People in the intellectual property community largely accept the law, but the area of who may be named an inventor leads to a hot debate.

U.S. patent law requires the inventor named on the patent be the person who mentally conceives of the IP.¹⁴ Before the technological advances of AI, patent law adequately met the needs of human inventors. However, since AI now can mentally conceive of its own IP, proponents of AI inventors believe that the law must change to allow for AI inventors to protect their IP through patents.¹⁵ Stephen Thaler is one of the greatest proponents of this amendment.

Thaler is the President and CEO of Imagination Engines Incorporated.¹⁶ He invented a machine, Device for Autonomous Bootstrapping of Unified Sentience (DABUS), with intentions for the AI to create its own inventions.¹⁷ He described DABUS as a human-like machine which “is sentient and develops ideas.”¹⁸ Further, he said DABUS is “a swarm of many disconnected neural nets, each containing interrelated memories” that “are constantly combining and detaching due to carefully controlled chaos introduced within and between them.”¹⁹

In 2019, DABUS invented a “food storage container based on fractal geometry.”²⁰ Thus, Thaler filed the patent in DABUS’s name because

11. Bitlaw, *Patent Law in the United States* (last visited Nov. 25, 2021), <https://www.bitlaw.com/patent/index.html#summary>.

12. See 35 U.S.C. § 271.

13. See 35 U.S.C. §§ 100, 101, 102, 103, 112.

14. The United States Patent and Trademark Office, 2109 INVENTORSHIP [R-10.2019] (last visited Nov. 25, 2021), <https://www.uspto.gov/web/offices/pac/mpep/s2109.html>.

15. IP Stars, *The Latest News on the DABUS Patent Case* (last visited Nov. 25, 2021), <https://www.ipstars.com/NewsAndAnalysis/the-latest-news-on-the-dabus-patent-case/Index/7366>.

16. Imagine Engines Incorporated, STEPHEN L. THALER (last visited Feb. 5, 2023), <https://imagination-engines.com/founder.html>.

17. IP Stars, *supra* note 15.

18. Max Walters, *DABUS Applicant: ‘It Would be Criminal to list Myself as Inventor’* (last visited Nov. 25, 2021), <https://www.managingip.com/article/b1p6d2xrpdxrfs/dabus-applicant-it-would-be-criminal-to-list-myself-as-inventor>.

19. Michael M. Rosen, *AI Invents- But Should it Get Patents, Too?* (last visited Nov. 25, 2021), <https://issues.org/artificial-intelligence-patents-innovation-rosen/>.

20. IPWATCHDOG, *DABUS Gets Its First Patent in South Africa Under Formalities Examination* (last visited Nov. 25, 2021), <https://www.ipwatchdog.com/2021/07/29/dabus-gets-first-patent-south-africa-formalities-examination/id=136116/>.

DABUS mentally conceived the invention.²¹ Courts in South Africa, the United Kingdom, the U.S., Europe, and Australia reviewed DABUS's patent application.²² Only South Africa granted the patent, making DABUS the first AI inventor to hold a patent.²³ Further, this decision granted a patent to the first artificial intelligence in history.²⁴

South Africa's decision created turmoil within the intellectual property legal world. South Africa's patent system "does not offer formal examination and instead requires applicants to merely complete a filing for their invention."²⁵ It also does not define who can be an "inventor" in its patent law.²⁶ Many skeptics attribute DABUS's South Africa win to its "rubber stamp approval" system.²⁷ However, Thaler believes that DABUS rightfully earned its patent because South Africa allows for non-human inventors with its lack of definition for an inventor.²⁸ Similarly, Australia's Federal Court followed in the footsteps of South Africa and granted DABUS's patent.²⁹ The court claimed that "AI is eligible to be designated as a patent inventor."³⁰ Reviewing each country's patent law brings light to the courts' decisions.

a. *South Africa*

South African patent laws define a patent as "an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something or offers a new technical solution to a problem."³¹ The law requires that an invention be novel, useful, and

21. *Id.*

22. *Id.*

23. IP Stars, *supra* note 15.

24. Quartz Africa, IN A WORLD FIRST, SOUTH AFRICA GRANTS A PATENT TO AN ARTIFICIAL INTELLIGENCE SYSTEM (last visited Jan. 24, 2022), <https://qz.com/africa/2044477/south-africa-grants-patent-to-an-ai-system-known-as-dabus/>.

25. Ed Conlon, DABUS: SOUTH AFRICA ISSUES FIRST-EVER PATENT WITH AI INVENTOR, *Managing IP* (July 29, 2021), <https://www.managingip.com/article/2a5czh91g6c8zwxjcp8/dabus-south-africa-issues-first-ever-patent-with-ai-inventor>.

26. IPWATCHDOG, *supra* note 20.

27. *Id.*

28. *Id.*

29. Amy Sandys, Opinion, *An Australian patent is a start. But Dabus needs the EPO to succeed*, *JUVE PATENT* (Aug. 18, 2021), <https://www.juve-patent.com/news-and-stories/legal-commentary/an-australian-patent-is-a-start-but-dabus-needs-the-epo-to-succeed/> (last visited Nov. 25, 2021).

30. *Id.*

31. CIPC, REGISTER PATENT, https://www.cipc.co.za/?page_id=4184 (last visited Feb. 2, 2023).

inventive.³² On July 28, 2021, South Africa granted a patent for one of DABUS's inventions.³³ The patent designated DABUS as the inventor and Thaler as the owner.³⁴

South Africa's patent law contains two major differences compared to other nations.³⁵ First, South African courts do not engage in an extensive approval or examination process.³⁶ As long as a patent application is properly completed, the courts essentially give a rubber stamp approval.³⁷ Second, as mentioned before, South Africa's Patent Act of 1978 does not define the inventor, so non-humans can qualify.³⁸ Specifically, Section 27(1) of the Patent Act states that "an inventor or any other person acquiring from him the right to apply" or both the inventor and such other person as those qualified to apply for a patent in South Africa.³⁹ Thus, Thaler won his first patent on behalf of DABUS because he completed the application and DABUS theoretically met the definition of an inventor per South Africa's patent law.

b. United Kingdom

The United Kingdom (UK) follows the Patents Act of 1977.⁴⁰ Section 7(1) of the Act describes that "any person may make an application for a patent."⁴¹ Section 7 also stipulates that "a patent may be granted to (a) the inventor, (b) any person who is the first owner of the 'property in' the invention at the time of the making of the invention."⁴² This section is one of the many hurdles for AI inventors in the UK. Section 13 also proves problematic for DABUS and AI inventors because "the inventor or joint inventors of an invention shall have a right to be mentioned as such in any patent granted for the invention" and shall also file a statement with the patent office "(a) identifying the person or persons whom he believes to be

32. Smit & Van Wyk, *Patent Law in South Africa*, <https://www.svw.co.za/patent-law-in-south-africa/> (last visited Nov. 25, 2021).

33. Catherine Cotter, *The Edge of Glory?: Will DABUS 'success' in South Africa and Australia be repeated in the UK?*, LEXOLOGY (Aug. 10, 2021), <https://www.lexology.com/library/detail.aspx?g=ee3fc7e5-e43c-4771-bd30-f0527f007785> (last visited Nov. 25, 2021).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Patents Act, 155, Republic of South Africa Government Gazette, at 9.

39. *Id.* at 23.

40. Patents Act 1977 (UK), at 1.

41. *Id.* § 7.

42. *Id.*

the inventor or inventors; and (b) where the applicant is not the sole inventor or the applicants are not the joint inventors, indicating the derivation of his or their right to be granted the patent; and, if he fails to do so, the application shall be taken to be withdrawn.”⁴³ The UK Court of Appeal initially denied Thaler’s patent because DABUS failed to be an adequate inventor as a non-human, and Thaler held no right to file the patent on behalf of DABUS.⁴⁴ On appeal, the court denied Thaler’s application again.⁴⁵ Largely, the court agreed with the original case decision because DABUS is not a natural person and the inventor must be the person who conceived the invention.⁴⁶

After the Court of Appeal denied the decision on DABUS, the UK government has published responses on how to move forward with artificial intelligence and intellectual property. The government response stated that “the power of AI is a top priority in the plan to be the most pro-tech Government ever.”⁴⁷ The response also stated that “AI will soon be inventing and creating things in ways that make it impossible to identify the human intellectual input in the final invention or work.”⁴⁸ If the AI can prove the human input versus its own input in the invention, officials can properly credit the AI for its work, which appears to be a big hurdle for the government’s decision today. With the UK seemingly having an open mind to the future of AI, critics expect that the UK Supreme Court will hear Thaler’s appeal in 2023.⁴⁹

c. *Australia*

The Federal Court of Australia originally denied Thaler’s patent application for DABUS’s invention.⁵⁰ The court determined that a “system”

43. *Id.* § 13.

44. *Thaler v. Comptroller General of Patents Trade Marks and Designs*, [2021] Royal Ct. of Justice (Sept. 21, 2021).

45. *Id.*

46. *Id.*

47. Gov.UK, *Artificial Intelligence and Intellectual Property: Copyright and Patents: Government Response to Consultation* (June 28, 2022), <https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/outcome/artificial-intelligence-and-intellectual-property-copyright-and-patents-government-response-to-consultation>.

48. *Id.*

49. IP Stars, *The Latest News on the DABUS Patent Case* (Nov. 17, 2022), <https://www.ipstars.com/NewsAndAnalysis/The-latest-news-on-the-DABUS-patent-case/Index/7366>.

50. *Thaler v. Commissioner of Patents*, [2021] FCA 879, VID 108 of 2021, Fed. Ct. Austl., at 2 (July 30, 2021).

cannot be an inventor under Australian law.⁵¹ Further, the court reasoned that while AI can create inventions that satisfy novelty, inventiveness, and utility, it cannot meet the last requirement of being a human inventor.⁵² After the decision,⁵³ Thaler sought judicial review, citing Section 15 of the Judiciary Act of 1903,⁵⁴ and he claimed that the Act and Regulations do not preclude AI as being treated as an inventor.⁵⁵ On appeal, Justice Beach, justice for the Federal Court of Australia, shared his opinion that artificial intelligence can be an inventor in the eyes of the Act because 1) an inventor is an agent noun, which could include a person or thing; and 2) there are many situations in which humans cannot be held as inventors; and 3) nothing in the Act definitively says otherwise.⁵⁶ Justice Beach further argued that while humans can be inventors, so can AI, and he believes that the High Court's argument in the past decision focused too heavily on textbook definitions for "inventor," and that the system described in the past decision improperly precludes inventions which are created by non-humans.⁵⁷ He continued to say that no provisions incorporated in the Australian patent law "exclude an inventor from being a non-human artificial intelligence device or system."⁵⁸ Justice Beach also distinguished patent law from copyright law, which requires that there be human authors or the existence of moral rights.⁵⁹ Justice Beach claimed that the copyright requirements necessitate a human inventor, but these provisions are not associated with patent law in Australia. Conversely, Justice Beach analogized patent law to the Act's object clause, which provides that the Australian patent system must balance the "interests of producers, owners and users of technology and the public," to promote economic well-being through innovation.⁶⁰ In sum, Justice Beach dismissed the original Commissioner's decision and Thaler's appeal is pending in the Full Federal Court.⁶¹

On April 13, 2022, the Full Court of the Federal Court agreed with the Commission of Patents in the original decision from 2021 and denied that

51. *See id.*

52. *Id.*

53. *See id.* at 1.

54. Judiciary Act 1903, Office of Parliamentary Counsel at 39B.

55. *Thaler*, FCA 879 at 13.

56. *See id.* at 20-21.

57. *See id.* at 1.

58. *Id.* at 13.

59. *Id.* at 21.

60. *Id.*

61. *See id.* at 41.

an AI could be an inventor in the Australian patent system.⁶² Ultimately, the Court agreed with the original denial because when giving regard “to the statutory language, structure and history of the Patents Act, and the policy objectives underlying the legislative scheme, [it] respectfully disagree[d] with the conclusion reached by the primary judge,” and decided that naming DABUS as an inventor on the parent application did not comply with the regulations.⁶³ Following this decision, the High Court rejected a special leave to appeal in November 2022, which officially ended Thaler’s DABUS’s patent litigation in Australia.⁶⁴

d. United States

U.S. patent law is governed by the U.S. Patent Act, 35 U.S.C.⁶⁵ The Code states that “whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”⁶⁶ After the U.S. Patent and Trademark Office (USPTO) denied DABUS’s patent, Thaler brought his DABUS case to the U.S. District Court for the Eastern District of Virginia on Appeal in 2021.⁶⁷ Thaler named Andrew Hirshfeld, the director of the USPTO,⁶⁸ as the defendant in the case.⁶⁹ In his appeal, Thaler sought “[a] declaration that a patent application for an AI-generated invention should not be rejected on the basis that no natural person is identified as an inventor; [a] declaration that a patent application for an AI-generated invention should list an AI where the AI has met inventorship criteria; and an award of the costs and reasonable attorneys’ fees plaintiff incurred in this litigation.”⁷⁰

62. Luvisa Gierson, *Full Court of the Federal Court of Australia dismisses DABUS – An AI system cannot be an Inventor*, LEGAL INSIGHTS (May 11, 2022), <https://www.gadens.com/legal-insights/full-court-of-the-federal-court-of-australia-dismisses-dabus-an-ai-system-cannot-be-an-inventor/>.

63. Commissioner of Patents v. Thaler [2022], VID 496 of 2021, Fed. Ct. Austl. ¶ 117 (Apr. 13, 2022).

64. See Dr. Claire Gregg & David Webber, *High Court powers down DABUS patent prospects* (Nov. 15, 2022), <https://dcc.com/news-and-insights/high-court-powers-down-dabus-patent-prospects-in-australia/#:~:text=On%2011%20November%202022%2C%20three,special%20leave%20applicati on%20with%20costs.>

65. U.S. Patent Act, 35 U.S.C. § 101 (1952).

66. *Id.*

67. Thaler v. Hirshfeld, 558 F. Supp. 3d 238 (E.D. Va. 2021).

68. *Id.*

69. *Id.*

70. *Id.* at 241.

Several requirements on the U.S. Patent application proved difficult for Thaler. For the inventor's "given name," Thaler wrote "DABUS," and for "family name," he wrote "Invention generated by artificial intelligence."⁷¹ Typically these sections contain a person's first and last name, however Thaler needed to improvise because DABUS does not have a family name. Similarly, Thaler included his own mailing address information to identify the "mailing address of inventor," however Thaler named DABUS as the inventor.⁷²

The preceding issues were minor compared to the next two problems within the application. First, because DABUS cannot execute an oath or declaration that the Patent Act requires, Thaler included a form for "Substitute Statement Under 37 CFR 1.64 in Lieu of Declaration Under 35 U.S.C. § 115(d)," which would allow Thaler to sign the substitute statement on DABUS's behalf because it has "no legal personality or capability to execute this substitute statement."⁷³ However, DABUS had no way of assigning its rights to Thaler and, thus, Thaler made the decision without necessary input from the inventor.

Thaler's second major application problem shows in the "Assignment" document, which Thaler included to show that DABUS assigned its inventor rights to Thaler.⁷⁴ The Assignment claimed that "in view of the fact that the sole inventor is a Creativity Machine, with no legal personality or capability to execute said agreement, and in view of the fact that the assignee is the owner of said Creativity Machine, this Assignment is considered enforceable without an explicit execution by the inventor."⁷⁵ Since DABUS has no legal personality and cannot receive any consideration, Thaler, as the owner/representative, acknowledged the sufficiency of "good and valuable consideration for this assignment."⁷⁶ Thaler signed the Assignment contract on behalf of both the assignor and the assignee.⁷⁷ However, U.S. contract law would not recognize this contract as being legally executed because Thaler gave no proper consideration to DABUS and the assignor and the assignee cannot be the same person on a contract.⁷⁸ The USPTO ultimately dismissed Thaler's petition because Congress defines "inventor" as an "individual," or

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 241-42.

75. *Id.* at 242.

76. *Id.*

77. *Id.*

78. U.S. Const. art. I, § 10, cl. 1.

“himself or herself,” thus indicating that an inventor must be a human being, which DABUS fails to meet.⁷⁹ The USPTO further concluded that it “properly issued the Notice . . . noting the inventor was not identified by his or her legal name.”⁸⁰

In June 2022, the Federal Circuit heard Thaler’s appeal. The court handed down its judgment on August 5, 2022, concluding that “the Patent Act requires that inventors must be natural persons; that is, human beings.”⁸¹ The Court held firm in its opinion that “only a natural person can be an inventor, so AI cannot be.”⁸² Thaler’s counterpart, Ryan Abbott,⁸³ plans to appeal the decision.⁸⁴

Given the differences in how the court views AI inventors, justice calls for an international harmonization of patent laws. Without harmonization, chaos will ensue as the International Patent Cooperation and other similar agencies worldwide will be inundated with requests to resolve disputes in which inventors do not receive fair protection for their patents in different regions.

III. AI CANNOT ORCHESTRATE LEGAL OR BUSINESS CAPABILITIES ON ITS OWN

Allowing AI inventors to hold patents will decrease innovation because the invention will essentially become dead since AI cannot license or produce it because AI is merely a shell for its owners. As property, it will never meet the human threshold needed to own property itself or to enter contracts. These functions are essential to the furtherance of the invention. One of the many legal rights granted to the patent owner is the power to give permission or to license third parties to use the invention based on agreed upon terms.⁸⁵ The patent owner also can sell the patent to another owner.⁸⁶ All of these scenarios would involve the inventor to grant legal rights to another person. Traditionally, this transfer of rights occurs through a contract. The basic elements of a legally enforceable contract in the U.S.

79. *Thaler*, 558 F. Supp. 3d. at 242-43.

80. *Id.* at 242.

81. *Thaler v. Vidal*, 43 F.4th 1207, 1209 (Fed. Cir. 2022).

82. *Id.* at 1213.

83. Ryan Abbott is the Research Lead in AI at the Surrey Law and Technology Hub and a professor of Law and Health Sciences at the University of Surrey. *Ryan Abbott*, SURREY L. AND TECH. HUB, <https://surreylawtech.org/authors/rabbott/> (last visited Nov. 27, 2021).

84. *Ryan Abbott*, <https://www.linkedin.com/feed/update/urn:li:activity:6961343021221113856/>.

85. *See Up Counsel, How do Patents Work: Everything You Need to Know*, ¶ 4 (Oct. 28, 2020), <https://www.upcounsel.com/how-do-patents-work> (last visited Nov. 27, 2021).

86. *Id.*

include mutual assent, expressed by a valid offer and acceptance; consideration; capacity; and legality.⁸⁷ AI would have difficulties satisfying these elements. The Restatement of Contracts defines consideration in terms of exchange and requires that a promise be supported by consideration in order to be legally enforceable.⁸⁸ Considering that AI is property itself, and cannot legally own or transfer property to another, AI cannot properly give adequate consideration. Second, having the capacity to legally enter a contract means a person is of “legal capacity to incur at least voidable contractual duties,”⁸⁹ and someone who is not “under guardianship, or an infant, or mentally ill or defective, or intoxicated.”⁹⁰ AI neither meets the qualification of being “a person,” and opponents of AI patent rights will argue that AI is not “of sound mind.” Thus, AI cannot legally enter contracts to promote the furtherance of its invention.

However, Thaler would argue that he orchestrated a legal assignment when he appealed the decision of the USPTO on DABUS’s behalf. As noted above, Thaler attached an “Assignment” contract, which stated that DABUS assigned Thaler all intellectual property rights in DABUS’s inventions to Thaler.⁹¹ He signed the contract as both the assignor and assignee.⁹² The contract, in essence, allowed Thaler to keep DABUS named as the inventor but gave Thaler the ability to orchestrate business functions. No consideration accompanied the contract.⁹³ Although the Assignment stated that Thaler “acknowledges the receipt and sufficiency of good and valuable consideration for this assignment,” still, DABUS offered no consideration.⁹⁴ Contract law requires that a party gives consideration in the course and dealings of an assignment, and thus, AI should not have an exception when entering into contracts. Thus, until AI can legally and properly give adequate consideration, all AI contracts, including Thaler’s Assignment in the U.S. appeal, should remain illegal.

