
Article

Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement

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Debate over the universality of human rights has typically focused on the extent to which international human rights law differs from local cultural practices and has generally sought to resolve these differences in favor of the international paradigm. Less attention, however, has been given to arguments that the international human rights paradigm may have something to learn from non-Western legal systems. This Article focuses on one such area: the conceptualization of individual duties to the community. In conventional human rights law, rights are explicit, while corresponding duties are often implicit, controversial, and poorly theorized. In contrast, the Islamic legal tradition offers a sophisticated paradigm of common ideals grounded in individual duties. The Article argues that a reconciliation of the rights-based and duties-based paradigms is both possible and necessary to render justiciable third generation “solidarity” rights, such as the right to development, the right to a healthy environment, and the right to peace.

I. INTRODUCTION

The question of the universality of human rights norms has challenged scholars and commentators for decades.¹ It is a highly important question

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1. See generally Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and*

from a pragmatic standpoint, because human rights are sure to be ignored if they are not culturally relevant.² Because cultural legitimacy is so crucial to compliance, efforts to engage local and international law in the effort to seek universal values should be applauded. Not only will the end result be more culturally legitimate, it will also be more complete, benefiting from the combined wisdom of all legal systems and making international human rights more applicable and appealing to every society.

This Article analyzes one area where efforts to find universal human rights values should begin with the teachings of non-western legal systems: the importance of individual duties to the community. In human rights law, rights are explicit, while corresponding duties are implicit, controversial, and poorly theorized. In several other legal, ethical, and religious systems—such as Islamic law, Jewish law, Christianity, Hinduism, and Confucianism—the reverse is true.³ Because the rights-based perspective and the duties-based perspective form such fundamental paradigm-establishing assumptions in their respective legal cultures, it is not easy to reconcile the two approaches into a universally acceptable international theory. This Article argues that such reconciliation is possible, however, within the so-called “third generation” of human rights—such as the right to development, the right to a healthy environment, and the right to peace—because these rights include both an individual right and individual duty component. Until now, the individual duty component of third generation solidarity rights has been de-emphasized by international human rights commentators. Examining Islamic notions of third generation solidarity rights, this Article finds a very different interpretation of their nature, one which specifically emphasizes their individual duty component. Not only can this add to our understanding of third generation solidarity rights, the strong presence of these rights in Islamic law can also contribute positively to the debate on the universality of human rights.

Although multiple scholars have discussed the importance of individual duties in local and regional legal traditions,⁴ including several

Human Rights, Toward a Communitarian Revision, 25 CUMB. L. REV. 651 (1994); Abdullahi Ahmad An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1984-1985); Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 HUM. RTS. Q. 235 (1994).

2. An-Na'im, *supra* note 1, at 15.

3. DOUGLAS HODGSON, *INDIVIDUAL DUTY WITHIN A HUMAN RIGHTS DISCOURSE* 41-60 (2003).

4. See, e.g., HUMAN RIGHTS AND HUMAN RESPONSIBILITIES, REPORT OF MR. MIGUEL ALFONSO MARTÍNEZ, SPECIAL RAPPORTEUR APPOINTED BY THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS TO UNDERTAKE THE STUDY REQUESTED BY THE COMMISSION IN ITS RESOLUTION 2000/63, ¶¶ 66-86, U.N. Doc. E/CN.4/2002/107 (2002) [hereinafter MARTÍNEZ REPORT]; HENRY J STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 324-66 (2000) (selections by various authors on “The Notion of ‘Rights’: Origins and Relation to Duties”); Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995).

examinations of the role of duties in Islamic law,⁵ no scholar has examined the potential of Islamic conceptions of duties to influence our understanding of international human rights law in the context of the debate on the universality of human rights. In fact, the vast majority of comparative scholarship on Islamic law and international law never leaves the defensive paradigm at all, content to *defend* Islamic law against an international standard, rather than *promote* the adoption of Islamic legal precepts in international law. In her seminal book on Islam and human rights, Professor Ann Mayer notes that “[q]uestions of Islamic law are only occasionally mentioned in scholarly writing on international human rights – for the sake of comparison with the international norms or to illustrate the problems of introducing international norms in areas of the developing world.”⁶ This Article, on the other hand, asks what Islamic law can teach the international human rights movement, particularly in the area of individual duties. By attempting this goal, it will help make the case that, as the international human rights movement progressively recognizes the importance of human duties, a core shared universal norm will develop with local (i.e., non-Western) tradition as its roots.