Proponents who believe that AI should own patents believe that AI furthers the goals of the patent system by encouraging innovation.⁹⁵ They argue that AI brings a different perspective to the inventing world and can

87. U.C.C § 2-206 (amended 2002).

88. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979).

89. *Id.* § 12.

90. *Id.* § 12.2(a-d).

91. Memorandum of Law in Support of Defendants’ Motion for Summary Judgement & in Opposition to Plaintiff’s Motion for Summary Judgement, at 8, *Thaler v. Hirshfeld*, 558 F. Supp. 3d 238 (2021) (Civ. Action No. 1:20cv903).

92. *Id.*

93. *Id.*

94. *Id.*

95. *See Rosen, supra* note 19, ¶¶ 8-10.

provide machine-made solutions to human problems, perhaps more efficiently and creatively than a human could.⁹⁶ They believe AI will create more breakthroughs, which would further benefit society.⁹⁷ Abbott, Thaler’s counterpart, argues that allowing for AI-generated patents “would make inventive AI more valuable and incentivize AI development, which would translate to rewards for effort upstream from the stage of invention and ultimately result in more innovation.”⁹⁸ If AI receives recognition and protection over its inventions, proponents believe that the AI’s creators will “be motivated to create more and better AIs—which will in turn develop new and better ideas to improve human well-being.”⁹⁹

While proponents of AI patent ownership argue that AI needs this power to further promote computer-generated innovation, AI patent owners would actually decrease innovation. If AI were to receive inventor rights, it would be the sole individual capable of licensing and granting use of its inventions to third parties. However, based on the above, AI cannot legally enter contracts, and thus, its inventions would be at a complete standstill. To further the process of innovation, humans must play a role in the business dealings for AI-created inventions.

IV. HUMAN CO-INVENTORS CAN ENSURE A FAIR TRIAL

Another crucial role of a patent owner is to file patent infringement claims for its invention. AI inventors cannot legally take an oath in court, and thus, a human counterpart who can testify must be a co-inventor named on the patent. Patent trials typically last between one to two weeks, and they take place in front of a jury of six to eight citizens from that court’s district.¹⁰⁰ Parties generally use expert witnesses to provide background information on the patent process, as well as information about the specific patent at hand. Parties themselves will also present evidence, which begins with testimony from the inventor or patent owner.¹⁰¹ All witnesses must be competent, meaning that the witness must “ha[ve] the sufficient mental capacity to perceive, remember, and narrate the incident he or she has

96. *See id.*

97. *See id.* ¶¶ 9-10.

98. *Id.* ¶ 10.

99. *Id.*

100. Fish & Richardson, *A Guide to Patent Litigation in Federal Court*, at 16, https://www.fr.com/wp-content/uploads/2019/11/2019-Q4-Guide-to-Patent-Litigation-in-Federal-Court_FINAL.pdf (last visited Nov. 27, 2021).

101. *Id.* at 10.

observed.”¹⁰² A competent witness must also “be able to understand and appreciate the nature and obligation of an oath.”¹⁰³ In the U.S. Rule 603 of the Federal Rules of Evidence requires that “before testifying, a witness must give an oath or affirmation to testify truthfully...[and] [i]t must be in a form designed to impress that duty on the witness’s conscience.”¹⁰⁴

The requirement for a witness to take an oath before testifying in court causes additional struggles for AI patent owners. A typical oath mimics the following: “I swear by Almighty God that the evidence I shall give will be the truth, the whole truth, and nothing but the truth.”¹⁰⁵ Based on the current patent system, if AI inventors were named as a party in a patent infringement suit, they would be required to testify as the inventor in the court of law. Thus, the AI inventor would need to take an oath to promise that the evidence it shares would be nothing but the truth.

Simply put, AI inventors cannot legally testify in court. History proves that AI does have the ability to lie. For example, Facebook developed an AI system to simplify negotiations within its system.¹⁰⁶ Facebook researchers claimed that its AI agents “learnt to deceive without any explicit human design simply by trying to achieve their goals.”¹⁰⁷ Thus, human inventors of AI can program it so that the AI can deceive and communicate something other than the truth. The American Psychological Association wrote that “[r]esearch has consistently shown that people’s ability to detect lies is no more accurate than chance, or flipping a coin.”¹⁰⁸ Judges and other officials in the court room should not be unfairly tasked with trying to determine if AI is effectively giving a truthful testimony, given that its oath would be meaningless. AI cannot serve as an adequate patent owner/inventor in the courtroom because it lacks the ability to legally testify in a patent infringement lawsuit.

Proponents may argue that AI inventors can handle lawsuits through the USPTO instead of in a federal court because the USPTO does not require testimony. The USPTO post-grant proceedings include

102. LEGAL INFO. INST., Cornell Law., *Competent Witness* ¶ 1, https://www.law.cornell.edu/wex/competent_witness (last visited Nov. 27, 2021).

103. *Id.*

104. FED. R. EVID. R. 603.

105. ACT GOVERNMENT VICTIM SUPPORT, *Oath or Affirmation*, <https://www.victimsupport.act.gov.au/criminal-justice-system/court-process/giving-evidence-in-court/oath-or-affirmation> (last visited Nov. 27, 2021).

106. Tristan Greene, *Study: It Might be Unethical to Force AI to Tell us the Truth*, THE NEXT WEB (Mar. 10, 2021, 10:43 PM), <https://thenextweb.com/news/it-might-be-unethical-to-force-ai-to-tell-us-the-truth>.

107. *Id.*

108. Laura Zimmerman, *Deception Detection*, APA (Mar. 2016 Vol. 47, No. 3), <https://www.apa.org/monitor/2016/03/deception>.

supplemental examination, which only the patent owner can seek.¹⁰⁹ AI inventors do not presently have the functionality or capabilities to request these proceedings from the court. Since the patent owner is the only individual with the right to file for supplemental examination, an AI inventor would also make the USPTO proceedings impossible to adequately complete.

The legal system still needs a solution to deal with proceedings involving an AI inventor. While humans formerly took ownership and responsibility over intellectual property created by their AI, humans no longer feel they can morally take credit. AI has evolved to the point in which it mentally conceives of the IP. The foregoing reasons presented in this section detail why AI cannot legally testify in court, and thus cannot hold the title as a patent owner, as the legal system would fall apart. However, two solutions can credit AI inventors while safeguarding human inventors from patent infringement. First, the legal system can allow for AI and human co-inventors to share the “inventor” title on a patent through a system similar to Copyright Law’s Work Made for Hire doctrine. Alternatively, the legal system can parallel a patent system for an AI-human relationship in a similar way to how the system currently allows for corporations to participate in the patent system as assignees.

a. *“Work Made for Hire” Solution*

Patent law and copyright law have many similarities, as they both aim to protect a creator’s intellectual property. Copyright law allows for a solution to an employee-employer relationship as it relates to inventorship, which can translate well to the AI-human relationship debate. U.S. copyright law accepts Section 101 of the Copyright Act, which details the “works made for hire” doctrine.¹¹⁰ The law defines the works that qualify under the act as “a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned for use (1) as a contribution to a collective work, (2) as a part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material for a test, or (9) as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a Work Made for hire.”¹¹¹ The law states that “if a work is made for hire, an employer is

109. Fish & Richardson, *supra* note 100, at 5.

110. U.S. COPYRIGHT OFFICE, *Works Made for Hire 2*, <https://www.copyright.gov/circs/circ30.pdf> (last visited Nov. 27, 2021).

111. *Id.*

considered the author even if an employee actually created the work.”¹¹² For this doctrine, the employer can be a firm, an organization, or an individual.¹¹³

The humans who create AI can deem the AI as its employee at the beginning of its conception. If the human creates a contract preceding the AI’s existence that positions the AI as an employee/agent of the human, then the human can take ownership of the AI’s inventions. Similar to the crediting in copyright law where the employee can claim creation rights to the intellectual property while the employer remains the owner, human owners of the AI can claim ownership over the AI’s IP while still crediting the AI for its inventions. This solution would allow for human actors to further the invention through business operations. However, humans must program its AI to detail each step of its conception process so that they can understand and properly articulate the AI’s choices when testifying on its behalf in court.

b. Treating AI Like Corporations in the Eyes of Patent Law

While AI may not yet be developed enough to receive the same rights as a human inventor, AI should be treated like other non-human entities that have rights in the patent system. For example, corporations, “a legal entity created through the laws of its state of incorporation,”¹¹⁴ have rights in the patent system. Generally, employees own the rights to their inventions that they create during their course of work unless one of the following two exceptions apply: 1) the employee signed an employment agreement assigning invention rights; or 2) the employer specifically hired the employee with the intent to create the specific invention on behalf of the corporation.¹¹⁵ In other words, in the eyes of patent law, if an employer considers an employee an officer of the business, then any inventions the employee/officer creates will be credited to the company.¹¹⁶ Per the first exclusion, typically, employers require employees to sign over pre-invention assignments when a company hires an individual to the

112. *Id.* at 4.

113. *Id.* at 3.

114. LEGAL INFO. INST., Cornell Law, *Corporations* ¶ 1, <https://www.law.cornell.edu/wex/category/corporations?page=7> (last visited Jan. 20, 2023).

115. Richard Stim, *Who Owns Patent Rights: Employer or Inventor?*, NOLO, <https://www.nolo.com/legal-encyclopedia/who-owns-patent-rights-employer-inventor.html> (last visited Nov. 27, 2021).

116. *Who Owns the Rights to a Patent? The Employer or Inventor?*, ADLI LAW, <https://adlilaw.com/who-owns-the-rights-to-a-patent-the-employer-or-inventor/> (last visited Nov. 27, 2021).

company.¹¹⁷ Per the second exclusion, employees automatically assign their patent rights to a company when a company hires for the purpose of creating an invention.¹¹⁸ When a fiduciary relationship exists, the court is more likely to rule that the corporation owns the rights to the invention.¹¹⁹

Human inventors of AI can create a similar relationship with their AI inventors to mimic how corporations treat their employees in regard to patent law. With corporations, the entity itself is not claiming mental conception of the product. Rather, the corporation is taking legal credit for the invention that the employee created while exhibiting a fiduciary duty to the corporation. The entity takes ownership over legal actions and can choose how to license the invention to third parties. Patent law created a streamlined and efficient process for employers and corporations to steadily increase innovation through their employees by assigning ownership rights to the entity and leaving the credit to the employee who created the invention.

The corporation solution would prove effective to meet the goals of the AI patent proponents. The solution would allow for AI inventors to remain credited for their mental conception but would allow the human inventors of the AI to take legal ownership over the AI's invention. Humans could then continue the flow of innovation by licensing the invention and allowing it to flourish in the open market for creators and businesses to use. Allowing humans to gain ownership rights would promote the flow of innovation because they have the legal capacity to testify in court and legally enter into contracts by providing adequate consideration. Upon the idea of an AI, humans can create contracts that essentially assign all patent law rights to the human inventors so that any invention created by the AI can be legally patented with the help of humans and can effectively protect the IP.

However, as noted in the "Work Made for Hire" solution above, humans still must find a solution for how to testify on behalf of AI. To properly take an oath in court, a witness must promise to tell the whole truth. In order to tell the truth, humans must have a full picture and cognitive understanding of the AI's functioning and choices. Humans must keep this in consideration when creating the AI's processing system. As the world evolves to adapt to AI, humans must also adapt to ensure that AI inventors will fit within the legal system. Proponents of AI inventors believe that AI should hold patent ownership rights, but currently the

117. Stim, *supra* note 115, ¶ 6.

118. *Id.*

119. *Patents: Protecting Corporate Patent Rights*, WIGGIN (Dec. 1, 1998), <https://www.wiggin.com/publication/patents-protecting-corporate-patent-rights/>.

humans cannot articulate the AI's processes as a witness in court, so the AI should not be granted a patent, and the invention will have to be protected through another means.

Ultimately, the business world is not ready to accept AI inventors as competent legal owners, and thus, in order to promote innovation, the patent system must allow for human co-inventors or another solution such as Work Made for Hire or a corporation treatment.

V. TRADE SECRET LAW AS AN ALTERNATIVE

If proponents of AI inventors insist that the AI is recognized as the inventor of the IP, they can turn to the already existing trade secret law to protect the invention. Serving as an intellectual property protection, trade secret law protects intellectual property in a similar manner to patents, trademarks, and copyrights. In the U.S., trade secret law is protected by the Lanham Act and the Uniform Trade Secrets Act.¹²⁰ Trade secrets are defined as “information that derives independent economic value because it is not generally known or readily ascertainable, and it is the subject of efforts to maintain secrecy.”¹²¹ All three elements of the definition must be encompassed in a trade secret for it to be eligible for protection under the law.¹²² The information contained in a trade secret includes “information that can be memorized or noted down by employees, customers, developers, suppliers, and others.”¹²³ Like other intellectual property protections, trade secrets bar infringement and allow enforcement of the protection by inventors.¹²⁴

A key difference for trade secrets, in comparison to other intellectual property protections, is that an inventor can acquire this protection without registering for it with a government agency.¹²⁵ Additionally, trade secret law does not require a human inventor to hold the protection.¹²⁶ While no formal registration system exists, companies are responsible for securing its trade secrets so that if a trade secret is divulged to the public through a

120. *What is a Trade Secret?*, ROCKETLAWYER, <https://www.rocketlawyer.com/business-and-contracts/intellectual-property/legal-guide/what-are-trade-secrets> (last visited Nov. 27, 2021).

121. *Trade Secrets*, JUSTIA, <https://www.justia.com/intellectual-property/trade-secrets/> (Oct. 2022).

122. U.S. Pat. & Trademark Office, *Trade Secrets/Regulatory Data Protection*, <https://www.uspto.gov/ip-policy/trade-secret-policy> (last visited Nov. 27, 2021).

123. JUSTIA, *supra* note 121, ¶ 3.

124. *Id.* ¶ 5.

125. *Id.* ¶ 1.

126. *See id.* ¶ 4.

breach of contract or breach of confidence, then the company can show the information was classified as a trade secret.¹²⁷

Trade secrets can also be protectable under a patent.¹²⁸ However, patents require the inventor to publicly disclose how the invention can be reproduced, whereas trade secrets protect an inventor's "secrets," including how they produced and created the invention. Trade secret law does not provide "defensive protection" for an inventor.¹²⁹ Thus, the protections of trade secrets and patents are at issue with each other, and courts will not issue both at the same time. In the interim, while the legal system decides how to patent AI-created inventions, trade secret law would provide adequate protection for AI inventors.

Other critics have discussed the idea of trade secret protection as an alternative to the AI inventor problem. Notably, Anna Carnochan Comer, the author of *AI: Artificial Inventor or the Real Deal?*, argued that trade secret law will not solve the AI-inventors' patent issues effectively.¹³⁰ Comer believes that "trade secrets do not always provide adequate protection due to the fluctuation of employees and the difficulty of actually keeping information secret."¹³¹ Additionally, Comer argues that "trade secrets inherently inhibit transparency and collaboration," and that trade secrets do not "prevent competitors from independently coming by the same invention, and then filing a patent with a human as the inventor."¹³²

However, Comer does not address the use of nondisclosure agreements, which is the "most effective way to protect trade secrets."¹³³ While trade secrets do not serve as the most protection for an invention, they do provide legal grounds for an inventor to file infringement claims. Inventors can limit their employees to a trusted group of individuals who can sign nondisclosure agreements for the invention. If a party to a nondisclosure agreement defies its commitments to the contract, then the

127. *See id.* ¶ 6.

128. *Id.* ¶ 5.

129. *See Trade Secrets*, WIPO, <https://www.wipo.int/tradesecrets/en/> (last visited Nov. 27, 2021).

130. *See* Anna Carnochan Comer, Note, *AI: Artificial Inventor or the Real Deal?*, 22 N.C. J.L. & Tech. 447,470 (2021).

131. *Id.*

132. *Id.* at 471.

133. *Trade Secret Basics FAQ*, NOLO, <https://www.nolo.com/legal-encyclopedia/trade-secret-basics-faq.html#:~:text=The%20most%20common%20and%20most,the%20secrecy%20of%20confidential%20information> (last visited Nov. 27, 2021).

breaching party may be subject to a lawsuit.¹³⁴ Human inventors, in collaboration with their AI, can create an isolated, controlled group to understand the “secrets” of the AI inventions to avoid the issues that Comer suggested could occur with large businesses. Using these agreements with a small, trusted group will allow for a legal protection of the IP in which the AI inventors and human counterparts can seek remedies for a breach.

While ultimately patent protection would prove the most effective for an AI-created invention, trade secret law will provide adequate legal protection to give AI inventors the rights to file infringement claims. Additionally, trade secret law eliminates the problems associated with the human-inventor prong of patent law. Proponents of AI-inventorship can find protection in trade secret law if they feel strongly that AI deserve inventor credit. When humans first create an AI, they can set guidelines through contracts to govern the AI’s inventions with protections through the company. For example, the company can create contracts stating that any humans who interact or learn about the inventions created by the AI will be subject to a nondisclosure agreement limiting exploitation about the IP for their own or someone else’s benefit. However, as Comer noted, competitors can step in to file a patent for the same or similar invention if a human inventor creates the same or similar product.¹³⁵ Thus, courts will still need to find a solution to the AI-invented products that require patent protection. When patent law resolves AI’s role, then AI inventors can upgrade their trade secret protection to patents and receive the same legal recognition as human inventors.

If the patent system does not allow AI inventors to protect their inventions, humans will likely name themselves as the inventor, even though they did not mentally conceive of the IP. Humans falsely claiming inventorship will cause the patent system to crumble, as inventors named on a patent must be the individuals who mentally conceived of the IP. Thus, the inefficiencies will create disincentive for humans to create AI, who could create important inventions, if AI cannot protect its own intellectual property. An alternative protection and adequate solution to this epidemic lies within trade secret law, which will serve as a protection for AI inventors until the patent system determines how to best incorporate them.

134. LEGAL INFO. INST., Cornell Law, *Nondisclosure Agreement*, [https://www.law.cornell.edu/wex/nondisclosure_agreement#:~:text=A%20non%2Ddisclosure%20agreement%20\(NDA,with%20any%20non%2Dauthorized%20party](https://www.law.cornell.edu/wex/nondisclosure_agreement#:~:text=A%20non%2Ddisclosure%20agreement%20(NDA,with%20any%20non%2Dauthorized%20party) (last visited Nov. 27, 2021).

135. Comer, *supra* note 130, at 470-71.

VI. THE NEED FOR HARMONIZATION OF INTERNATIONAL PATENT LAWS

Patent laws around the world are too diverse, and the legal system needs a uniform patent law to govern intellectual property. If countries fail to coordinate their approaches to patent law, then patent owners will forum shop for a jurisdiction which will allow for AI inventor protections. Given the inequalities in how AI is viewed, unfair competition and exploitation will ensue in favorable jurisdictions. For example, Australia proves to be an appealing forum for AI proponents because its courts are “blazing the trail for patent protection,” following its DABUS decision.¹³⁶ Australia’s Justice Beach, who overturned the original DABUS decision, encourages AI inventors to create IP because, like other proponents, he believes that they are increasing the flow of innovation.¹³⁷ Justice Beach discussed the impact of patents on the COVID-19 pandemic. He believes that AI advances “could significantly accelerate drug discovery.”¹³⁸ Given the need for fast and effective solutions to the environment COVID-19 created, Beach believes that “no narrow view should be taken as to the concept of ‘inventor,’” so that they do not discourage new inventions because they cannot be protected by patent law.¹³⁹

Like other countries such as South Africa, Justice Beach takes a progressive stance on patent law. The international patent system will become more complex with these alternative approaches to defining an inventor. For example, in the U.S., patents protect an inventor against anyone “making, using, selling, or offering for sale the invention in the United States.”¹⁴⁰ Additionally, U.S. patents protect against unauthorized imported copies of the invention making their way into the country.¹⁴¹ However, the U.S. patent protection does not reach beyond the national borders.¹⁴² Thaler demonstrated that an inventor must file a patent application in each country’s courts to receive protection within that country; no international patent exists which protects an invention in every

136. Grant Shoebridge, *The DABUS Decision Makes Australia Look Like a Champion of Innovation, Not a Chump*, IAM (Sept. 11, 2021), <https://www.iam-media.com/law-policy/the-dabus-decision-makes-australia-look-champion-of-innovation-not-chump>.

137. *See id.*

138. *Id.*

139. *Id.*

140. Brian Farkas, *Can I Get International Patent Protection?*, NOLO, <https://www.nolo.com/legal-encyclopedia/can-i-get-international-patent-protection.html> (last visited Nov. 27, 2021).

141. *Id.*

142. *Id.*

court in every country. This international patent crisis proves problematic for inventors seeking protection.

Not only is the patent application process and approval process time-consuming, but it is also extremely expensive. Countries have implemented task forces to help facilitate international patent filings and assist in protection in disputes. For example, the U.S. created the International Patent Cooperation to lead “efforts to assist U.S. inventors and businesses in protecting their patent rights worldwide and [to support] the global innovation community.”¹⁴³ The United States Patent and Trademark Office also employs the International Patent Legal Administration to assist the patent community in further developing inventions and policy related to the patents, as well as to help resolve legal issues arising internationally.¹⁴⁴ Inevitably, organizations such as the International Patent Cooperation will be inundated with requests for help with patent infringement if patent laws remain different in each country. Like Australia, South Africa proves more lenient in its characterization of an inventor. Courts in these regions will be overwhelmed with both patent approvals and consequently international patent infringement suits that follow. The World Intellectual Property Organization (WIPO) also holds its own offices for some international matters. For example, WIPO’s office in Geneva processes Patent Cooperation Treaties on behalf of several countries that agreed to be members of the Patent Cooperation Treaties.¹⁴⁵ This office and international processing system could stand as a strong foundation for a governing entity for a uniform patent law.

Critics will argue that creating a uniform patent system is not realistic and that international harmony will be difficult to achieve. However, several legal systems exist that acknowledge international harmony. Some of these already developed international agreements could serve as a framework for a uniform patent law system. These treaties include the Paris Convention,¹⁴⁶ the Patent Cooperation Treaty,¹⁴⁷ the Strasbourg Agreement Concerning the International Patent Classification,¹⁴⁸ and the Patent Law

143. U.S. Pat. & Trademark Office, *International Patent Cooperation* (Jan. 30, 2019, 4:09 PM), <https://www.uspto.gov/patents/basics/international-patent-cooperation>.

144. U.S. Pat. & Trademark Office, *Patent Cooperation Treaty*, (Sept. 20, 2018, 6:27 AM), <https://www.uspto.gov/patents/basics/international-protection/patent-cooperation-treaty>.

145. *Participating Offices*, WIPO, http://www.wipo.int/das/en/participating_offices/details.jsp?id=10589 (last visited Nov. 27, 2021).

146. The Paris Convention, Mar. 20, 1883.

147. Patent Cooperation Treaty, June 19, 1970.

148. The Strasbourg Agreement Concerning the International Patent Classification, Mar. 24, 1971.

Treaty.¹⁴⁹ Elements of these already existing agreements can be combined as a strong and effective universal governing system for the problem we face today.

a. The Paris Convention for the Protection of Industrial Property

Dating back to 1883, the Paris Convention provided that member countries must “adopt certain minimum protections for industrial property,”¹⁵⁰ which includes patents, trademarks, and trade names. The agreement consists of three main substantive provisions. First, member countries must extend the same IP protections to non-citizens as they do to their own nationals.¹⁵¹ Second, an application for industrial property protection “in one member country may use that application as the basis for filing later applications for that IP in other member countries.”¹⁵² For patents, if any later application is filed within 12 months of the first application, then the right of priority applies.¹⁵³ Third, the member countries must abide by other rules the convention sets for particular types of IP.¹⁵⁴

While the Paris Convention has 177 nations in agreement,¹⁵⁵ several countries do not agree with its governing orders. The agreement makes some strides in regard to extending IP protections to non-citizens,¹⁵⁶ but it does not solve the problems associated with differing inventor definitions and the unfair competition which will ensure when human counterparts forum shop for patent protection.

b. The Patent Cooperation Treaty

Similar to the Paris Convention, the Patent Cooperation Treaty allows applicants to file patent protection internationally, and through one application, they can “simultaneously seek protection for an invention in a

149. Patent Law Treaty, June 1, 2000.

150. *Paris Convention for the Protection of Industrial Property (Paris Convention)*, THOMAS REUTERS, [https://ca.practicallaw.thomsonreuters.com/8-506-0344?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/8-506-0344?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited Nov. 27, 2021).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. WIPO IP Portal, *WIPO-Administered Treaties*, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=2 (last visited Feb. 9, 2023).

156. The Paris Convention, *supra* note 146, art. 3.

large number of countries.”¹⁵⁷ The treaty procedure includes filing, international search, international publication, supplementary international search, international preliminary examination, and national phase.¹⁵⁸ Currently, 153 contracting states accepted the treaty.¹⁵⁹ While an applicant only files one international patent for countries to consider, each court still uses its own governing law to grant or deny the patent.¹⁶⁰ This filing system is appealing to inventors, as the application need only be filed in one language, and the inventor needs only to pay one fee.¹⁶¹

While the Patent Cooperation Treaty helps streamline the application process, this ease may be detrimental to the regions which will accept AI inventors. For example, South Africa and Australia both are contracting members of the treaty.¹⁶² Therefore, inventors who use the treaty to file patents will have an incentive to file in these regions because with a quick check of the box, they have a high probability that their patents will be accepted. This treaty makes the patent application process too simple for inventors, and in turn, countries will be flooded with new patent applications to assess.

c. *The Patent Law Treaty*

The Patent Law Treaty aims to “harmonize and streamline formal procedures in respect of national and regional patent applications and patents,” and to make the experience more user-friendly.¹⁶³ Like the Paris Convention, the Strasbourg Agreement, and the Patent Cooperation Treaty, the Patent Law Treaty still looks to each nation for its own patent law when considering whether or not a patent will be accepted.¹⁶⁴ One of the unique features of the agreement is that it “provides relief with respect to time

157. *PCT- The International Patent System*, WIPO, <https://www.wipo.int/pct/en/> (last visited Nov. 27, 2021).

158. *PCT FAQs*, WIPO, <https://www.wipo.int/pct/en/faqs/faqs.html> (last visited Nov. 27, 2021).

159. *PCT Contracting States*, WIPO, https://www.wipo.int/pct/en/pct_contracting_states.html (last visited Nov. 27, 2021).

160. U.S. Pat. & Trademark Office, *Patent Cooperation Treaty*, <https://www.uspto.gov/patents/basics/international-protection/patent-cooperation-treaty> (last visited Nov. 27, 2021).

161. Farkas, *supra* note 140.

162. WIPO IP Portal, *WIPO-Administered Treaties*, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=6 (last visited Nov. 27, 2021).

163. *Summary of the Patent Law Treaty (PLT)*, WIPO (2000), https://www.wipo.int/treaties/en/ip/plt/summary_plt.html (last visited Nov. 27, 2021).

164. U.S. Pat. & Trademark Office, *Patent Law Treaty*, <https://www.uspto.gov/ip-policy/patent-policy/patent-law-treaty> (last visited Nov. 27, 2021).

limits that may be imposed by the Office of a Contracting Party and reinstatement of rights where an applicant or owner has failed to comply with a time limit and that failure has the direct consequence of causing a loss of rights.”¹⁶⁵ The Patent Law Treaty is similar in many respects to the Patent Cooperation Treaty, as both make the application process more refined so that inventors can easily file their patent in many regions. This treaty will result in the same issues of inundation and overflow of applications in regions that have a more lenient definition of an inventor. Thus, this treaty does not address the issues that would be solved by a uniform patent law.

d. The Strasbourg Agreement Concerning the International Patent Classification

The Strasbourg Agreement is a great example of how a uniform system could benefit the intellectual property community. The agreement establishes the International Patent Classification (IPC) which sets forth a system to divide “technology into eight sections with approximately 80,000 subdivisions.”¹⁶⁶ The system creates a uniform “classification of patents, inventors’ certificates, utility models and utility certificates.”¹⁶⁷ The classification system is organized with Arabic numerals and letters of the Latin alphabet to signify different subdivisions.¹⁶⁸ Each patent application is filed with the appropriate symbols, which allows for “the retrieval of patent documents in the search for ‘prior art.’”¹⁶⁹ The agreement further suggests that a Committee of Experts, comprised of individuals from the member countries, will work together to amend the classification system to make it the most effective.¹⁷⁰ The agreement also prescribes an International Bureau to host conferences for the Committee of Experts to discuss revisions and improvements to the classification system.¹⁷¹

165. *Id.*

166. *Strasbourg Agreement Concerning the International Patent Classification*, WIPO, <https://www.wipo.int/treaties/en/classification/strasbourg/> (last visited Nov. 27, 2021).

167. *Strasbourg Agreement Concerning the International Patent Classification*, KENYA LAW, <http://kenyalaw.org/treaties/treaties/1035/Strasbourg-Agreement-Concerning-the-International> (last visited Nov. 27, 2021).

168. *Summary of the Strasbourg Agreement Concerning the International Patent Classification (1971)*, WIPO, https://www.wipo.int/treaties/en/classification/strasbourg/summary_strasbourg.html (last visited Nov. 27, 2021).

169. *Id.*

170. *Strasbourg Agreement Concerning the International Patent Classification*, *supra* note 148, art. 4.

171. *Id.* art. 7.

Additionally, the agreement sets forth a voting system, in which each member nation will hold one vote on each revision at issue.¹⁷²

Currently, only sixty-four nations are members to the agreement.¹⁷³ The Strasbourg Agreement is the perfect breeding ground for the implementation of a uniform patent law to be used by all courts worldwide. Members of the agreement see the benefits of an international classification system. By filing these patents in a uniform manner, courts and inventors can track down different similar inventions that exist all over the world. The Committee of Experts is a particularly interesting component of the agreement. Experts from all different regions, with different interpretations of patent laws, bring their background and expertise to one conversation. Each expert is given one vote. This level playing field allows for a unique opportunity for the brilliant minds of patent law to come together to agree on the best approach for this legal protection. The classification system proves to have many benefits for the worldwide patent community. This group of experts can turn the conversation to defining a uniform patent law for all countries to abide by. During this conversation, the experts can bring their experiences, opinions, and ideas for the future to collaborate on a uniform approach to patent law that can benefit the group as a whole. In these conversations, the group can determine the best path forward for how to incorporate the future of technology into its approach. One major point of discussion obviously remains within the definition of a patent-accepted inventor. Voices from around the world can work to decide how to approach the future of AI with patent law.

The international legal bodies need to create a uniform patent system to ensure a just foundation for inventors.

VII. CONCLUSION

AI inventors on their own will not effectively further their inventions because they lack legal capabilities. Patent laws need to allow for a human co-inventor to be named on the patent to continue the flow of innovation. Solo AI patent owners would decrease innovation, given that AI is property and is unable to enter contracts or otherwise exploit the patent. Additionally, patent lawmakers must allow for a human co-inventor to be named on the patent with the AI who mentally conceives so that the human can testify under oath on behalf of the AI to explain its processes and

172. *Id.*

173. WIPO IP Portal, *WIPO-Administered Treaties*, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=11 (last visited Feb. 9, 2023).

protect the patent in court. Given the current legal system, those AI proponents who want the AI to be credited for its inventions can look to trade secret law to protect the IP. However, courts should consider adopting a system like copyright law's "Work Made for Hire" doctrine or mimicking how corporations are viewed in patent law to give AI similar protections. Ultimately, World Intellectual Property Organization needs to create a universal patent law to combat an abuse of the more lenient courts and to provide harmony and ease for the evolving inventors of today.

THE DIFFICULTIES WITH ENSURING RESPONSIBILITY: A CRITIQUE OF OONA HATHAWAY’S INTERPRETATION OF COMMON ARTICLE 1

*Nicolas Gomez**

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* J.D. Candidate, Southwestern Law School, 2023; B.A., California State University Long Beach, 2018. I thank my parents and my brother, Andy; your inspiration is everything. I also thank Professor Jonathan Miller, Professor Rachel Van Landingham, Professor Natalia Anthony, and Southwestern’s community for their support.

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I. INTRODUCTION.

An astute observer of contemporary affairs will note the increased prevalence of proxy wars. In a proxy war, States support paramilitary and rebel groups that have no affiliation to any State government. International law often considers these groups “non-State actors.” Although States support non-State actors for a variety of reasons, a serious problem emerges when States support groups that commit violations of international humanitarian law; no State will face accountability. Legally, a State cannot be responsible for the breaches of a group unless the group’s acts are attributable to it.¹ The law of State responsibility will attribute the wrongful acts of a group to a State only if the State exercised control over the group.² Providing arms or funding does not constitute “control.”³ However, in recent years the International Committee of the Red Cross (“ICRC”) has interpreted Common Article 1 of the Geneva Conventions as requiring that States “ensure respect” for the Conventions.⁴ This means that a State may not encourage or aid in a group’s commission of grave breaches.⁵ Additionally, the ICRC⁶ and some progressive scholars⁷ believe that the

1. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001) [hereinafter Draft Articles].

2. *Id.*

3. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 115 (June 27) (explaining that training, supplying, and financing the Nicaraguan *contras* was insufficient for attribution); see also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 131 (Int’l. Crim. Trib. for the Former Yugoslavia July 15, 1999) (explaining that financing and equipping an armed group is insufficient for attribution).

4. INT’L COMM. OF THE RED CROSS, COMMENT. OF 2016, art. 1, ¶ 121 (2d ed. 2016) [hereinafter COMMENTARY OF 2016], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>.

5. *Id.* ¶ 158.

6. *Id.* ¶ 164.

7. See Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539 (2017); see also Fateh Azzam, *The Duty*

rule requires that States take reasonable measures in preventing and suppressing their non-State partners' breaches.

The proposed negative obligations ("the duties to refrain from aiding or encouraging") of Common Article 1 do not garner as much controversy as the proposed positive obligations to prevent and suppress grave breaches. Some international law scholars have pushed back against imputing positive obligations to the provision.⁸ Arguably, such an interpretation would impose a significant burden on the extent that States could coordinate with potential allies.⁹ Furthermore, positive obligations might place States in a legally risky position. The more a State acts in furtherance of preventing or suppressing a non-State actor's grave breaches, the more likely a factfinder might see that the State has controlled the non-State actor's operations to the point where it should be responsible for all the group's conduct.¹⁰ Suppressing humanitarian law violations could become an exercise of control leading to liability under the existing rules of State responsibility.¹¹

Professor Oona Hathaway, a leading international law scholar, offers a safe harbor solution to this issue. Hathaway acknowledges that preventing a non-State actor's humanitarian law violations may make a State appear as if it exercised control over the non-State actor and its operations to the point where the State has become vicariously responsible for all of the group's conduct.¹² She also considers that under the rules of State responsibility, a hands-off approach by the State would free it of responsibility for the non-State actor's conduct.¹³ In response, she argues that if a State assists the non-State actor in complying with international humanitarian law, it should have an affirmative defense.¹⁴ The State should be able to use the training as a defense against claims that it exercised so much control as to face liability for all of the non-State actor's illegal acts.¹⁵ In her article, she proposes several measures that States can take to comply with Common

of Third States to Implement and Enforce International Humanitarian Law, 66 NORDIC J. INT'L L. 55 (1997); see also Hannah Tonkin, *Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. OF INT'L L. 779 (2009).

8. See Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to "Ensure Respect,"* 96 INT'L L. STUD. 674 (2020); see also Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit*, in REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 665 (2007).

9. Schmitt & Watts, *supra* note 8, at 687.

10. See Hathaway et al., *supra* note 7, at 578.

11. See *id.*

12. *Id.*

13. See *id.* at 562-63.

14. *Id.* at 579.

15. *Id.*

Article 1, and subsequently avoid liability.¹⁶ Most centrally, she suggests that States can avoid the risk of vicarious liability if they conduct international humanitarian law training.¹⁷

Hathaway's approach, although thoughtful, is problematic to the extent that it requires that a State train its non-State partner to then raise an affirmative defense. This is impractical because some circumstances are exigent and cannot require that a State train a non-State actor. Moreover, her approach risks detracting from Common Article 1's open-ended nature, because it substitutes the ICRC's emphasis on context with a bright-line training requirement. Ultimately, it may be wiser to defer to the ICRC's contextual/ case-by-case interpretation of the provision, which calls for a fact-specific analysis and which more closely aligns with the law of war in general.

This article will develop why the ICRC has offered a better approach than Professor Hathaway. Part Two will discuss several examples of State support for non-State-actors in armed conflicts, as well as review the existing laws regarding State attribution, Common Article 1, and Oona Hathaway's interpretation of that provision. Part Three will discuss the problems with Hathaway's approach as it applies to an exigent circumstance such as the invasion of Rojava. Part Four will discuss the ICRC's emphasis on context, and how Hathaway's approach detracts from it. Part Five will discuss how the ICRC's contextual approach comports with the law of war in general. This article will conclude that Common Article 1 should not impose a bright-line training requirement but should consider a lack of training as one of several factors which determine a State's fault in respect to supporting a non-State armed group.

II. BACKGROUND.

Recent history and current affairs indicate that States often support non-State armed groups for the purpose of furthering their own geopolitical interests. While the Geneva Conventions set out the basic rules of humanitarian law, the law of State responsibility sets a high bar for holding States responsible when they support non-State actors that commit atrocities in war. Under the law of State responsibility, a State cannot be responsible for a non-State actor's crime unless it exercised "control" over the group or the group's operations in which the crime occurred. The law's narrow construction of "control" creates an accountability gap which does not hold States responsible when they support non-State actors.

16. *Id.* at 585-89.

17. *Id.* at 586.

However, the International Committee of the Red Cross and some scholars have sought to limit this evasion of liability. They interpret Common Article 1, a provision within all four of the Geneva Conventions, as imposing a more stringent standard on States than the law of State responsibility. Common Article 1 provides that States “undertake to respect and ensure respect for the [Geneva Conventions] in all circumstances.” According to the ICRC’s interpretation of the provision, States may not encourage or assist other parties in breaching the Conventions and must do everything reasonably within their power to ensure that other parties comply with the Conventions.

Recognizing that Common Article 1 could hold States accountable for supporting problematic non-State actors, Professor Oona Hathaway identifies a problem which could disincentivize States from embracing the provision’s power. States might worry that they must take actions in compliance with Common Article 1 which would make them appear as if they exercised “control” over the operations of their non-State partners. Under the law of State responsibility, this degree of “control” may trigger liability for a non-State partner’s conduct which occurs in lieu of a State’s efforts to comply with Common Article 1.

In response to this problem, Hathaway suggests that States should have an affirmative defense. If a State took actions in furtherance of securing its non-State partner’s compliance with the Geneva Conventions per Common Article 1, it should then have an affirmative defense against allegations that it exercised “control” over the group such that it is liable for the group’s ultra vires actions.

Moreover, she recommends that training should be a requirement for complying with Common Article 1.