In Part II, I survey the theoretical underpinnings of the universality debate, focusing on the differences between universalism, moderate cultural relativism, and my theory of reverse moderate relativism (RMR). In Part III, I discuss the role of individual duties, beginning with a discussion of the relationship between duties and rights. After tracing the historical presence of duties in Western political theory—which held sway from ancient Greece through to at least the eighteenth century—I argue that duties have essentially disappeared from the modern human rights paradigm. I conclude Part III by contrasting Islamic law, which exhibits an unflinching emphasis on duties both historically and in its current practice.

In Part IV, I examine the rebirth of individual duty in the international human rights (IHR) paradigm as a component of third generation solidarity rights such as the right to development, the right to a healthy environment, and the right to peace. Contrary to the concept of correlative duties, which exist outside of and complementary to the right, third generation solidarity rights make individual duty one of the components of the right itself. Despite this apparent breakthrough, the individual-duty component of third generation rights has been de-emphasized. By

5. See, e.g., Ahmad Farrag, *Human Rights and Liberties in Islam*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 133, 134-46 (Berting et al. eds., 1990) [hereinafter INDIVIDUALS & COLLECTIVITIES]; Ebrahim Moosa, *The Dilemma Of Islamic Rights Schemes*, 15 J. L. & RELIGION 185 (2000); Muhammad Tal’at Al-Ghunaimi, *Justice and Human Rights in Islam*, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW 1, 6 (Gerald E. Lampe ed., 1997).

6. ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 46 (1991). Unfortunately, this is even true with respect to the drafters of Islamic human rights schemes such as those cited *infra* notes 90-93. Professor Mayer astutely notes that these documents “[e]ven while promoting Islamic versions of human rights, ... seem to regard international human rights as the ultimate norm against which all rights schemes are inevitably measured and from which they fear to be caught deviating.” *Id.* at 53.

examining Islamic notions of third generation solidarity rights, I practice a substantive form of RMR, showing that while duty is a new and fragile part of third generation solidarity rights in their international conception, the Islamic view of these same rights is wholly based in duties. I then briefly answer some of the major criticisms regarding third generation solidarity rights. In Part V, I attempt a methodological form of RMR, transposing elements of the Islamic duties paradigm to human rights law. After an overview of the complex Islamic jurisprudence of duties, I suggest several possible areas where the Islamic duties model could enlighten international human rights theory. Although such a transposition is particularly relevant to third generation solidarity rights, it should prove useful to all human rights.

II. THE UNIVERSALITY DEBATE AND REVERSE MODERATE RELATIVISM (RMR)

The question of the universality of human rights norms has challenged scholars since the *Universal Declaration of Human Rights* of 1948, and efforts to formulate a jurisprudence of rights valid for all of humanity are considered laudable by some, offensive to others. Such efforts take three different forms. At one extreme, universalists argue that all human rights are applicable in all cultures,⁷ an untenable stance because it eliminates the tensions between various cultures by simply ignoring them. At the other extreme, strict cultural relativists believe cultural variation is so great that no universally shared norms of any kind exist.⁸ A third approach is offered by the moderate cultural relativists, who accept cultural differences but still strive to find a core group of universal norms.⁹ In the area of Islamic law, moderate cultural relativism is best represented by the outstanding work of Professor Abdullahi Ahmad An-Na'im on interpreting Islamic textual sources (the Qur'an and *Sunna*) consistent with international human rights norms.¹⁰ Moderate cultural relativists such as An-Na'im have accepted equality as a core right shared across cultures, and their work analyzing equality of the sexes,¹¹ equality of religious groups,¹² and other areas¹³ in Islam has been extensive, certainly controversial,¹⁴ but in my view highly

7. Schooley, *supra* note 1, at 691-98.

8. *Id.* at 679-82.

9. *Id.* at 682-90.

10. See, e.g., ABDULLAHI AHMAD AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW (1990); Abdullahi Ahmed An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987) [hereinafter *Rights of Women*]; An-Na'im, *supra* note 1, at 46-52.

11. See, e.g., An-Na'im, *Rights of Women*, *supra* note 10; ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 97-130 (1999).

12. See, e.g., An-Na'im, *supra* note 1, at 24-25.

13. See, e.g., Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 208 (1990) (discussing criminal defense rights); An-Na'im, *supra* note 1, at 22-23 (slavery); *id.* at 23 (freedom of expression); *id.* at 24-25 (non-discrimination).