A. *Examples of State Support for Non-State Actors.*

The Cold War provides many examples of States giving support to non-State actors, including the United States’ support for the Nicaraguan *Contras* and Iran’s support for Hezbollah. Between the years 1979 and 1990, the United States provided funding, training, and material support to the Nicaraguan *Contras*, a rebel group that attempted to overthrow the socialist Sandinista government.¹⁸ This support garnered criticism in its day, as information came to light of the *Contras*’ record of committing

18. Brown Univ., *The Counterrevolutionaries (“The Contras”)*, UNDERSTANDING THE IRAN-CONTRA AFFAIRS, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/n-contras.php (last visited Dec. 14, 2021).

atrocities.¹⁹ The *Contras* targeted civilians and engaged in torture, rape, and kidnapping.²⁰ They also conducted assaults on civilian facilities like farms and health centers.²¹ Today, one of the most significant examples of State support is Iran's support for Hezbollah, a radical Shiite group. Hezbollah is now one of the largest violent non-State actors in the world.²² Iran's support for Hezbollah began in the early 1980s during the Lebanese Civil War.²³ In 1983, Hezbollah bombed the U.S. barracks in Beirut.²⁴ The group has continued to conduct terrorist activities, including assassinations, kidnappings, and bombings.²⁵ In recent years, Iran has continued to send weapons, funding, and fuel to Hezbollah.²⁶

The practice of supporting non-State actors ensues today. The Syrian Civil War is a conflict in which non-State actors receive assistance from various countries and engage in much of the fighting. Turkey provides support to several groups, such as the Free Syrian Army²⁷ and Ahrar al-Sharqiya.²⁸ These groups fight in opposition to Syrian president Bashar-al-Assad's regime.²⁹ Both groups received attention for committing atrocities. In October 2019, members of Ahrar-al-Sharqiya murdered Kurdish

19. Larry Rohter, *Nicaragua Rebels Accused of Abuses*, N.Y. TIMES, (Mar. 7, 1985), at A1.

20. *Id.*

21. REED BRODY, *CONTRA TERROR IN NICARAGUA: REPORT OF A FACT-FINDING MISSION: SEPTEMBER 1984-JANUARY 1985* 10 (1st ed. 1985).

22. See Christopher P. Dallas-Feeney, *Violent Non-State Actors in the Middle East: Origins and Goals*, E-INT'L RELS. (May 28, 2019), <https://www.e-ir.info/2019/05/28/violent-non-state-actors-in-the-middle-east-origins-and-goals> (describing Hezbollah as one of several non-State groups capable of competing with Western-style military forces).

23. Matthew Levitt, *Hezbollah's Regional Activities in Support of Iran's Proxy Networks*, MEI@75 (July 26, 2021), <https://mei.edu/publications/hezbollahs-regional-activities-support-irans-proxy-networks>.

24. The Editors of Encyclopedia Britannica, *1983 Beirut Barracks Bombings*, BRITANNICA (Oct. 15, 2008), <https://www.britannica.com/event/1983-Beirut-barracks-bombings>.

25. See Levitt, *supra* note 23 (describing these activities throughout).

26. David Kenner, *Why Israel Fears Iran's Presence in Syria*, THE ATLANTIC (July. 22, 2018), <https://www.theatlantic.com/international/archive/2018/07/hezbollah-iran-new-weapons-israel/565796/>; see also Joyce Karam, *Iran Pays Hezbollah \$700 Million a Year, US Official Says*, THE NATIONAL NEWS (June. 6, 2018), <https://www.thenationalnews.com/world/the-americas/iran-pays-hezbollah-700-million-a-year-us-official-says-1.737347>.

27. See Ibrahim Hamza Mese & Hamoon Khelghat Doost, *Syrian Non-State Actors and the Turkish National Security*, INT'L POLICY DIGEST (May 24, 2021), <https://intpolicydigest.org/the-platform/syrian-non-state-actors-and-the-turkish-national-security/>.

28. *Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies*, AMNESTY INT'L (Oct. 18, 2019, 12:01 AM), <https://www.amnesty.org/en/latest/press-release/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>.

29. *Id.*

politician Hevrin Khalaf.³⁰ Human Rights Watch reported that members of the Turkish-backed Syrian National Army conducted extrajudicial killings, unlawfully occupied civilian properties, and engaged in looting.³¹

Also notable is the emergence of a Moscow-based private military contractor, the Wagner Group. Private military contractors do not enjoy legal status in Russia.³² Nevertheless, the Wagner Group maintains close ties to the Russian government.³³ Both the contractor and the Main Intelligence Directorate, the official Russian military intelligence organ, keep bases in the Russian town of Molkino,³⁴ Vladimir Putin enjoys a close relationship with the company's financier, Yevgeny Prigozhin.³⁵ Yet, despite facts suggesting this close relationship to the government, some analysts prefer to regard the Wagner Group as a non-State actor.³⁶ The group's legally ambiguous relationship with the Russian government should trouble consciences, given the group's activities in Libya³⁷ and the Central African Republic.³⁸

States see several advantages in supporting non-State actors. For one, the practice allows States to refrain from sending their own armed forces to fight in conflicts.³⁹ Additionally, these groups have a familiarity with local

30. *Hevrin Khalaf: Death of a Peacemaker*, BBC (Jan. 13, 2020), <https://www.bbc.com/news/av/world-middle-east-51068522>.

31. *Syria: Civilians Abused in "Safe Zones,"* HUMAN RIGHTS WATCH (Nov. 27, 2019, 12:00 AM), <https://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones#>.

32. Niklas Eklund & Jorgen. Elfving, *Russia Private Military Companies-Redwater?*, JAMESTOWN FOUND. (Mar. 22, 2017, 9:05 PM), <https://jamestown.org/program/russian-private-military-companies-redwater/>.

33. *Band of Brothers: The Wagner Group and the Russian State*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 21, 2020), <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

34. *Id.*

35. *Id.*

36. Fredrik Hellem, *Wagner in Africa: Russia's Non-State Actor' Part I*, GREY DYNAMICS (Apr. 15, 2021), <https://www.greydynamics.com/wagner-in-africa-russias-non-state-actor-part-i/>; Maxim Trudolyubov, *Vladimir Putin's Parallel State*, THE WILSON CTR. (Feb. 21, 2018), <https://www.wilsoncenter.org/blog-post/vladimir-putins-parallel-state>.

37. Ilya Barabanov & Nader Ibrahim, *Wagner: Scale of Russian Mercenary Mission in Libya Exposed*, BBC NEWS (Aug. 11, 2021), <https://www.bbc.com/news/world-africa-58009514>; *UN Accuses Russia's Wagner Group of Possible War Crimes in Libya*, DAILY SABAH (Oct. 4, 2021, 3:01 PM), <https://www.dailysabah.com/world/mid-east/un-accuses-russias-wagner-group-of-possible-war-crimes-in-libya>.

38. Neil Munshi & Max Seddon, *Russian Mercenaries Leave Trail of Destruction in the Central African Republic*, FIN. TIMES. (Oct. 21, 2021), <https://www.ft.com/content/020de965-429e-4fb9-9eed-f7e4370514b3>.

39. Daniel L. Byman, *Why Engage in Proxy War? A State's Perspective*, BROOKINGS (May 21, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/>.

conditions and cultural norms.⁴⁰ Nevertheless, these strategic advantages should not outweigh the serious consequences inherent in supporting corrupt, abusive, non-State actors. States are largely able to invest in non-State armed groups, including ones with malicious motives or interests, to further their own political interests. Because no effective legal mechanisms exist, States can continue investing in these groups without facing consequences or scrutiny when international humanitarian law violations occur.

B. The Law at Present Sets a High Bar for Attributing the Grave Breaches of a Non-State Actor to a Supporting State.

Existing law sets a high bar for attributing the grave breaches of a non-State actor to a supporting State. The standards for attribution derive largely from the law of State responsibility. The International Law Committee of the United Nations composed the Draft Articles of State Responsibility, which received the approval of the UN General Assembly.⁴¹ Under the Draft Articles, a State is responsible for the wrongful conduct of a group if the State either controlled the group as a whole or controlled the group's specific operations.⁴² Most of the present controversy regarding State responsibility for non-State actors' conduct revolves around the interpretation of the term "control." Three different interpretations of "control" exist at present. These interpretations consist of the International Court of Justice's ("ICJ") "complete control" and "effective control" standards, and the International Criminal Tribunal of Yugoslavia's ("ICTY") "overall control" standard. The tests have different uses, yet all of them exist for the purpose of attributing the actions of a non-State group to a State.

1. The ICJ's "complete control" test.

The International Court of Justice established two approaches to assessing "control" in the *Paramilitary Activities in and Against Nicaragua* case. The first approach is what Professor Marko Milanović describes as the "complete control" test.⁴³ Under this test, a State is responsible for the acts of a non-State actor when the State exercises so much control over the non-

40. *Id.*

41. Draft Articles, *supra* note 1, at 1.

42. *Id.* at 47.

43. Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 576 (2006).

State actor that it keeps the group in a position of complete dependency.⁴⁴ As a result of this complete dependence, a factfinder could find that the non-State actor functioned as a *de facto* organ of the State.⁴⁵ Under the “complete control” test, the group must have no real autonomy from the supporting State.⁴⁶

Professor Milanović⁴⁷ and Professor Stefan Talmon⁴⁸ wrote about the various factors that the ICJ in *Nicaragua* considered when determining whether the United States exercised “complete control” over the Nicaraguan *Contras*. Factors included: (1) whether the United States created the group,⁴⁹ (2) whether the group was completely dependent on the United States,⁵⁰ (3) whether this complete dependence extended to all fields of the group’s activity,⁵¹ (4) whether the United States actually exercised control over the group and did not merely retain the power to do so,⁵² (5) and whether the United States selected, installed, or paid the group’s political leaders.⁵³ The ICJ found that the United States did not exercise “complete control” over the *Contras*.⁵⁴

Of all the “control tests,” the “complete control” test is perhaps the most difficult to establish. Moreover, it may not reflect the typical relationship between a non-State actor and a State, given that many non-State groups retain at least some considerable degree of autonomy in their operations. Nevertheless, the test indicates that one way of finding a State responsible for the acts of a non-State actor is to find that the group was a *de facto* organ of the State. Where a non-State actor is a *de facto* organ of the State, the “complete control” test attributes the entirety of the group’s conduct to the State.

44. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 110 (June 27).

45. Milanović, *supra* note 43, at 577.

46. *Id.*

47. *Id.*

48. Stefan Talmon, *The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L AND COMPAR. L. Q. 493, 498 (2009).

49. Milanović, *supra* note 43, at 577.

50. *Id.*

51. Talmon, *supra* note 48, at 498.

52. *Id.*

53. Milanović, *supra* note 43, at 577.

54. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 109 (June 27).

2. The ICJ's "effective control" test

In addition to the "complete control test," the International Court of Justice established the "effective control" standard in the *Nicaragua* case.⁵⁵ The International Law Committee endorsed this test in its commentaries to the Draft Articles of State Responsibility.⁵⁶ Unlike the "complete control" test, which establishes a State's responsibility for the entirety of a group's conduct, the "effective control" test focuses on whether the State should face liability for *specific operations* by the group.⁵⁷ This test looks for a finding that the State controlled a group's operation to such a degree that the group conducted the operation on the State's behalf.

Under the "effective control" standard, a State will not face responsibility for a group's wrongful acts unless the State exercised effective control over the specific operation in which the violations occurred.⁵⁸ Moreover, the State will only be responsible for those wrongful acts that were integral to the operation.⁵⁹ Actions that a group takes beyond the scope of the supporting State's authorization will not be attributable to the State if the actions were peripheral or incidental to the operation.⁶⁰

The "effective control" test sets a very exacting standard. Under the "effective control" test, a State cannot incur liability by generally providing arms, information, finances, or any form of material support to a non-State actor.⁶¹ As Professor Talmon explained, a complainant must demonstrate that the State helped plan the operation, choose the operation's targets, gave instructions to participants, and provided operational support for the mission.⁶² Moreover, he explained that the complainant must show that the State was involved in the operation from its beginning until its end.⁶³ Although the "effective control" test sets a lower burden of proof than that for the "complete control" test, it nevertheless creates such a strict standard that it fails to hold States accountable in most instances.

3. The ICTY's "overall control" test.

The "overall control" test stands as a counterpart to the "effective control" standard. The International Criminal Tribunal for the former

55. *Id.* ¶ 115.

56. Draft Articles, *supra* note 1, ¶ 4.

57. Milanović, *supra* note 43, at 577.

58. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115.

59. Draft Articles, *supra* note 1, ¶ 3.

60. *Id.* ¶ 8.

61. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115.

62. Talmon, *supra* note 48, at 503.

63. *Id.*

Yugoslavia established this rule in *Prosecutor v. Tadić*.⁶⁴ However, unlike *Nicaragua*, *Tadić* was an international criminal trial. The prosecutor charged an individual, Dusko Tadić, with torture, inhuman treatment, and murder in relation to his participation in the Bosnian War.⁶⁵ To demonstrate that international humanitarian law applied to the case, the prosecutor had to show that Tadić participated in an international armed conflict.⁶⁶ This meant that the prosecutor had to draw a link between the Federal Republic of Yugoslavia and the Bosnian Serb Army, to which the former provided support and to which Tadić belonged. The Appeals Chamber did not apply the ICJ's "effective control" test,⁶⁷ asserting that the "effective control" test applied to situations in which private individuals acted on behalf of a State.⁶⁸ The Chamber explained that a different standard should apply where the State supported a hierarchically organized group.⁶⁹ The Chamber was satisfied that the Federal Republic of Yugoslavia exercised "overall control" over the Bosnian Serb Army.⁷⁰ Under this "overall control" standard, a group's actions are attributable to a State if the State coordinated or helped in the general planning of the group's military activities, as well as provided equipment and finances to it.⁷¹

This test sets a less stringent standard than the "complete control" test because it does not require that the non-State actor act in "complete dependence" to the supporting State. Moreover, the "overall control" test is less stringent than the "effective control" standard because it does not require that the State have controlled, or instructed, the specific operation in which the breaches occurred. Nevertheless, the ICJ disapproves of the "overall control" rule outside of its use in international criminal settings.⁷² Many in the international community view the "overall control" test as applying to international criminal cases for the purpose of establishing whether the defendant participated in an international armed conflict.⁷³

64. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

65. *Id.* ¶¶ 4.1-11.55.

66. *Id.* ¶¶ 83-87.

67. *Id.* ¶ 115.

68. *Id.* ¶ 118.

69. *Id.* ¶ 120.

70. *Id.* ¶ 162.

71. *Id.* ¶ 131.

72. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. 43, ¶ 403 (Feb. 26).

73. See Haris Jamil, *Classification of Armed Conflict: An Analysis of Effective Control and Overall Control Tests*, ISIL Y.B. INT'L. HUM. AND REFUGEE L., 2016-2017, at 185 (discussing the "overall control" standard's viability as a form of classifying an armed conflict); Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18

Ultimately, its purpose is to find that humanitarian law applies to the acts of a criminal defendant, which is a different inquiry than whether a State is responsible for the acts of its agent.

4. The accountability gap.

Scholars continue to evaluate the merits of the “control” tests, particularly the “effective control” and “overall control” tests. On one hand, the “effective control” standard sets a very high bar for complainants to meet. It presents difficult, if not impossible, evidentiary burdens, given the covert nature of State/non-State actor relationships.⁷⁴

On the other hand, the “overall control” test sets a much lower bar. Cassese Antonio wrote that the “overall control” standard might better reflect the realities of relationships between States and non-State actors.⁷⁵ Moreover, he noted that the rule would account for the evidentiary difficulties that the “effective control” standard poses.⁷⁶ Arguably, however, this rule should not apply outside of the international criminal context because it could inhibit cooperation that may prove beneficial.⁷⁷ In some instances, providing aid to a non-State actor might further a proper humanitarian purpose, but a lower threshold for liability would dissuade States from doing so.

It may well be that times call for a re-evaluation of the “control” tests. Such a task presents difficulties. At present, however, the predominant standards set a high bar for complainants. As a result, an accountability gap exists for States that support problematic non-State actors. States have an incentive to support these groups because they do not have to worry about the narrow “control” tests. However, some in the international community believe that Common Article 1 of the Geneva Conventions effectively addresses this accountability gap.

C. Common Article 1 Bridges the Accountability Gap.

Common Article 1 of the Geneva Conventions states that “the High Contracting Parties undertake to respect and to ensure respect for the

EUR. J. INT’L. L. 649 (2007) (recognizing the “overall control” standard’s present status as merely a way to classify an armed conflict).

74. See Hathaway et al., *supra* note 7, at 552; see Cassese, *supra* note 73, at 666.

75. Cassese, *supra* note 73, at 666.

76. *Id.*

77. See Hathaway et al., *supra* note 7, at 561-62.

[Conventions] in all circumstances.”⁷⁸ As Professors Michael N. Schmitt, Sean Watts, and Frits Kalshoven argue, the provision may simply serve as an aspirational statement or a truism.⁷⁹ They explain the provision merely reiterates that States have obligations to ensure their own armed forces and populations respect the Geneva Conventions.⁸⁰ However, the ICRC and some progressive scholars argue that Common Article 1 has incurred a more expansive interpretation over the years.⁸¹ Under this more expansive reading of Common Article 1, a State must ensure that *other* States and non-State actors respect the Conventions.⁸² Even if a State is not involved in a conflict, it must keep other parties accountable to international humanitarian law.⁸³

Professors Schmitt, Watts, and Kalshoven find that this progressive interpretation lacks corroborating support. They argue that the Drafters did not intend such a broad reach for the provision.⁸⁴ Moreover, they argue that an insufficient amount of State practice supports this expansive reading.⁸⁵ For the purpose of this note, I will not determine which camp has the better argument. Like Professor Oona Hathaway, I will presume that Common Article 1 requires States to ensure that other States and non-State actors respect the Geneva Conventions.

States have both negative and positive obligations under this modern interpretation of Common Article 1.⁸⁶ Under its negative obligations, a State may not encourage, aid, or assist parties to a conflict in committing

78. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3.

79. Schmitt & Watts, *supra* note 8, at 676-77; Kalshoven, *supra* note 8, at 669.

80. Schmitt & Watts, *supra* note 8, at 681; Kalshoven, *supra* note 8, at 692.

81. COMMENTARY OF 2016, *supra* note 4, ¶ 173; Marten Zwanenburg, *The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation*, 97 INT’L L. STUD. SERIES. US NAVAL WAR COL. 622-24 (2021); Hathaway et al., *supra* note 7, at 565-78; Knut Dormann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT’L REV. RED CROSS 707-11 (2014).

82. COMMENTARY OF 2016, *supra* note 4, ¶ 153.

83. *Id.*

84. Schmitt & Watts, *supra* note 8, at 680-84; Kalshoven, *supra* note 8, at 702.

85. Schmitt & Watts, *supra* note 8, at 689-92; Kalshoven, *supra* note 8, at 719-27.

86. COMMENTARY OF 2016, *supra* note 4, ¶ 154.

breaches of the Geneva Conventions.⁸⁷ The ICJ established this in *Nicaragua*—the same case in which it devised the “effective control” standard.⁸⁸ In that case, the ICJ held that the United States violated Common Article 1, because it provided a training manual to the *Contras* which endorsed extrajudicial killings of government officials and suggested shooting civilians trying to leave towns.⁸⁹ The ICJ concluded that the United States had encouraged breaches of the Conventions.⁹⁰ To date, this remains one of the clearest applications of Common Article 1 by any tribunal. However, it only illustrates how the provision’s negative obligations function.

Under Common Article 1’s positive obligations, a State must do everything reasonably within its power to prevent or suppress another group or State’s grave breaches.⁹¹ The ICRC gives flexibility to States in determining how they discharge these obligations.⁹² However, there is a lack of case law and authority which elucidates on how these obligations function. Instead of requiring definitive measures, the ICRC argues that a State’s positive obligations depend on the context of a given situation.⁹³ The nature of a State’s obligations depends on the extent and nature of its relation to the other State or non-State group. A State fulfills its obligations when it takes all *possible and lawful* steps to ensure that its non-State partners and other States respect the Conventions.⁹⁴

Professor Oona Hathaway advocates for a progressive interpretation of Common Article 1. In her article “Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors,” Hathaway writes that Common Article 1 resolves the accountability gap for States that support non-State actors.⁹⁵ Common Article 1 would not hold a State accountable for a non-State actor’s wrongful acts but would hold it responsible for not doing everything within its power to ensure that the group did not commit grave breaches.⁹⁶

87. *Id.* ¶ 158.

88. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 220 (June 27).

89. *Id.* ¶¶ 255-56.

90. *Id.*

91. COMMENTARY OF 2016, *supra* note 4, ¶ 164.

92. *See id.* ¶¶ 165, 180 (suggesting that States have a choice in choose which measures to take, depending on the circumstances).

93. *See id.* ¶ 165 (suggesting that the nature of a State’s due diligence depends on the circumstances).

94. *Id.* ¶¶ 165, 174.

95. Hathaway et al., *supra* note 7, at 574-78.

96. *Id.* at 576.

Hathaway believes that Common Article 1 would require that “States... make respect of international law a major focus in their interactions with non-State actors in armed conflicts.”⁹⁷ She writes that the provision would have States take “affirmative steps to ensure [that] their non-State partners complied with relevant law.”⁹⁸ She suggests that a State’s failure in properly instructing and training a non-State partner in its international law obligations should be a violation of Common Article 1.⁹⁹ However, Hathaway sees a problem with the due-diligence standard. A State that took steps to secure its non-State partner’s compliance with the Geneva Conventions might risk appearing as if it had exercised “control” over the group or its operations.¹⁰⁰ Thus, if the non-State partner subsequently violated the Geneva Conventions in lieu of the State’s preventative efforts, the State may nevertheless face liability under the “control” tests.¹⁰¹

Hathaway writes that this tension between Common Article 1’s obligations and the law of State responsibility’s attribution doctrine dissuades States from embracing the contemporary reading of Common Article 1.¹⁰² States would not embrace an interpretation of the provision which would place them in a legally precarious situation. She attempts to resolve this problem with a safe-harbor approach. Hathaway’s approach consists of the following: a State which trains a non-State partner in humanitarian law may use the training as an affirmative defense against charges that it exercised “control” over the non-State actor or its operations.¹⁰³ Of course, a State would be responsible for violations that it instructed a non-State partner to commit.¹⁰⁴ However, the State would have this affirmative defense at its disposal against claims that it was responsible for the group’s conduct under the law of State responsibility.

Hathaway’s approach is flawed to the extent that it prescribes international humanitarian law training as a requirement for States to avoid legal responsibility. Some circumstances might present exigencies which make international humanitarian law training practical. Additionally, a bright line training requirement would detract from the ICRC’s emphasis on context. This emphasis on context is important, given the political, social, and strategic realities that come into play in any given situation.

97. *Id.* at 577.

98. *Id.*

99. *Id.*

100. *Id.* at 578.

101. *Id.*

102. *Id.*

103. *Id.* at 579.

104. *Id.* at 580.

III. HATHAWAY'S APPROACH DOES NOT ACCOUNT FOR EXIGENT CIRCUMSTANCES.

Some circumstances may be too exigent to require a State to conduct international humanitarian law training. The Siege of Kobani provides such an example and highlights the difficulty with Oona Hathaway's approach. A State providing support in this situation should have different obligations than the training requirement Hathaway provides.

A. *Background on the Siege of Kobani.*

In September 2014, the militant Sunni group ISIS launched an offensive on the region and town of Kobani, which lies along the Turkish-Syrian border.¹⁰⁵ ISIS sought to capture Kobani as a means of controlling a span of territory touching the Turkish border.¹⁰⁶ Kobani is home to a large Kurdish population.¹⁰⁷ Kurds are a minority in Syria who push for self-governance and autonomy in the region.¹⁰⁸ ISIS views the Syrian Kurdish political project as inherently un-Islamic¹⁰⁹ because of the Kurds' ideological commitment to secularism,¹¹⁰ women's rights,¹¹¹ and religious tolerance.¹¹² The ISIS invasion presented an existential threat to the city's inhabitants. They knew that ISIS captured many Kurdish villages beforehand and that the group did not spare civilians from beheadings, executions by stoning, and other atrocities.¹¹³ 400,000 refugees crossed or

105. Rebecca Grant, *The Siege of Kobani*, AIR FORCE MAG. (Aug. 29, 2018), <https://www.airforcemag.com/article/the-siege-of-kobani/>.

106. Zach Beauchamp, *ISIS is About to Take a City Called Kobane: Will it Draft Turkey Into War?*, VOX (Oct. 7, 2014), <https://www.vox.com/2014/10/6/6918763/kobane-isis-where-is-kobane-turkey>.

107. *Who are the Kurds?*, BBC NEWS (Oct. 15, 2019), <https://www.bbc.com/news/world-middle-east-29702440>.

108. *Id.*

109. Derek H. Flood, *The Battle for Kobani Comes to the Fore*, 7 CTC SENTINEL 5, 5-6 (2014), <https://ctc.usma.edu/the-battle-for-kobani-comes-to-the-fore/>.

110. See Si Sheppard, *What the Syrian Kurds Have Wrought*, THE ATLANTIC (Oct. 25, 2016), <https://www.theatlantic.com/international/archive/2016/10/kurds-rojava-syria-isis-iraq-assad/505037/> (quoting the Kurdish Rojava administration's foreign minister as stating "We want a federation in Syria [not based] in religion").

111. *Id.*

112. *Kurds*, MINORITY RTS. GROUP INT'L, <https://minorityrights.org/minorities/kurds-5/> (Mar. 2018) (describing the Kurdish Rojava administration as introducing "positive practices" for respecting the rights of religious minorities).

113. Tom Perry & Laila Bassam, *Kurds Issue Call to Arms as Islamic State Gains in Syria*, REUTERS (Sept. 18, 2014, 12:30 AM), <https://www.reuters.com/article/us-syria-crisis-drones/kurds-issue-call-to-arms-as-islamic-state-gains-in-syria-idUSKBN0HD00820140918>.

attempted to cross into Turkey, fleeing the massacres which ensued in their home territory.¹¹⁴

ISIS outmatched the Kurdish People's Defense Units (YPG),¹¹⁵ convincing some in the international community that an ISIS takeover was imminent.¹¹⁶ ISIS possessed numerous tanks and armed vehicles at its disposal.¹¹⁷ The YPG lacked heavy weapons which could meet these challenges.¹¹⁸ President Obama decided against sending ground troops, instead deciding to provide other forms of support.¹¹⁹ The U.S. Air Force dropped supplies and provided aerial support to YPG soldiers on the ground.¹²⁰ The YPG assisted in coordinating the aerial bombardments.¹²¹ This assistance proved crucial for the Kurdish resistance, as it ultimately managed to expel ISIS from the city by the following year.¹²²

B. Oona Hathaway's Common Article 1 as Applied to the Kobani Invasion.

Oona Hathaway's approach to Common Article 1 would be unrealistic in a situation like Kobani. If Common Article 1 resembled Hathaway's interpretation and required that the United States train the YPG in international humanitarian law, surely it would have thwarted an effective resistance.

Any kind of meaningful humanitarian law training requires more than a day because it involves building relationships and confronting cultural differences. The situation in Kobani involved an imminent existential threat which required that the Kurdish resistance prepares for combat within a

114. Scott Bobb, *Kobani Fighting Sends 400,000 Refugees to Turkey*, VOA NEWS (Oct. 19, 2014, 9:05 AM), <https://www.voanews.com/a/kobani-fighting-sends-four-hundred-thousand-refugees-to-turkey/2488705.html>.

115. See Flood, *supra* note 109, at 5.

116. Grant, *supra* note 105 (quoting National Security Advisor Tony Blinken stating, "[I]t is going to be difficult just through airpower to prevent ISIS from potentially taking over the town"); *Turkish President Says Kobani About to Fall to "IS"*, DEUTSCHE WELLE (Oct. 7, 2014) (quoting Turkish President Tayyip Erdogan stating "Kobani is about to fall"), <https://www.dw.com/en/turkish-president-says-kobani-about-to-fall-to-is/a-17981034>.

117. Flood, *supra* note 109, at 5.

118. *Id.*

119. David Jackson, *Obama Team: Success Against Islamic State in Kobani*, USA TODAY (Feb. 3, 2015, 9:57 AM), <https://www.usatoday.com/story/theoval/2015/02/03/obama-islamic-state-kobani-iraq-syria/22788287/>.

120. Grant, *supra* note 105.

121. Jamie Dettmer, *In Kobani, Kurd Fighters Help Coordinate Airstrikes on IS Targets*, VOICE OF AM. (Oct. 15, 2014, 2:05 PM), <https://www.voanews.com/a/kobani-islamic-state-fighting-airstrikes-kurdish-fighters/2484354.html>.

122. Grant, *supra* note 105.

short time frame. This was glaringly apparent given that ISIS captured twenty-one Kurdish villages within twenty-four hours during the period leading up to the invasion.¹²³ Ultimately, Hathaway's training requirement would have been unrealistic in a situation like this.

In a situation like Kobani, the supporting State's obligations may involve actions different from providing courses in international humanitarian law training. For example, the circumstances around such a siege could require that the State ensure that the group does not misuse intelligence information for unlawful purposes. The circumstances may require that the State provide weapons that comply with the Geneva Conventions. Such obligations would reflect the factual circumstances of the situation. Ultimately, this scenario highlights the importance of interpreting the positive due diligence requirement as factually specific. Hathaway's affirmative defense would incentivize States to conduct training when, as a measure, it would not address the necessities at hand.

IV. AN AFFIRMATIVE DEFENSE DETRACTS FROM THE ICRC'S EMPHASIS ON CONTEXT.

Oona Hathaway's interpretation of Common Article 1 also devalues the ICRC's emphasis on context. In imputing positive obligations to Common Article 1, the ICRC focuses on the context surrounding the State's engagement with the non-State actor. It does not recognize specific forms of conduct as always appropriate regardless of the circumstances. This position is defensible, given the ICRC's political credibility in the international community. Moreover, this position is both practical and moral. Hathaway's approach detracts from this emphasis on context because it threatens to impose a bright-line training requirement which will likely be superficial or ineffective.

A. *The ICRC's Approach to Common Article 1's Positive Obligations Focuses on Context.*

The ICRC's modern interpretation of Common Article 1 is open-ended and emphasizes context. In its 2016 commentaries, the ICRC explained that States "must do everything reasonably in their power" to prevent or end their non-State partners' violations of the Geneva Conventions.¹²⁴ The ICRC refrained from requiring that States take specific measures in all circumstances. Rather, it explained that States may choose between

123. Perry & Bassam, *supra* note 113.

124. COMMENTARY OF 2016, *supra* note 4, ¶ 118.

different possible measures,¹²⁵ so long as those means are lawful¹²⁶ and adequate¹²⁷ for preventing or ending their partners' grave breaches. The ICRC has set out a standard of means, not of result; thus, the State will not face liability if it did everything reasonably within its power to prevent or suppress the grave breaches of its non-State partner.¹²⁸

This approach focuses less on the State's actions, and more on whether it exercised due diligence under the given circumstances.¹²⁹ The extent of that due diligence depends on the circumstances of each individual case.¹³⁰ Relevant considerations in assessing the extent of a State's due diligence include the means reasonably available to the State, the gravity of the potential breach, the degree of influence that the State holds over the group responsible for the breach, and the foreseeability that breaches will occur.¹³¹

Because the ICRC's approach looks to the reasonableness of the State's conduct according to the circumstances, it emphasizes contextual analysis over imposing bright lines. This approach tasks a tribunal or political body with evaluating States' conduct on a case-by-case basis.

B. The ICRC's Approach is Defensible Because of Its Sensitivity to Military Necessity, as Well as Its Moral and Practical Appeal.

The ICRC's approach is defensible, given its place in the international community. The organization functions as a supervisory authority of international humanitarian law, but it must balance this role against its sensitivity to military necessity. The ICRC's approach to Common Article 1 reflects this need for military necessity. Moreover, its approach carries both a practical and moral appeal.

The ICRC considers itself both a "monitor" and a "catalyst" of international humanitarian law.¹³² The organization performs its supervisory role by monitoring conditions in various conflicts and making "practical proposals" for revisions and adaptations of international

125. *Id.* ¶ 165.

126. *Id.* ¶ 174.

127. *Id.* ¶ 165.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (Dec. 31, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>.

humanitarian law.¹³³ For example, the ICRC pushed for the expansion of international humanitarian law to the civil war context.¹³⁴ Due in part to its influence, it is now a reality that international tribunals will try individuals who allegedly committed war crimes in civil wars.¹³⁵ The organization also advocated for legal protections for civilians.¹³⁶ Before 1949, the Geneva Conventions mainly focused on combatants.¹³⁷ Today, humanitarian law often emphasizes a distinction between combatants and civilians.¹³⁸ Over the years, the ICRC has observed changes in warfare and has often functioned as a major agent for establishing legal paradigms.

The international community also regards the ICRC as a supervising authority in international humanitarian law. The organization conducts field reporting and appeals to belligerents to change their practices.¹³⁹ Working with the ICRC can lend credibility to a government or faction.¹⁴⁰ The organization published a two-volume compendium of what it regards as customary international humanitarian law.¹⁴¹ As some scholars have noted, the organization has a lot of political capital.¹⁴² This political capital allows it to advocate for the development of international humanitarian law.

133. *Id.*

134. David P. Forsythe, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L REV. OF THE RED CROSS 63, 66 (2007).

135. *Id.*

136. *Id.* at 69.

137. *See id.* at 69 n.15.

138. Protocol 1, *supra* note 78, art. 48.

139. *See* Forsythe, *supra* note 134, at 70-71 (discussing the ICRC's work to limit the uses of poison gas and land mines); David P. Forsythe, *Human Rights and the International Committee of the Red Cross*, 12 HUM. RTS. Q. 265, 275 (1990) (describing the ICRC's advocacy to end torture and mistreatment in Iran, French Algeria, Uruguay, and Gre); *see also* INT'L COMM. OF THE RED CROSS, *Special File: The Intifadah- An Act of Self Defence: D- The World Reaction to and Assessment of Israeli Measures: 6*, 4 PAL. Y.B. INT'L. L. 129, 130 (1987-1988) (describing the ICRC's efforts to improve tensions and harsh conditions in an Israeli detention center).

140. *See* FIONA TERRY, *CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION 45* (2002) (discussing the ICRC's position in lending credibility to the apartheid government in South Africa).

141. INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 2: PRACTICE PART 1* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 2: PRACTICE PART 2* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

142. Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 227 (2006).

However, the organization must spend this capital wisely to maintain itself as a supervisory authority.¹⁴³

To maintain its supervisory authority, the ICRC must respect States' demand for military necessity.¹⁴⁴ In writing its commentaries and advocating for the creation of certain laws, the organization must take caution not to lose the trust of others.¹⁴⁵ States will not agree to laws that keep them from engaging in the battlefield. This is where the ICRC encounters trouble regarding Common Article 1. The United States¹⁴⁶ has taken a skeptical stance toward Common Article 1's positive obligations. The criticism that some of its representatives have made is that the broad provision would place an ever-increasing amount of legal responsibility on States.¹⁴⁷

Arguably, the ICRC's broad interpretation of Common Article 1 is politically sensitive enough to quell this concern. Because it focuses on "reasonableness" and context, the ICRC sets out a rule that gives States discretion to make choices about how to cooperate with non-State actors.¹⁴⁸ The rule merely asserts that the extent of a State's legal responsibilities should depend on the nature of its relationship with the group that it supports.¹⁴⁹ Although it does not give absolute deference to States, the ICRC's approach respects the need for States to make their own decisions regarding how to support non-State actors. Thus, it balances humanitarian concerns with respect for military necessity.

Moreover, the ICRC's contextual approach is practical. States need the discretion to make strategic decisions that take into consideration all the exigencies and nuances of the moment. No two situations are alike. The ICRC's emphasis on "reasonableness" gives States freedom to evaluate the extent to which they will engage with non-State groups, and then allows them to choose¹⁵⁰ which measures to take to ensure respect for the Conventions. In other words, it allows States to make thoughtful and

143. *Id.*

144. *The International Committee of the Red Cross (ICRC): Its Mission and Work* (Adopted by the Assembly of the ICRC on June 17, 2008), 91 INT'L. REV. OF THE RED CROSS 399 (2008).

145. *Id.* at 404.

146. Brian J. Egan, Remarks on *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, AM. SOC'Y OF INT'L L. (Apr. 1, 2016), <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm>; Quinta Jurecic, *Defense Department General Counsel Remarks at IDF Conference*, LAWFARE (May 28, 2019, 8:30 AM), <https://www.lawfareblog.com/defense-department-general-counsel-remarks-idf-conference>.

147. Jurecic, *supra* note 146.

148. COMMENTARY OF 2016, *supra* note 4, ¶ 165 (indicating that a State's obligations depend on the circumstances, including the means reasonably available to it).

149. *Id.*

150. See COMMENTARY OF 2016, *supra* note 4, ¶ 165.

tactical decisions. This is more practical than a training requirement, which has the potential of burdening States' logistical capacities and disrupting their ability to make effective plans.

Lastly, the ICRC's approach is moral. At the heart of Common Article 1's legal obligations are a recognition that a State which supports a non-State actor has at least some influence over how the group wages war. A State with such influence cannot abandon its commitment to the Geneva Conventions merely because it only indirectly invests in a conflict. Yet, the broad nature of the rule also recognizes that these relationships are fraught with nuances. These relationships do not always lend themselves to easy value judgments. The ICRC's approach allows for appreciations of ambiguities and discrepancies, instead of enabling overtly broad deference or unrealistic pronouncements.

The ICRC's broad, due-diligence approach is open-ended enough for States to take charge of their own strategic planning and policy choices. States can have their discretion, so long as they also uphold the Geneva Conventions. As discussed below, Hathaway's approach devalues these merits by constructing a more rigid rule.

C. Hathaway's Approach Deters from the Benefits of the ICRC's Approach.

An affirmative defense approach departs from the emphasis on context which underlies the ICRC's approach. To the extent that an affirmative defense encourages training above other means of "ensuring respect," this may be insufficient where States employ training in bad faith or as a superficial way of preventing humanitarian law violations. Instead of an affirmative defense approach, the ICRC's approach may provide for a better analysis: a factfinder should consider several factors when assessing whether a State took adequate measures in supporting a non-State actor, whether through training or some other means.

Hathaway's affirmative defense incentivizes States to train their non-State partners in international humanitarian law. Given that Common Article 1's mandate is broad, training is a clear course of action that a State may undertake as a way of complying with the article's obligations. Moreover, it provides a defense against allegations of "control" under the law of State responsibility. Much like in the employment law context, where employers utilize training in part as a way of protecting themselves

against claims of not preventing workplace harassment,¹⁵¹ training could become a standard protocol for States under Hathaway's approach.

Encouraging training could constitute a valid policy outcome: in many armed conflicts, non-State actors have little to no familiarity with international humanitarian law.¹⁵² A lack of familiarity with the law contributes to an environment in which violations will likely occur.¹⁵³ In many situations, training may serve as a perfectly legitimate preventative measure.

However, the problem with Hathaway's approach is that States may use training as a way of ensuring against liability even when violations will foreseeably occur regardless of the training. States could conduct training in bad faith. The *Nicaragua v. United States* case provides such an example. In that case, the United States argued that its training manual, which encouraged extrajudicial killings and the targeting of civilians, was an effort in moderating the *Contras*' behavior.¹⁵⁴

Moreover, even in instances where a State is not acting in bad faith, training may at times be a superficial way of "ensuring respect" for the Geneva Conventions. Mechanisms of moral disengagement may undermine the efficacy of training.¹⁵⁵ For example, a group may feel animus towards their enemy or believe that the ends of victory justify the use of illegals means.¹⁵⁶ Under Hathaway's affirmative defense approach, States may "phone in" training even if it is insufficient as a way of preventing violations. This is troublesome; the law should not exculpate the State for conducting training if the circumstances called for other actions.