14. An-Na'im's approach is controversial particularly because he advocates expanding the scope of Islamic legal reasoning (*ijtihad*) "to enable modern Muslim jurists . . . to substitute previously enacted texts with other, more general, texts of Qur'an and Sunna [the two

valuable. Similarly, the practical effects of moderate cultural relativism are evident in the momentous legal and political efforts to reinterpret Muslim status law consistent with human rights instruments, first in Tunisia a half century ago, and currently in Morocco.¹⁵

Concurrent with these laudable efforts, however, another discourse is also warranted. As scholars continue to analyze, influence, and advocate for a legal shift towards an international standard in some areas, such as women's rights, there should be a concurrent dialogue examining the extent to which international human rights law can or should move towards a more Islamic standard in other domains. This opinion is advanced by An-Na'im in his later work, noting that the human rights movement cannot be effective "so long as there is a perception of exclusive Western authorship of the concept of human rights and its normative implications."¹⁶

In a previous work, I therefore proposed a new theory, reverse moderate relativism (RMR). Like moderate cultural relativism, RMR also seeks to develop a core set of shared rights concepts across cultures, but it does so "in reverse." Whereas moderate cultural relativism makes IHR law the neutral benchmark towards which other legal traditions should gravitate in the creation of universally shared norms, RMR explores other non-dominant legal systems as potential neutral benchmarks to be achieved by IHR law in select areas.¹⁷ Without necessarily claiming any *past* causative link between non-dominant legal systems and the development of international law,¹⁸ reverse moderate relativism rather is concerned with *future* development of universal norms, arguing for a restructuring of the universality debate from central, overly-dominant neutrals to diversified, non-dominant but potentially more universal neutrals.¹⁹ This is possible on two levels. First, substantive RMR, the focus

principle textual sources of Islamic Law] despite the categorical nature of the prior texts." An-Na'im, *supra* note 1, at 49. See also *infra* notes 229-231 and accompanying text. An-Na'im defends this technique on the grounds that "the proposed new rule would also be based on the Qur'an or *Sunna*, albeit on a new interpretation of the text," *id.*, but admits that this approach is sure to meet resistance. *Id.* at 51.

15. See Tewfik Hakem, *Les Députés Marocains ont Adopté à l'unanimité l'égalité juridique entre hommes et femmes*, LE MONDE, Jan. 19, 2004, at 4.

16. Abdullahi A. An-Na'im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANIZATIONS, AND FOREIGN POLICY 7* (Monique Castermans-Holleman et al. eds, 1998).

17. Jason Morgan-Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Perspective*, 10 ILSA J. INT'L & COMP. L. 35 (2003). Cf. Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997) [hereinafter *Rethinking Universality*] (advocating a post-structural, transformative approach to the human rights paradigm); Dianne Otto, *Everything Is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law*, 5 AUSTL. J. HUM. RTS. 17 (1999); Dianne Otto, *Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law*, 18 AUSTL. Y.B. INT'L L. 1 (1997).

18. For such an attempt, albeit in the domain of international law generally and not international human rights law, see Marcel A Boisard, *On the Probable influence of Islam on Western Public and International Law*, 2 INT'L J. MIDDLE E. STUD. 429 (1980).

19. This is a particularly novel argument in the context of Islamic law, as the very idea

of my previous article, aims merely to seek and *acknowledge* places where international human rights is universalizing towards a standard previously found in a non-dominant legal system. Second, methodological RMR, attempted at the end of this Article, aims to actively *transpose* aspects of the non-dominant paradigm to international human rights law in order to speed and facilitate the development of a nascent universal norm. It is only through the combined use of moderate cultural relativism in certain areas (such as equality), and reverse moderate relativism in others (such as social welfare), that the most appropriate core set of universal human rights norms can be established, a set of rights which is neither intolerant of nor overly accepting of local cultures. This Article examines one area where reverse moderate relativism can be applied to further develop international human rights norms—the presence of individual duty within a rights paradigm—by examining notions of duty in Islamic law.

III. BACKGROUND ON DUTIES

Rights and duties are intrinsically related and historically connected. However, the international human rights paradigm has exalted the language of rights while under-developing the concept of duties. This sole emphasis on rights to the exclusion of duties is destructive. It is not inherent to Western thought, however, but rather is a modern departure from earlier recognition of fundamental individual duties to the community. After a discussion of the complementarity between the rights and duties paradigms, this Part traces the rise and fall of the duties paradigm in Western thought, arguing that although duties play a strong role in Western political thought, they have gotten lost in the modern human rights paradigm, which resists duties, to the overall detriment of human rights. It then contrasts this with a review of Islamic jurisprudence, which is based on duties.