For this reason, the ICRC's contextual approach should stand. Under the ICRC's approach, training may or may not be adequate after a factfinder takes into consideration the circumstances, the means available to the State, the State's degree of influence over its partner, and the

151. See *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1181 (9th Cir. 2003) (finding that a research university viably established a "reasonable care" affirmative defense precluding employer liability in part because it provided periodic sexual harassment training to employees).

152. Ezequiel Heffes & Jonathan Somer, *Inviting Non-State Armed Groups to the Table*, at 5, CTR. FOR THE STUDY OF ARMED GRPS. (2020).

153. Annysa Bellal & Stuart Casey-Maslen, *Rules of Engagement: Protecting Civilians Through Dialogue with Armed Non-State Actors*, at 6, GENEVA ACAD. OF INT'L HUMANITARIAN L. AND HUM. RTS. (2011).

154. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 120 (June 27).

155. See Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding & Preventing IHL Violations*, 86 INT'L REV. OF THE RED CROSS 189, 194-98 (2004).

156. *Id.* at 197-98.

foreseeability that violations would occur regardless of any training.¹⁵⁷ The ICRC's emphasis on "reasonableness" and circumstance indicates that some situations call for measures other than training.¹⁵⁸ For example, a situation may require that the State forego certain tactics or operational plans with its non-State partner. Perhaps in some situations, a State may not provide any assistance at all, or cease providing it where violations have already occurred. The contextual approach, although not as clear-cut as Hathaway's affirmative defense, does not easily lend itself to abuse or half-heartedness on the part of States. Moreover, it demands a more nuanced analysis, as opposed to a bright-line outlook which focuses on whether the State trained its partner or not. This is important given that the "effective control" test already lends itself to a rigid analysis. An approach which considers circumstance better resolves the flaws of an already strict attribution framework.

Nevertheless, the due diligence standard should require that a State conduct training when it engages in a long-term and involved relationship with its non-State partner, or where both parties engage in a joint operation.¹⁵⁹ In a joint operation, both parties share time and objectives. Moreover, the State that has joint control over the operation can directly supervise and control the conduct of subordinates, including those belonging to the non-State group. In this scenario, the State should assume some degree of command responsibility. Alternatively, training is proper where the State established a form of academy for non-State actors. Such a scenario naturally calls for training that meaningfully implements international humanitarian law.

Hathaway's proposal for an affirmative defense may not be optimal to resolve the accountability gap if it merely results in an analysis which focuses on whether the State trained its partner in international humanitarian law. States may overly rely on training as a way of complying with Common Article 1 and defending itself against allegations of "control" under the law of State responsibility, even if training is inadequate as a measure for preventing violations. Under the ICRC's approach, States may consider a variety of possible measures and factfinders may assess the circumstances of a given situation when determining States' fault. This is favorable because it better resolves the problem of a rigid accountability framework under the "control" tests.

157. See COMMENTARY OF 2016, *supra* note 4, ¶ 165.

158. See *id.* ¶ 165 (indicating that States "remain...free to choose between different possible measures...").

159. See *id.* ¶ 167.

V. A CONTEXTUAL APPROACH CORRESPONDS TO THE PHILOSOPHY
BEHIND THE LAW OF WAR IN GENERAL.

It is not surprising that the ICRC took a contextual approach in interpreting Common Article 1. The law of war, including the doctrine of command responsibility, often accounts for context.

For example, under Article 14 of Additional Protocol I, an occupying power must ensure that the medical needs of the civilian population in an occupied territory are satisfied.¹⁶⁰ The occupying power generally cannot requisition civilian medical units, equipment, or services.¹⁶¹ However, Article 14 makes an exception for requisition when the occupying power needs the resources for the adequate and immediate medical treatment of its wounded or sick soldiers.¹⁶² Article 14 permits such a requisition so long as the necessity exists,¹⁶³ and if the occupying power takes measures to ensure that the civilian population's medical needs will continue to be satisfied.¹⁶⁴

Article 12 of Additional Protocol I states that civilian hospitals may not be the object of an attack.¹⁶⁵ However, Article 13 states that this protection ceases once combatants use the hospital to commit acts harmful to the enemy.¹⁶⁶ Again, the existence of legal protections depends on the context in which the belligerent uses the hospital.

Even the doctrine of command responsibility, which shares certain theoretical underpinnings to Common Article 1, accounts for context. Apart from directly ordering the commission of wrongful acts,¹⁶⁷ the superior is also responsible for failing to take all reasonable and necessary measures within his power to prevent or repress breaches of international humanitarian law.¹⁶⁸ This focus on reasonableness mirrors Common Article 1's due diligence standard and focuses on the context of the situation at hand.

These examples help to justify the ICRC's approach to Common Article 1. The law of war frequently focuses on the context of a given scenario when determining what is appropriate, rather than imposing bright lines in difficult situations. Although the law outright forbids some forms of

160. Protocol 1, *supra* note 78, art. 14 ¶ 1.

161. *Id.* ¶ 2.

162. *Id.* ¶ 3(a).

163. *Id.* ¶ 3(b).

164. *Id.* ¶ 3(c).

165. *Id.* art. 12.

166. *Id.* art. 13.

167. Rome Statute of the International Criminal Court, art. 25, July 7, 2002, 2187 U.N.T.S. 105.

168. *Id.* art. 28.

conduct, there are other scenarios where the obligations bear on what happens in the moment. The ICRC's approach to Common Article 1 operates in a similar manner, because it focuses less on the specific conduct but rather looks to the circumstances and the nature of the normative obligations at issue.

VI. CONCLUSION.

Common Article 1 could hold States accountable when their dealings with non-State actors do not respect or ensure respect for the Geneva Conventions. However, it would be a mistake to construe Common Article 1 as containing a strict training requirement. It is unrealistic to expect international humanitarian law training in certain emergencies. Moreover, such a requirement would make it difficult for tribunals to make nuanced assessments which take into consideration context and military necessity. Instead, training should be merely one factor for tribunals and human rights bodies when they assess a State's fault. For this reason, tribunals should defer to the ICRC's contextual due-diligence approach.

NOT ALL SURROGACY & RAINBOWS: BARRIERS TO GAY MEN SEEKING TO BECOME PARENTS THROUGH SURROGACY WITHIN THE EUROPEAN UNION

*Bianca Rector**

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I. INTRODUCTION

For gay men and male same-sex couples who wish to have biological children, commercial surrogacy provides the only realistic option for starting a family.¹ However, because the European Union (EU) does not

* J.D., Southwestern Law School, 2022; B.A., Pepperdine University, 2017. Bianca is currently an Associate Attorney at Babok & Robinson, LLP in Beverly Hills, California.

1. Altruistic surrogacy, where the surrogate is not given monetary compensation for her services is permitted in some EU States, such as the UK and Greece. However, the commitment surrogacy requires makes this practice relatively rare. In addition, some States that permit altruistic surrogacy have implemented additional restrictions, such as requiring one intended

permit commercial surrogacy, gay men who wish to be genetically related to their child must pursue surrogacy abroad.² The European Parliament (Parliament) has expressly condemned commercial surrogacy, and all EU States forbid surrogacy arrangements in which the surrogate mother is compensated for her services.³ To support the prohibition of commercial surrogacy, Parliament and EU States claim the practice is inherently exploitative, specifically targets poor, vulnerable women, and leaves surrogate mothers both physically and psychologically damaged.⁴ Nevertheless, many nations outside of the EU have a growing surrogacy industry that caters to Union citizens and other procreative tourists.⁵ Although the EU's ban on commercial surrogacy has meant that both straight and gay citizens must travel internationally to pursue surrogacy, the ban has primarily and disproportionately burdened male couples. For example, while several countries within Europe, but outside of the EU, permit surrogacy for heterosexual couples, the majority forbid same-sex couples from participation.⁶ Therefore, options for male couples are often limited to significantly more expensive surrogacy programs, such as those in the United States, or risky and unregulated programs in developing countries.⁷

Male couples who do engage in commercial surrogacy abroad are also not guaranteed the same legal rights as heterosexual couples upon returning to the EU. Many EU States will only consider the genetically related father to be the child's legal parent and make it difficult or impossible for the non-

parent be biologically related to the surrogate. See Noelia González, *Regulating Surrogacy in Europe, Common Problems, Diverse National Laws*, 26 EUR. J. OF WOMEN'S STUD. 435, 436 (2019).

2. Alice Cuddy, *Where in Europe is Surrogacy Legal?*, EURONEWS, <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> (Sept. 13, 2018).

3. See *Annual Report on Human Rights and Democracy in the World*, at 29 (Nov. 30, 2015), https://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.pdf.

4. See *A Comparative Study on the Regime of Surrogacy in EU Member States*, EUR. PARL. DOC. PE 474-403(23) (2013).

5. See Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTHCARE POL'Y 111, 112, 114-15 (2015).

6. See William Houghton, *Surrogacy for Gay Couples Worldwide*, SENSIBLE SURROGACY <https://www.sensible-surrogacy.com/gay-surrogacy/> (Oct. 14, 2021); *Unregulated Surrogacy Poses Risks for LGBT Couples, Warns Global Consultant*, PRWEB (Mar. 10, 2018), <https://www.prweb.com/pdfdownload/15295170.pdf>.

7. Emma Lott, *Why is Surrogacy for Same-Sex Couples So Expensive?*, GAY PARENTS TO BE (Sept. 8, 2021), <https://www.gayparentstobe.com/gay-parenting-blog/surrogacy-for-same-sex-couples-cost>.

genetically related parent to obtain any parental rights.⁸ The lack of a genetic link is often used as a legal loophole to punish male same-sex couples, while heterosexual couples who have engaged in a transnational surrogacy arrangement do not experience any significant repercussions.

In addition to harming same-sex couples, the EU's surrogacy ban does little to protect women from exploitation. In fact, prohibiting surrogacy has pushed more EU citizens to engage in surrogacy arrangements in impoverished countries where women enjoy fewer protections.⁹ Surrogacy in poorer countries, like the Ukraine and Russia, often have minimal regulation, and women commonly report experiencing poor healthcare, underpayment, and emotional trauma.¹⁰ At the same time, research from countries that have a strong regulatory framework in place has shown that guidelines and screening procedures generally protect surrogates from both health complications and abuse. Not only do existing EU restrictions enforce a strong anti-gay bias, but the broader grounds for the restrictions do not provide any protections for women.

This note will first argue that the EU's condemnation of surrogacy has a discriminatory impact on gay men and male couples. Due to male biology and persistent homophobia within many EU States, gay men encounter more challenges when attempting to have biological children by surrogacy. Next, this note will demonstrate that the EU's condemnation of commercial surrogacy is based on unsubstantiated beliefs, gender stereotypes, and inapplicable data. Empirical research has shown that surrogate mothers in countries with proper regulation are not comprised of primarily vulnerable women and are not psychologically damaged by their experience. Lastly, this note will argue that the EU's ban on surrogacy has contributed to the growth of an international surrogacy industry, where women in poorer countries are more likely to be victims of abuse. While the purpose of the EU's position is to protect women from victimization, professional regulation and procedural safeguards are more effective at preventing the exploitation of women.

8. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. REV. 369, 380 (2012).

9. See Emma Lamberton, Note, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. PUB. & INT'L AFF. (2020), <https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children> ("a surrogacy ban could potentially drive the market underground or to third country markets, as happened in Ukraine after the closure of surrogacy markets in India . . ."); *Banning Commercial Surrogacy Will Expose Women to Exploitation*, THE ECON. TIMES, <https://economictimes.indiatimes.com/magazines/panache/banning-commercial-surrogacy-will-expose-women-to-exploitation/articleshow/53889509.cms> (last updated Aug. 21, 2016).

10. Lamberton, *supra* note 9.

II. SURROGACY POLICY WITHIN THE EU DISPROPORTIONATELY AFFECTS MALE, SAME-SEX COUPLES

The EU and most Member States have always condemned commercial surrogacy.¹¹ Though this position has prevented all Union citizens from engaging in commercial surrogacy within the EU, it has had a less than uniform effect with regard to international surrogacy arrangements. Specifically, the EU's prohibition on commercial surrogacy unevenly burdens gay men and same-sex male couples who wish to have biological children.¹² While both male couples and those facing reproductive issues must pursue surrogacy abroad if they want biological children, only male couples experience significant obstacles as a result of this choice. Even though LGBT individuals are protected against discrimination by EU treaties and laws,¹³ their familial rights are still restricted in many Member States.¹⁴ Because certain States have chosen to provide minimal protections for LGBT individuals, male couples who have had children by surrogacy often face blatant homophobia and difficulties establishing their parental rights.¹⁵ Although recent decisions on transnational surrogacy by the European Court of Human Rights and the European Court of Justice have helped to lessen this discriminatory treatment, they have primarily served to benefit heterosexual couples and their surrogate children.¹⁶ Unfortunately,

11. González, *supra* note 1, at 435-36.

12. *Obstacles to the Free Movement of Rainbow Families*, EUR. PARL. DOC. PE 671-505(74) (2021),

("The parental rights that same-sex couples enjoy under national law vary considerably throughout the EU and . . . when rainbow families move to some EU Member States, the legal ties between child and one or both parents, will be dissolved."); Dan Sobovitz, *Long Way to Go for Gay Rights in Europe*, THE BRUSSELS TIMES (June 21, 2020),

<https://www.brusselstimes.com/opinion/117865/long-way-to-go-for-gay-rights-in-europe/>.

13. Consolidated Version of the Treaty on the Functioning of the European Union art. 2 & 3, May 9, 2008, 2008 O.J. (C 115) 47; Charter of Fundamental Rights of the European Union art. 21, Dec. 18, 2000, 2000 O.J. (C 364).

14. See European Parliamentary Research Service, *The Rights of LGBTI People in the European Union*, at 2 (May 2019)

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637950/EPRS_BRI\(2019\)637950_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637950/EPRS_BRI(2019)637950_EN.pdf).

15. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 74 ("The parental rights that same-sex couples enjoy under national law vary considerably throughout the EU and . . . when rainbow families move to some EU Member States, the legal ties between child and one or both parents, will be dissolved."); Ian Smith, *This is How LGBTQ+ People are Excluded from Freedom of Movement in the EU*, EURONEWS (June 6, 2021), <https://www.euronews.com/travel/2021/06/11/this-is-how-lgbtq-people-are-excluded-from-freedom-of-movement-in-the-eu>.

16. In *Mennesson v. France*, The European Court of Human Rights found that France was obligated to recognize the parentage of the non-genetically related intended mother over a child born by surrogacy. However, the court was silent on whether EU States were required to

due to inconsistent policy and legal barriers, biological children are frequently out of reach for gay men and male couples within the EU.

A. *Barriers Abroad*

From the start of their surrogacy journey, gay men encounter more obstacles participating in international surrogacy arrangements than heterosexual couples. There are several nations outside of the EU that allow commercial surrogacy, such as the Ukraine and the Republic of Georgia, but the practice is illegal for homosexual couples.¹⁷ In fact, the United States (U.S.)¹⁸ and Colombia¹⁹ are the only countries in which homosexual couples are legally permitted to employ a commercial surrogate. Due to limited options, gay men must typically travel farther if they wish to take part in a surrogacy arrangement.

The higher cost of surrogacy in LGBT-friendly nations makes the service unattainable for those with lower incomes. Surrogacy costs start at \$60,000 USD in Colombia²⁰ and \$100,000 USD²¹ in the U.S., without factoring in the cost of travel and program fees. Considering the median income in EU states generally falls between \$35,000 USD and \$45,000 USD, employing a surrogate in one of these destinations is likely too expensive for the majority of male couples.²² Heterosexual couples, on the other hand, have more financial flexibility when choosing to take part in a

recognize non-genetically related fathers as legal parents. Thus, in many States, one or both parents in a same-sex male couple may not be able to establish parentage over a child born by surrogacy. *See* *Mennesson v. France*, App. No. 65192/11, ¶¶ 96-102 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=001-145389>.

17. *See* Rachel Savage, *As Anderson Cooper Becomes a Father, Here's What You Need to Know About LGBT+ Surrogacy*, OPENLY (May 1, 2020), <https://www.openlynews.com/i/?id=1b20c88c-cc09-40db-af47-1e40a31a6890>.

18. Not all states have legalized commercial surrogacy. States with permissive surrogacy laws include California, Connecticut, Delaware, Maine, New Hampshire, Nevada, North Dakota, Oregon, and Rhode Island. Additional states allow commercial surrogacy, but with further restrictions, such as on the ability to get a pre-birth order. *See State by State Laws on Surrogacy for Gay Parents*, SIMPLE SURROGACY (Sept. 2, 2019), <https://simplesurrogacy.com/surrogacy/state-by-state-laws-on-surrogacy-for-gay-parents/>.

19. *Same-Sex Surrogacy in Colombia*, SURROGACY COLOMBIA, <https://surrogacycolombia.com/gay-surrogacy/> (last visited Nov. 10, 2021).

20. *Surrogacy in Colombia*, SENSIBLE SURROGACY, <https://www.sensible-surrogacy.com/surrogacy-in-colombia/> (last visited Nov. 10, 2021).

21. Beth Braverman, *How Much Surrogacy Costs and How to Pay for It*, U.S. NEWS (June 2, 2022), <https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it>.

22. *See* Rakesh Kochhar, *Through an American Lens, Western Europe's Middle Classes Appear Smaller*, PEW RES. CTR. (June 5, 2017), <https://www.pewresearch.org/fact-tank/2017/06/05/through-an-american-lens-western-europes-middle-classes-appear-smaller/>.

surrogacy arrangement. Ukraine, Russia, and the Republic of Georgia have all legalized commercial surrogacy for heterosexual couples and cost significantly less than the U.S. and Colombia. For instance, the average cost of surrogacy in the Ukraine is \$35,000 USD,²³ and ranges from \$32,000 to \$42,000 USD in the Republic of Georgia.²⁴ Due to superior reproductive technology and regulation, wealthier couples may still choose to pursue surrogacy in the U.S. despite the larger expense.²⁵ However, heterosexual couples with moderate to low incomes have more affordable alternatives to surrogacy that are not available to gay men or male couples.

Undeniably, the EU has little influence over the cost and legality of surrogacy in nations outside of the Union. Nevertheless, the obstacles explained above are challenges gay men confront when navigating the international surrogacy industry before they have even returned to the EU with their families.

B. Biological Barriers

Due to the biological differences between men and women, same-sex male couples who want a genetic link to their children must engage in surrogacy.²⁶ Though only one partner is biologically capable of being the genetically-related parent, countries with LGBT-friendly surrogacy laws will provide a birth certificate naming both male partners as father of the child.²⁷ Yet, upon returning to the EU, some Member States will only recognize the biological father as a legal parent, putting the non-genetically related father at constant risk of losing his parental rights.²⁸ Generally,

23. *Ukraine Surrogacy Cost: Benefits and What You Need to Know About the Financial Side*, WORLD CTR. OF BABY, <https://worldcenterofbaby.com/surrogate-cost-in-ukraine/> (last visited Nov. 10, 2021).

24. *Top 4 Cheapest Countries for Surrogacy that Parents Should Know*, IVF CONCEPTIONS, <https://www.ivfconceptions.com/cheapest-countries-for-surrogacy/> (last visited Nov. 10, 2021).

25. See William Houghton, *Understanding Surrogacy Success Rates*, SENSIBLE SURROGACY, <https://www.sensiblesurrogacy.com/surrogacy-success-rates/> (last visited Nov. 10, 2021).

26. Lesbian couples generally do not face the same reproductive challenges as male couples because they are biologically capable of becoming pregnant. Thus, they do not need to hire a third party, a surrogate, to have children, and can instead rely on artificial insemination. See Camisha Russell, *Rights-holders or refugees? Do gay men need reproductive justice?*, 7 REPROD. BIOMEDICINE & SOC'Y 131, 132 (2018).

27. In states where surrogacy is permitted, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate. See *Gestational Surrogacy Law Across the United States*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/married-same-sex-couples/> (last visited Nov. 12, 2021).

28. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 19-20 (“same-sex couples, who have legally established their (joint) parental status with regard to a child that was born through a surrogacy arrangement in a country where surrogacy is allowed . . . may be

heterosexual couples do not experience the same issues when establishing parentage. Assisted reproductive technologies, such as In Vitro Fertilization (IVF), allow a woman's eggs and a man's sperm to be manipulated outside of the body and the resulting embryo to be implanted in the surrogate's uterus.²⁹ In the most common scenario, both members of a heterosexual couple will have biological links to the surrogate child, so laws that require a genetic link do not affect them.³⁰ Thus, policies that withhold parental rights from the non-genetically related parent primarily impact same-sex male couples.

Moreover, though both female and heterosexual couples who cannot conceive naturally also face challenges with having biological children and establishing parentage, the EU's ban on commercial surrogacy disproportionately burdens male couples. In female relationships, one or both partners are capable of having biological children through artificial insemination or In Vitro Fertilization (IVF).³¹ Males do not have the option of carrying their own children and must spend a significant amount of money for egg donation and gestational carrier costs.³² When male couples pursue surrogacy, it is a complex, expensive, and legally precarious decision significantly more difficult than donor insemination or IVF. Further, female couples generally encounter less barriers to establishing joint parentage because of traditionally held beliefs about gender and motherhood.³³ Because women are frequently expected to be inherently maternal and natural caregivers, female couples are viewed to more closely resemble the heteronormative family.³⁴ The opinion that parenthood is instinctive to women, and not men, is reflected in the familial leave policies

faced with non-recognition of their status as parents when they return to the EU with their child . . .").

29. See *IVF – In Vitro Fertilization*, AM. PREGNANCY ASS'N, <https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization/> (last visited Mar. 21, 2022).

30. Gestational surrogates agree to carry a fertilized embryo created from another woman's egg and are not biologically related to the child they carry. In the United States, gestational surrogacy constitutes 95% of all surrogacy arrangements. See Robert Klitzman, *Paying gestational carriers should be legal in all states*, STAT NEWS (Feb. 12, 2020), <https://www.statnews.com/2020/02/12/paying-gestational-carriers-should-be-legal-in-all-states/>.

31. Lesbian couples may use IVF to combine one partner's egg with donor sperm, while implanting the resulting embryo in the other partner. Anna Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 360 (2011).

32. Russell, *supra* note 26, at 133.

33. THE PALGRAVE HANDBOOK OF FAMILY POLICY 421 (Rense Niewenhuis & Wim Van Lancker eds., 2020).

34. *Id.*

of EU States.³⁵ For instance, the majority of States rarely grant paternity or co-parent leave, and when they do, it is seldom paid.³⁶ Although female couples can still face challenges when attempting to establish the parentage of a non-genetically related parent, biology and ideals about a child's need for a mother have made it easier for female couples to have biological children.

Even where functional infertility, such as a low sperm count or having no viable eggs, prevents one partner from providing their genetic material, heterosexual couples still experience fewer issues establishing parentage.³⁷ In 2019, the European Court of Human Rights (ECtHR) released an opinion providing that States should recognize a non-genetically related mother as the legal parent of a child born by surrogacy.³⁸ In *Mennesson v. France*, the Court found that France had violated the child's right to respect for private life by refusing to establish the intended mother's parentage.³⁹ Introduced by the Convention of Human Rights, the right to respect for private life protects a child from arbitrary interference in his or her privacy, family, and home, and maintains that every child should be able to develop their own personal identity.⁴⁰ Despite the lack of genetic link between mother and child, the Court reasoned that declining the existence of the parent-child relationship would have negatively impacted the child's definition of identity.⁴¹ Though the Court acknowledged that States had an incentive to discourage their citizens from participating in surrogacy abroad, this was ultimately outweighed by what was in the best interest of the child.⁴² Thus, the Court demanded that EU States adopt some mechanism that would allow the non-genetically related to obtain parentage under domestic law.⁴³

35. *Id.* (“Ideals about a child’s need of a mother are strong, and women are expected to want to have children and to be more child-oriented and better caretakers than men.”).

36. *Id.*

37. *See* Dana, *supra* note 31, at 360.

38. *See* *Mennesson v. France*, App. No. 65192/11, ¶¶ 96, 99 (June 26, 2014) <https://hudoc.echr.coe.int/fre?i=001-145389>; *see also* Concerning the Recognition in Domestic Law of a Legal Parent-Child

Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Advisory Opinion P16-2018-001, Eur. Ct. H.R. ¶ 53 (Apr. 10, 2019). States are not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother: adoption may also serve as a means of recognizing that relation.

39. *Mennesson*, Eur. Ct. H.R. ¶ 99.

40. Eur. Conv. on H.R. at 11, https://www.echr.coe.int/documents/convention_eng.pdf.

41. *Mennesson*, Eur. Ct. H.R. ¶¶ 97, 99.

42. *Id.*

43. *See id.* ¶ 100; *see also* *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 20 (recognition of the parent-child relationship is generally accomplished through second-parent adoption, if not transcription of the foreign birth certificate).

The ECtHR, however, was silent as to whether their reasoning regarding a non-genetically related mother could be similarly applied to a non-genetically related father.

Instead, the ECtHR's advisory opinion established that at a minimum, Member States must examine each surrogacy arrangement "in light of the circumstances of the particular case."⁴⁴ This allows States to maintain a large amount of discretion over how their citizens may gain parentage and which citizens are ultimately granted parental rights over a child born by surrogacy. Though some States have created mechanisms for legally recognizing the non-genetically related parent, few provide these options where the intended parents are a same-sex couple. As a result, many States require male same-sex couples to go through court processes before both partners can be recognized as legal fathers,⁴⁵ or choose to justify the denial of parental rights with blatant homophobia.⁴⁶ In *Menesson*, the ECtHR provided that establishing the parentage of the non-genetically related mother was required so that the child may share the citizenship of his or her parents as to avoid statelessness.⁴⁷ The Court's reasoning, specifically the best interests of the child, would in theory demand the recognition of the non-genetically related father regardless of sexual orientation. Unfortunately, the flexibility in enforcement the Court has left up to EU States has often meant that only heterosexual couples enjoy the benefit of the argument.

In the years following *Menesson*, few countries within the EU have introduced mechanisms to allow legal recognition of parentage where the intended parents are a same-sex couple.⁴⁸ A 2019 survey found that only

44. Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Advisory Opinion P16-2018-001, Eur. Ct. H.R. ¶ 54 (Apr. 10, 2019).

45. See Sobovitz, *supra* note 12.

46. See Corte di Cassazione (Sezioni Unite Civili), 6 Marzo 2021, filed 31 Marzo 2021, No. 9006, para. 18 ff; Jessica Phelan, *Italy won't recognize gay couple as dads to surrogate babies: Top court*, THE LOCAL (May 9, 2019), <https://www.thelocal.it/20190509/italy-wont-recognize-gay-couples-as-dads-to-surrogate-babies-top-court/> ("Minister for Families Lorenzo Fontana . . . claims to believe only in 'natural' families with one mother and one father."); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. L ¶ 1; Marton Dunai, *Hungary amends constitution to redefine family, limits gay adoption*, REUTERS (Dec. 15, 2020), <https://www.reuters.com/article/hungary-lgbt/hungary-amends-constitution-to-redefine-family-limits-gay-adoption-idUSKBN28P1N8> ("The new Hungarian constitution defines family as 'based on marriage and the parent child relation. The mother is a woman, the father a man.'").

47. *Menesson*, Eur. Ct. H.R. ¶ 98.

48. Björn Sieverding, *Even where countries in Europe recognise marriage equality, children born to same-sex families remain at risk of statelessness*, EUR. NETWORK OF STATELESSNESS (Nov. 7, 2019), <https://www.statelessness.eu/updates/blog/even-where-countries-europe-recognise-marriage-equality-children-born-same-sex>.

eighteen of forty-three EU states provide methods, such as second-parent adoption, for male couples to obtain equal rights as parents.⁴⁹ A small number of EU countries will recognize joint parenthood from the child's birth, but this primarily applies to female couples who have given birth within the EU.⁵⁰ Even where second-parent adoption is permitted for male couples, it is frequently a burdensome and lengthy process.⁵¹ Adoption can be expensive and often requires the procurement of attorneys to show the non-genetically related parent is capable of being a competent parent.⁵² This can be a humiliating experience, considering both partners, as with heterosexual couples, have raised their children born by surrogacy since birth.⁵³

Moreover, EU States that decline to provide a mechanism that would allow non-genetically related fathers to gain parentage often use indirect or flagrant homophobia to justify their policies. In Italy, for instance, the Court of Cassation has ruled that only the biological father of twins born through international surrogacy would be listed as their legal parent.⁵⁴ In its opinion, the Court indicated that its decision was “intended to protect the dignity of pregnant women and the institution of adoption.”⁵⁵ The Court's statement is somewhat confounding, considering Italy generally restricts adoption to married, heterosexual couples. Even if male couples could legally adopt in Italy, this reasoning ignores that gay men, like those with infertility, have no special duty to adopt. Some countries, such as Hungary, are more blatant in their discrimination against same-sex couples and their ability to be parents. Recently, Hungary amended its constitution to provide that only traditional, heterosexual couples and their children could be defined as a family, effectively banning adoption and parental rights to non-genetically related fathers.⁵⁶ Poland has similarly refused to recognize the children of gay parents as legitimate. According to Poland's Supreme Administrative Court, a child of a same-sex couple could not be granted Polish citizenship

49. *Id.*; Lydia Bracken, *The ECtHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents*, 21 MED. L. INT'L 3, 4 (2021).

50. *See, e.g.*, Sieverding, *supra* note 48.

51. *See Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 20, 116.

52. *See* Sobovitz, *supra* note 12; Roberta Messina & Salvatore D'Amore, *Adoption by Lesbians and Gay Men in Europe: Challenges and Barriers on the Journey to Adoption*, 21 ADOPTION Q. 59, 60-61 (2018).

53. *See* Sobovitz, *supra* note 12.

54. Lilly Wakefield, *Italy Won't Let Gay Dads Register as Co-Parents to Babies*, PINKNEWS (May 9, 2019) <https://www.pinknews.co.uk/2019/05/09/italy-wont-let-gay-dads-register-as-co-parents-to-babies/>.

55. Press Release, Corte Suprema di Cassazione [Supreme Court of Cassation], Judgement in the Matter of Medically-Assisted Procreation (May 8, 2019) (It.).

56. *See* Dunai, *supra* note 46.

because “[o]nly a mother and a father can be parents under Polish law.”⁵⁷ Other EU States, such as Bulgaria, Greece, Romania, and the Czech Republic do not even allow gay marriage, much less recognize the parentage of same sex couples.

C. *Barriers to Free Movement*

The right to free movement is a fundamental principle of EU law and underpins the right of persons to move and reside freely within the territory of the Member States.⁵⁸ When a family exercises its free movement rights by moving or travelling to another EU Member State, the host State will recognize the parents’ marriage certificate and their children’s birth certificates.⁵⁹ However, traditionally, the right to free movement has been based on the assumption that a Union citizen and their partner are heterosexual.⁶⁰ As a result, if one EU State’s law does not allow same-sex couples to be legally recognized as joint parents, their child may lose one or both legal parents when the family enters that State.⁶¹ This refusal to recognize the parentage of homosexual couples can render the child stateless and lead to a host of negative consequences for both the child and parent.⁶² For example, the non-genetically related parent may lack the legal authority to grant permission for their child’s medical procedure or obtain custody of the child if the couple were to separate.⁶³ Thus, the non-genetically related father may be left in legal-limbo regarding their ability to make decisions for their children, or if they would possess any parental rights if their relationship were to end.

Fortunately, a recent decision by the Court of Justice of the European Union (CJEU) in *VMA v. Stolichna Obshtina* proclaimed that a parental relationship between a same-sex parent and their child acknowledged by one State must be recognized by all member States.⁶⁴ In the 2021 ruling, the

57. Milana Nikolova, *Landmark case could increase rights of rainbow parents across CEE*, EMERGING EUR. (Feb. 11, 2021), <https://emerging-europe.com/news/landmark-case-could-improve-the-rights-of-rainbow-parents-across-cee/>.

58. Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2008 O.J. (C 115) 47.

59. *Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 11.

60. *Id.*

61. *Id.*

62. *Id.* at 13.

63. *See id.* at 80.

64. Released on December 14, 2021, the judgement of the European Court of Justice has the potential to eliminate the limitations placed on same-sex couples and their families when they exercise their right to free movement. However, even if the EU is successful in enforcing the Court’s judgement, this will not remove the barriers same-sex male couples encounter when they

CJEU demanded that Bulgaria grant citizenship to a child whose birth certificate listed two mothers as the child's legal parents.⁶⁵ Even though one mother was a Bulgarian national, the government refused to register the child or issue her a passport.⁶⁶ While the child was born in Spain, since neither of her parents were Spanish citizens and Spanish citizenship depends on parentage, the child was essentially left stateless.⁶⁷ The CJEU provided that Bulgaria's failure to issue the child a passport violated the rights of the child and her parents to freely move within the EU.⁶⁸ Though States could continue to choose whether to legalize same-sex marriage or adoption within their borders, the CJEU stated they must recognize a person's civil status from another State to comply with EU law.⁶⁹ The CJEU's ruling not only advances the rights of LGBT individuals within Europe, but appears to clarify the ambiguity left by *Menesson* as to the status of non-genetically related fathers. However, though CJEU judgments are intended to be automatically recognized in all EU States, doubts remain on whether the EU can successfully enforce the ruling.⁷⁰

The EU has yet to enforce a 2018 CJEU decision in regard to EU States' recognition of same-sex unions and the right to cohabit.⁷¹ In *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior*, the CJEU released a judgement providing that an EU State that did not recognize same-sex marriage must still permit couples to reside with one another if they were legally married in another EU State.⁷² The CJEU's decision was in response to Romania's refusal to grant a residency permit to a Romanian citizen's spouse after the couple was legally married in Belgium.⁷³ Like in *VMA*, the CJEU cited the right to free movement to support its decision, explaining that the right is protected for LGBT citizens and their spouses, despite not fitting the definition of a spouse under Romanian law.⁷⁴ Still, after almost four years, Romania has not

pursue having biological children. See Case C-490/20, *VMA v. Stolichna Obshtina, Rayon 'Pancharevo'*, ECLI:EU:C:2021:1008, ¶ 71 (Dec. 14, 2021).

65. *Id.*

66. *Id.*

67. *Id.* ¶¶ 4, 19.

68. *Id.* ¶ 65.

69. *Id.* ¶ 52.

70. See *Mutual Recognition of Judgements*, EUROPA, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-recognition-judgments_en (last visited Dec. 15, 2021).

71. See Case C-673-16, *Coman & Others v. Inspectoratul Gen. for Immigr. & Ministry of the Interior*, ECLI:EU:C:2018:385, ¶ 59 (June 5, 2018).

72. *Id.*

73. *Id.* ¶ 12.

74. See *id.* ¶ 31.

implemented the CJEU's ruling.⁷⁵ Furthermore, during this time, the European Commission has failed to take any enforcement actions against Romania and other States that have refused to abide by *Coman*.⁷⁶ While the parties to *Coman* have since appealed to the European Court of Human Rights for relief, the lack of repercussions for Romania's failure to implement the CJEU's ruling raises questions as to whether States will similarly respond to *VMA*.⁷⁷ *VMA* remains an important step in improving the treatment of male couples returning from international surrogacy arrangements, but it appears that they may continue to face barriers to free movement for the foreseeable future.

III. STRINGENT REGULATION PROTECTS SURROGATE MOTHERS FROM VICTIMIZATION

The European Parliament expressly opposes commercial surrogacy, claiming the practice constitutes an offense against a woman's dignity and commodifies a surrogate's reproductive functions, making her vulnerable to abuse and exploitation.⁷⁸ Many EU officials also believe that surrogate women inevitably bond with the children they carry, and are incapable of denying their "maternal instincts."⁷⁹ While abuses within the surrogacy industry do occur in impoverished countries with little oversight, the implementation of stringent regulation largely prevents instances of harm. Empirical research has also demonstrated that most women are not psychologically harmed from being a surrogate mother, and that this belief is rather based on misinformation and gender stereotypes.⁸⁰

Critics of commercial surrogacy claim that the industry victimizes vulnerable, poverty-stricken women who are often compelled to become surrogates to improve their financial situation.⁸¹ However, research has

75. *Freedom of Movement for Same-Sex Spouses: The Coman Case, 3 Years On*, ILGA EUROPE (June 11, 2021), <https://www.ilga-europe.org/blog/freedom-of-movement-same-sex-spouses-coman-case-3-years-on/>.

76. *See Obstacles to the Free Movement of Rainbow Families*, *supra* note 12, at 9.

77. *See id.* at 42.

78. *See A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 23.

79. González, *supra* note 1, at 438.

80. *See* Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. OF FAM. L. 13, 41 (2009); *see also* Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 J. GENDER SOC. POL'Y & L. 555, 566 (2013).

81. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy: The Question of European & International Rules*, at 8 (Feb. 2015), <https://www.comece.eu/wp-content/uploads/sites/2/2022/04/20150223-COMECE-opinion-on-gestational-surrogacy.-The-question-of-European-and-international-rules.pdf>.

shown that surrogate mothers within the United States tend to be financially stable and have a moderate to high household income.⁸² In fact, data provides that in developed countries, money is rarely stated as the primary or sole motivation for becoming a surrogate mother.⁸³ The lack of financial difficulties amongst surrogates within the U.S. is predominately due to the rigorous screening and selection procedures that are subject to professional regulation.⁸⁴ Though laws vary from state to state, all surrogacy agencies in the U.S. adhere to standards set by the American Society for Reproductive Medicine (ASRM), with many states implementing additional restrictions. The recommendations provided by ASRM ensure that potential surrogates are represented by independent legal counsel, have a stable social environment, and do not have a criminal record.⁸⁵ States have further built upon these requirements, disqualifying candidates that receive public assistance⁸⁶ or have children on Medicaid or Temporary Assistance for Needy Families (TANF).⁸⁷

When critics within the EU reference empirical data to substantiate their assertion that the surrogacy industry exploits vulnerable women, they cite research from countries with little to no regulatory framework. For example, the International Coalition for the Abolition of Surrogate Motherhood (ICASM), a French feminist group, contend that surrogate

82. Erika L. Fuchs et al., *Screening of gestational carriers in the United States*, 106 FERTILITY & STERILITY 1496, 1501 (2017).

83. See Busby & Vun, *supra* note 80, at 53 (though financial reasons are an important factor in a woman's decision to become a surrogate, women overwhelmingly report that they primarily choose surrogacy out of altruistic concerns); see also Fuchs et al., *supra* note 82, at 1502; Vasanti Jadva et al., *Surrogacy: the experiences of surrogate mothers*, 18 HUM. REPROD. 2196, 2199 (2003).

84. Busby & Vun, *supra* note 80, at 41 ("Many feminists . . . have suggested that payment for commercial surrogacy will take advantage of . . . ethnic minority women."); Peng, *supra* note 80, at 557 ("Critics repeatedly alleged that surrogate mothers . . . were uneducated [and] did not make informed decisions . . .").

85. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Consideration of the gestational carrier: an Ethics Committee Opinion*, 110 FERTILITY & STERILITY 1017, 1019 (2018).