A. Rights and Duties: Two Paradigms Are Better Than One

A normative structure based in rights is situated to deal effectively with different social problems than one based in duties. For example, in an examination of the Jewish legal order of duties, Professor Robert Cover argues that whereas “there is a comparative rhetorical advantage to mitzvot [duty] in the realm of communal entitlements, there is . . . a corresponding comparative rhetorical advantage to rights in the area of

that Islamic law may have something to teach international human rights law has been noticeably absent from Western scholarship. Professor Mayer notes that “Islamic law and Islamic thought have been treated as irrelevant by people involved in the development of international human rights law. A study of serious treatises by recognized specialists on the development of international human rights law will not reveal claims on behalf of the possibility of Islamic inspiration for international human rights law or its historical antecedents.” MAYER, *supra* note 6, at 46.

political participation.”²⁰ Professor Cover explains why a paradigm of duties, rather than rights, is preferable to regulate communal entitlements:

The jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual. While we may talk of the right to medical care, the right to subsistence, the right to an education, we are constantly met by the realization that such rhetorical tropes are empty in a way that the right to freedom of expression or the right to due process are not. When the issue is restraint upon power it is intelligible to simply state the principle of restraint. . . . [T]he intelligibility of the principle remains because it is always clear who is being addressed – whoever it is that acts to threaten the right in question. However, the “right to an education” is not even an intelligible principle unless we know to whom it is addressed. Taken alone it only speaks to a need. A distributional premise is missing which can only be supplied through a principle of “obligation.”²¹

Whereas a rights paradigm has proven weak in guarantying such communal entitlements, they fit quite naturally into a duty paradigm, which realizes them through duties upon family members, teachers, relatives, community members, and others.²² Conversely, Professor Cover argues that the rights paradigm is better suited to handle equality jurisprudence, because what can be effectively stated in a straightforward rights-based equality provision can only be replicated in a complex balancing of corresponding duties when transposed into a duties model.²³ Whereas equality of the sexes “is very straightforward under a rights jurisprudence,”²⁴ a duties paradigm must achieve substantive equality by

first creat[ing] an argument for equality of obligation and only as a result of that come to equality of participation. The fact is that there might be important reasons which justify distinctions in obligations (e.g., the capacity to bear children) which nonetheless do not in any straightforward way mitigate against complete equality of participation. The rights rhetoric goes to the nub of this matter because it is keyed to the projection of personality among indifferent or hostile others. The reality of such indifference, hostility or oppression is what the rhetoric of responsibility obscures. At its best it obscures it by, in fact, removing or mitigating the causes. At its worst it is the ideological mask of

20. Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 73 (1987).

21. *Id.* at 71.

22. *Id.*

23. *Id.* at 73.

24. *Id.*

familiar oppressions.²⁵

Acknowledging the strengths and weaknesses presented by the rights-based and duties-based paradigms, a solution which synergistically draws from both models is clearly desirable. As I will argue later, this is just the sort of system proposed by third generation solidarity rights. Why has this system been so long in coming and so under-developed even after its arrival? The answer is rooted in a generalized misconception of the essence of rights and duties themselves, a conception that focuses on their formally different means rather than their functionally equivalent ends. It is a mistake to distinguish rights from duties on the basis of formal substance, because just as much variation exists between different rights, or between different duties, as between rights and duties themselves. For example, Steiner and Alston note that “[r]ights are no more determinate in meaning, no less susceptible to varying interpretations and disputes among states, than any other moral, political or legal conception – for example, ‘property’, or ‘sovereignty’, or ‘consent,’ or ‘national security.’”²⁶ Similarly, Cover cautions that he would not “suggest for a moment that with a starting point of ‘rights’ and social contract one must get to a certain end.”²⁷ Rather than a one-dimensional, categorical, definable thing, the notion of “rights” is more properly conceptualized functionally: it is what Cover calls a “fundamental word” around which a culture creates normative, social, political, and moral paradigms.²⁸ Just as “rights” is such a fundamental word in the Western liberal culture, “duties” is the paradigm-creating fundamental word in Islamic, Jewish, Hindu, Christian, Confucian, and other cultures.²⁹

Viewed functionally, rather than formally, rights and duties are but two different attempts towards the same end: a structure of normative, social, political, and moral order.³⁰ For example, Mashood Baderin explains that the object and purpose of Islamic law (*maqâsid al-sharī‘ah*) is human welfare and prevention of harm (*maslahah*),³¹ a goal most certainly in line with the purpose of international human rights:

While human rights specifically aim at protecting the rights of individuals, the ultimate aim is equally to guarantee the benefit and welfare of human beings as a whole wherever they may be. Protecting the welfare of individuals does ultimately ensure

25. *Id.*

26. STEINER & ALSTON, *supra* note 4, at 365.

27. Cover, *supra* note 20, at 66.

28. *Id.* at 65.