86. See N.Y. DEP'T OF HEALTH, CLINICAL GUIDELINES FOR ASSISTED REPRODUCTIVE TECHNOLOGY SERVICE PROVIDERS FOR SCREENING OF GESTATIONAL SURROGATES (2021) ("Psychological consultation should . . . cover specific topics such as . . . Personal histories, including . . . financial . . . history . . ."); JOINT COMM'N, LEGIS. COMM'N ON SURROGACY, REP. TO THE LEGIS. at 11-12 (Minn. 2016) ("The Commission recommends that legislation include requirements for the surrogate, including that the surrogate . . . be financially secure and not on any form of public assistance."); *Surrogacy by State: California Surrogacy Requirements*, SURROGATE.COM, <https://surrogate.com/surrogacy-by-state/california-surrogacy/surrogacy-requirements-in-california> ("[S]urrogate qualifications that California professional require . . . almost always include . . . [that the surrogate] receive no financial assistance from the government.") (last visited Jan. 17, 2023).

87. David Dodge, *Meet the Women Who Become Surrogates*, N.Y. TIMES (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/parenting/fertility/surrogates-new-york.html>.

mothers are willing to sacrifice their health to gain financial stability for their families.⁸⁸ In support of this position, the group only references the experience of surrogate mothers in India,⁸⁹ where a lack of oversight and proper medical care makes surrogacy significantly more dangerous than in the U.S.⁹⁰ Furthermore, in the 2015 Annual Report on Human Rights and Democracy in the World, the European Parliament took a firm stance against surrogacy, stating that the practice was a human rights abuse that preyed on poor women.⁹¹ Similar to ICASM, the Parliament has only discussed the exploitation of women in India and the Ukraine in their condemnation of the commercial surrogacy industry.⁹² Although women in poorer countries undoubtedly suffer from mistreatment, this is due to an absence of government regulation, and is not an inherent part of the surrogacy industry itself.

Another common criticism used to denounce commercial surrogacy is that the practice will inevitably result in the surrogate mother and/or child experiencing psychological damage. Proponents of a worldwide ban on surrogacy argue that surrogate mothers are naturally inclined to bond with the child they carry, and that surrogates who report otherwise must be in denial.⁹³ It is additionally alleged that surrogate mothers need constant psychological conditioning to avoid the pain of relinquishment and to

88. *Dr. Sheela Suryanarayanan speaks at International Coalition for the Abolition of Surrogate Motherhood*, UOH HERALD (July 9, 2021), <https://herald.uohyd.ac.in/dr-sheela-suryanarayanan-speaks-at-international-coalition-for-the-abolition-of-surrogate-motherhood>.

89. *Id.*

90. See Aimee Jakeman, *Putting a Price on Reproduction: The Global Surrogacy Market*, NEWSECURITYBEAT (Sept. 6, 2016), <https://www.newsecuritybeat.org/2016/09/putting-price-reproduction-global-surrogacy-market>.

91. *Annual Report on Human Rights and Democracy in the World*, *supra* note 3, at 29.

92. *A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 25, 32; see also Lamberton, *supra* note 9 (the Ukrainian government has been resistant to regulate the surrogacy industry because the market boosts the economy by bringing in over \$1.5 billion USD annually. Surrogate mothers within Ukraine have reported underpayment, poor healthcare, and physical damage following surrogacy).

93. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 12 (“[G]estational surrogacy almost always leads to a very rapid, even brutal separation of the child from the surrogate mother.”); Busby & Vun, *supra* note 80, at 68 (“The [Royal Commission on New Reproductive Technologies] stated that if a surrogate mother ‘succeeds in denying her emotional responses . . . she is dehumanized in the process.’”); Jacky Jones, *Second Opinion: Surrogacy Laws must put children first*, IRISH TIMES (Dec. 3, 2014), <https://www.irishtimes.com/life-and-style/health-family/second-opinion-surrogacy-laws-must-put-children-first-1.2015718> (“Pregnant women bond with the babies they carry . . . This bonding is instinctive . . . and to pretend it can be switched off in a surrogacy arrangement is nonsense.”).

convince themselves the pregnancy is only a commercial transaction.⁹⁴ In a study commissioned by the European Parliament, researchers claimed that in many cases, surrogate mothers refused to give up the child because of “important biological bonds” that developed during pregnancy.⁹⁵ Moreover, though the child is transferred from the surrogate mother to the intended parents shortly after birth, some also worry that this detachment will have negative effects on the child’s development. It has been surmised that the child would subconsciously suffer from feelings of abandonment that would later manifest in adolescence as feelings of despair, anxiety, and insecurity.⁹⁶

However, the perception that women are incapable of ignoring their “maternal instincts” and that surrogate children are emotionally stunted from the “trauma” of separation is based on unsubstantiated beliefs about motherhood. Empirical research consistently shows that surrogate mothers do not experience emotional instability during or after the pregnancy, and that detachment from the child is reported relatively early.⁹⁷ In fact, refusal of the surrogate mother to relinquish the child to the intended parents is incredibly rare in places where proper screening procedures are in place.⁹⁸ In the United States, this is likely due to regulation that requires potential surrogates to undergo a psychological evaluation that covers topics such as the woman’s coping skills, maturity, current life stressors, and whether she has a history of sexual and/or emotional abuse.⁹⁹ Conversely, in the

94. EUR. CTR. FOR L. AND JUST., *Surrogate Motherhood: A Violation of Human Rights, Report Presented at the Council of Europe*, at 8 (Apr. 26, 2012), <https://www.ieb-eib.org/ancien-site/pdf/surrogacy-motherhood-icjl.pdf>.

95. *A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra* note 4, at 28 (“Surrogacy interrupts the process of bonding that starts during gestation and continues after birth and this is a very important reason why many surrogates refuse to relinquish the child.”).

96. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 12; *see also* Busby & Vun, *supra* note 80, at 76 (“It has been argued that surrogacy may be bad for children because they may be angry at the women who abandoned them . . .”).

97. Busby & Vun, *supra* note 80, at 68; González, *supra* note 1, at 439 (“Different surveys suggest that most surrogates report feeling less of a maternal bond with the babies they hand over and experience little difficulty in giving the child to the intended parents.”); Jadva et al., *supra* note 83, at 2200 (“[No women] had experienced any doubts or difficulties whilst handing over the baby.”).

98. Alex Finkelstein, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUMB. L. SCH. SEXUALITY & GENDER L. CLINIC 30 (2016) (“studies conducted in Western countries . . . indicate few women . . . experienced distress upon giving up the child after birth, and that surrogates rarely refuse to relinquish the child after birth.”).

99. *See* CLINICAL GUIDELINES FOR ASSISTED REPRODUCTIVE TECHNOLOGY SERVICE PROVIDERS FOR SCREENING OF GESTATIONAL SURROGATES, *supra* note 86, at 3; *Evaluating Surrogate Mothers*, CAL. CTR. FOR REPROD. MED., <https://cacrm.com/evaluating-surrogate-mothers> (last visited Nov. 6, 2021).

Ukraine, where regulation is lacking, twenty-five surrogates per year appeal to keep their surrogate babies.¹⁰⁰ The opinion that surrogate mothers will inherently love the child from birth, despite the absence of a genetic link, is instead based on the stereotype that women are naturally inclined to motherhood and research that is inapplicable to well-regulated surrogacy industries. For example, it is theorized that a surrogate mother will develop an attachment to the child because mothers often experience difficulties when giving up their children for adoption.¹⁰¹ However, this comparison is not supported by scientific facts, and does not consider that the reasons for putting a child up for adoption are very different than those present in surrogacy.¹⁰² Moreover, no research has established that children born from surrogate mothers experience any adverse impacts to their development or emotional damage later on in life. A study conducted by the University of Cambridge found that there were no significant differences in the psychological well-being or self-esteem of children born by surrogacy and those born through natural conception.¹⁰³

The absence of evidence demonstrating that surrogate mothers in developed countries are motivated by financial desperation, or are left psychologically harmed by the process, establishes that the EU's ban is not based on protecting women from exploitation. Instead, criticisms are based on data on surrogate mothers from countries with little to no regulation, such as India, Ukraine, and Thailand. Furthermore, the belief that women are emotionally damaged from being a surrogate and are "in denial" if they report otherwise appears to be driven by stereotypes regarding women. Commercial surrogacy challenges traditional perceptions of women as instinctive nurturers and mothers, or as being emotional and irrational. The EU draws upon both these misconceptions about surrogacy to justify its continued illegality amongst member nations.

IV. THE EU'S CURRENT POLICY PUSHES COMMERCIAL SURROGACY

100. Lamberton, *supra* note 9.

101. *Opinion of the Reflection Group on Bioethics on Gestational Surrogacy*, *supra* note 81, at 10; *Surrogate Motherhood: A Violation of Human Rights*, *supra* note 94, at 8-9 ("[B]ecause long-term difficulties have been reported by women relinquishing a child for adoption, it is reasonable to expect similar situations will manifest in surrogate mothers over time.").

102. González, *supra* note 1, at 439. Studies of women ten years after they worked as a surrogate mother show that these women still did not endure any psychological issues or feelings of regret in relation to relinquishing the child; see also V. Jadva et. al., *Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins*, 27 HUMAN REPRODUCTION 3008, 3012 (2012).

103. Susan Golombok et al., *A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14*, 53 DEVELOPMENTAL PSYCHOLOGY 1966, 1974 (2017).

OUTSIDE ITS BORDERS TO COUNTRIES WITH LITTLE TO NO
REGULATION

Despite the illegality of commercial surrogacy among member nations and the European Parliament's condemnation of the practice, Union citizens can pursue surrogacy in countries outside of the EU. Though some EU nations have attempted to punish families returning from international surrogacy arrangements, decisions by the European Court of Human Rights (ECtHR) have made any meaningful repercussions difficult to enforce. Thus, despite the European Parliament's condemnation, Union citizens are generally free to engage in surrogacy outside of the EU. Unfortunately, many who go abroad in search of a surrogate travel to poorer nations where prices are significantly lower, and where women are more likely to be victims of exploitation. Instead of protecting women from potential abuse, the EU's ban on commercial surrogacy has contributed to the growth of the international market. Effectively, the EU is sending the symbolic message that they are against the exploitation of women, unless it occurs beyond their borders.¹⁰⁴

Due to a 2014 decision by the ECtHR, member nations within the EU have largely failed to discipline Union citizens who have participated in international surrogacy arrangements. For example, in 2011, France's highest court refused to recognize children born by surrogacy as French citizens, providing "it would give effect to a surrogacy agreement that was null and void on public policy grounds."¹⁰⁵ In the cases of *Mennesson v. France* and *Labassee v. France*, the ECtHR found that the failure of the French government to enter surrogate-born children's birth certificates violated the European Convention on Human Rights.¹⁰⁶ Specifically, the ECtHR found that France had violated Article 8 concerning the children's right to respect for their private life, stating that the best interests of the child outweighed the interests of the state.¹⁰⁷ In its opinion, the ECtHR declared that establishing citizenship and parentage was critical to the

104. Nila Bala, *The Hidden Costs of the European Court of Human Rights' Surrogacy Decision*, 40 YALE J. INT'L L. 11, 15 (2014) ("The ECtHR decision sends a symbolic message that it is acceptable to protect domestic wombs at the cost of foreign wombs.").

105. See Press Release, European Court of Human Rights, Totally Prohibiting the Establishment of a Relationship Between a Father and his Biological Children Born Following Surrogacy Arrangements Abroad was in Breach of the Convention, Registrar of the Court (June 26, 2014).

106. *Mennesson v. France*, App. No. 65192/11, ¶ 71 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=001-145389>; *Labassee v. France*, App. No. 65941/11 (June 26, 2014), <https://hudoc.echr.coe.int/fre?i=002-9780>.

107. *Mennesson*, Eur. Ct. H.R. ¶ 101.

“children’s identity within French society,”¹⁰⁸ and that denying this right was detrimental to their best interests. Because all states that are parties to the European Convention generally conform to the judgements of the ECtHR,¹⁰⁹ member nations will be obligated to recognize surrogate children that are born abroad. While the interests of children certainly exceed member nations’ interest in punishing their parents, this decision has the unintended effect of contributing to the very industry that the European Parliament condemns.¹¹⁰

Although some Union citizens work with surrogacy agencies in the U.S., many choose to employ surrogates in poorer countries where women have little protections. Before India prohibited foreigners from retaining Indian surrogates, the country was a popular commercial surrogacy destination for those travelling outside Europe.¹¹¹ While surrogacy in the U.S. runs upwards of \$90,000 USD,¹¹² hiring a surrogate in India usually costs under \$30,000 USD,¹¹³ a price that couples could more feasibly afford. But, unlike the U.S., India has minimal regulations to protect vulnerable women from exploitation. Indian women often have no choice between surrogacy and other more oppressive forms of work, and the commitment to surrogacy is generally decided by the husband.¹¹⁴ Research has also shown that Indian surrogate mothers experience higher rates of depression¹¹⁵ and pregnancy complications, such as Caesarean sections.¹¹⁶

108. *See id.*; *see Sieverding, supra* note 48 (“[The children’s] right to respect for their private life, which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage, was significantly affected.”).

109. *See* George Ress, *The Effect of Decisions and Judgements of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L. J. 359, 374 (2005).

110. Akm Ahsan Ullah et. al., *Surrogacy-led migration: reflections on the policy dilemmas*, 21 PUB. ADMIN. & POL’Y ASIA PAC. J. 157, 158 (“With...debates gathering intensity, many countries declared commercial surrogacy illegal. However, where one market closes, another opens in order to meet the growing demand...”); *see also* Nina Avramova, *The UK’s restrictive surrogacy laws are hurting couples and pushing many abroad*, CNN (Jan. 18, 2019), <https://www.cnn.com/2019/01/18/health/female-surrogacy-abroad-uk-study-intl/index.html>.

111. *See* Margot Cohen, *A Search for a Surrogate Leads to India*, THE WALL ST. J. (Oct. 9, 2009), <https://www.wsj.com/articles/SB125498315210272749>.

112. *Surrogate Mother Costs*, W. COAST SURROGACY, <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> (last visited Mar. 12, 2023).

113. Cohen, *supra* note 111.

114. *See* Virginie Rozee et al., *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, 20 BMC WOMEN’S HEALTH 234, 238, 241 (2020).

115. Kristine Schanbacher, Note, *India’s Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women*, 25 HASTINGS WOMEN’S L.J. 201, 205 (2014).

116. Jakeman, *supra* note 90 (“[researchers] found [Indian] surrogates face a higher risk for Caesarean not only because of the possibility of a multiple gestation pregnancy but in order to make the timing convenient for the commissioning parents.”); Steven Spandorfer, *Experts’ Report*

Even though surrogacy in India is no longer available to Union citizens,¹¹⁷ India's surrogacy industry is representative of how poor, marginalized women can be left vulnerable by procreative tourism.

Presently, Union citizens in search of surrogacy arrangements frequently choose to work with a surrogate in Ukraine. At an average of \$50,000 USD, surrogacy in Ukraine is considerably cheaper than it is in the U.S.,¹¹⁸ and a much closer destination for commissioning parents travelling from the EU. Sadly, like India, limited regulation has left surrogate mothers within Ukraine susceptible to coercion, exploitation, and greater risk of physical and psychological injury. In Ukraine, what little surrogacy regulation exists principally concerns itself with the rights of the intended parents and offers minimal protections for the surrogate mother.¹¹⁹ This lack of oversight is likely the reason surrogate mothers within Ukraine have reported unsafe living environments, poor healthcare during and post-pregnancy,¹²⁰ and significant underpayment.¹²¹ Many Ukrainian women come from rural villages and become surrogates due to financial pressure, engaging in surrogacy so they can provide for their families.¹²² Unfortunately, surrogate mothers often do not achieve financial stability, considering surrogacy agencies pay surrogates only a fraction of the fee paid by the commissioning parents.¹²³ Despite pressure from the European

Examines Medical & Legal Basis for Gestational Surrogacy, WEILL CORNELL MED. (Mar. 19, 2020) (“Interestingly, all [Indian surrogates] underwent caesarian sections for reasons not explained, putting women at risk for infections, operative complications, and longer recovery times.”).

117. The Indian government banned foreigners from using surrogate mothers in the country in an attempt to curb the exploitation of young, poor women. *See India bans foreigners from hiring surrogate mothers*, THE GUARDIAN (Oct. 28, 2015), <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers>.

118. *Surrogacy in the Ukraine*, THE SURROGACY GUIDE, <https://www.sensiblesurrogacy.com/%20surrogacy-in-ukraine/> (last visited Nov. 8, 2021).

119. *See* Anna Lelyuk, *Ukraine: Ukrainian Surrogacy Laws*, MONDAQ (Nov. 12, 2012), <https://www.mondaq.com/family-law/205832/ukrainian-surrogacy-laws> (Article 123 of the Ukrainian Family Code requires the informed consent of all the parties and stipulates that the surrogate mother has no legal rights over the child. Surrogacy is also regulated by Order 24 and 771, but those primarily deal with artificial insemination and embryo implantation).

120. *See* Kevin Ponniah, *In search of surrogates, foreign couples descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602> (“[Ana, a Ukrainian surrogate mother stated] [s]ome surrogates had health problems that were not diagnosed correctly or treated on time, leading to complications ...”).

121. Lamberton, *supra* note 9 (“Surrogates have ... claimed that companies paid them as little as \$350 USD, though the cost to clients is between \$45,000 and \$55,000 USD.”).

122. *Id.*; Grace Emily Stark, *Renting Wombs, Renting Hearts: The Dark Realities of Surrogacy*, VERILY (Jan. 26, 2021), <https://verilymag.com/2021/01/surrogacy-altruistic-commercial-exploitation-women-children-2021>.

123. Lamberton, *supra* note 9.

Parliament, Ukrainian lawmakers are resistant to impose any regulations upon surrogacy agencies because the surrogacy industry brings \$1.5 billion USD annually.¹²⁴ Considering that Ukraine is one of Europe's poorest nations,¹²⁵ it appears unlikely Ukraine will take any action restrict its surrogacy industry, especially as the market continues to rise.

Though the European Union certainly does not support the mistreatment of surrogate mothers, its surrogacy ban has assisted in the growth of the international surrogacy industry. While some poorer countries, such as India and Thailand, have recently prohibited foreigners from participating in their surrogacy programs,¹²⁶ other nations have quickly taken their places on the global market. Due to rising rates of infertility and the inability of many same sex couples to naturally conceive, it is unlikely the EU's disapproval of the industry will stop its growth. However, allowing some form of commercial surrogacy in the EU would be a significant step towards ending any exploitation of surrogates that occurs abroad. It is unrealistic to believe that Union citizens would stop entering into transnational arrangements if commercial surrogacy is legalized. However, it is reasonable to expect that a majority of Union citizens would prefer to enter a surrogacy arrangement at home. Therefore, it would seem that allowing a regulated form of commercial surrogacy within the EU would better protect the rights of women, while also reducing instances of exploitation that may occur overseas.

V. CONCLUSION

The European Union's condemnation of commercial surrogacy disproportionately impacts gay men and male couples seeking to have biological children. Even though the EU's ban on commercial surrogacy applies to all EU citizens, gay men returning from international surrogacy arrangements encounter more challenges than heterosexual couples. Although recent decisions by European Courts promise to lift some of the burdens encountered by gay men and their families, the EU's failure to enforce previous rulings raises questions on when or how this will be achieved. While the EU claims a ban on commercial surrogacy is necessary to protect vulnerable women from exploitation, research of surrogate mothers in the United States has shown that professional regulation and safeguards are effective at preventing instances of abuse. Instead, banning

124. *Id.*

125. Ponniah, *supra* note 120.

126. *India follows Thai lead, bans commercial surrogacy*, BANGKOK POST (Nov. 6, 2015), <https://www.bangkokpost.com/world/756640/india-follows-thai-lead-bans-commercial-surrogacy>.

commercial surrogacy has pushed EU citizens to pursue surrogacy abroad, where impoverished women are more likely to be exploited. If the EU implemented surrogacy regulations, or even issued guidance on the subject within its borders, it could better protect women and decrease the disparity in treatment faced by gay men trying to start families.