29. HODGSON, *supra* note 3, at 41-60.

30. Even the means are more similar than commonly acknowledged. Duties, by their very definition, are a “giving up,” a surrendering of individual autonomy to the larger good. The surrender of “a portion of . . . autonomy for a measure of collective security,” the “social contract,” is also the fundamental underlying assumption of the rights paradigm. Cover, *supra* note 20, at 66.

31. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 40 (2003).

communal/public welfare and vice versa. This makes the doctrine of *maslahah* very relevant in the discussion of human rights under Islamic law.³²

The *maslahah* doctrine is significant for two reasons. First, the notion of an object and purpose of Islamic law (*maqasid al-Shari'ah*) challenges the view that duties-based paradigms have no end at all. As Professor Jack Donnelly has noted, “[i]t is conventional to distinguish deontological (duty-based) theories . . . from teleological (ends-, goals-, or consequence-based) theories. . . . [In deontological theories, w]e are required to do what is right (follow our duty), period, independent of the effects, for good or bad, produced by our actions.”³³ In contrast, linking the duties-based paradigm of Islamic law with an aim of human welfare and prevention of harm (*maslahah*) thus foresees a theory that is simultaneously duties-based and ends-based.

Second, and more importantly, the substance of Islamic law’s object and purpose, the *maslahah doctrine*, can be – as Baderin rightly argues – quite consistent with the goals of the international human rights movement. If we accept this “common ends” argument, and acknowledge the different challenges and successes, strategies and structures, created by the choice of a rights-based or duties-based paradigm, it follows that an ideal approach to reaching those desired ends would combine the strengths of both paradigms. In this way, the duties perspective can serve as a necessary complement to an otherwise incomplete rights perspective, the latter having a comparative advantage in some areas, such as equality, and the former having a comparative advantage in other areas, such as social welfare.

In the following sections, I show that although Western political thought originally placed an emphasis on duties, this has not held true in modern practice. This contrasts with Islamic law, a jurisprudence based on duties. In order to re-invigorate the important role of duties within international human rights, the remainder of the Article examines the Islamic duties model in depth, concluding with an attempt to transpose select aspects of that model to international human rights legal theory.

B. The Strong Presence of Duties in Western Political Thought

The concept of individual duty has strong historical roots in Western political thought. As Professor Douglas Hodgson has argued, “the principle of duty occupied a preeminent position in political and social philosophy and thinking until its relatively recent supersession by the principle of individual right.”³⁴ This emphasis on duty to the community

32. *Id.* at 43.

33. Jack Donnelly, *Ethics and International Human Rights*, in *ETHICS & INTERNATIONAL AFFAIRS: EXTENT AND LIMITS* 128, 134 (Jean-Marc Coicaud & Daniel Warner eds., 2001).

34. HODGSON, *supra* note 3, at 7.

in Western thought has its origins as far back as Greek philosophy. Aristotle (384-322 B.C.E.) considered the individual not as an isolated atom but rather “part of the whole,” with all the duties that this entails.³⁵ He believed that “it is not right . . . that any of the citizens should think that he belongs just to himself”³⁶ and stressed in his canonical treatise *Politics* the fundamental importance of community (*koinonia*).³⁷ Holding that groups of communities (*koinonia*) together form the city-state (*polis*), he wrote that “the city-state is . . . prior by nature to the individual.”³⁸ In addition to this foundational work on the concept of community, Aristotle also developed the concept of natural law, “universally valid rules of natural law or natural justice which transcend local laws and customs . . . aris[ing] from the shared or common features of human nature . . . and capable of being discerned and understood by human reason.”³⁹ Thus, we find in the writings of Aristotle the historical antecedents not only to third generation solidarity rights (which combine individual rights and duties), but also the origins of moderate cultural relativism, in which rational human beings are endowed with the ability to categorize truly universal rights.

The importance of individual duty to the larger social group is also apparent from the etymology of key Greek and Latin words, cultures that form the foundation of Western society. For example, the Greek word for citizen is *polites* (πολίτης), or “member of the civic order.”⁴⁰ This is contrasted to the word for individual, *idios* (ίδιος), meaning “personal” and “private,” but also “separate” and “particular,” or even “peculiar” and “strange.”⁴¹ Similarly, Professor Selbourne has analyzed the etymology of the word “civic,” which comes from the Latin verb *ciere*, to summon. The “citizen” is thus “he who is summoned by the principle of duty to assemble and take counsel with his fellows upon the safety and well-being of the ordered community to which he belongs.”⁴² The citizen is identified in Greek and Latin culture “by his active co-responsibility for the security and well-being of the civic order, which is at the same time the source and guarantee of his privileges and rights: *duty is citizenship’s first term, right its second.*”⁴³

Some fifteen centuries after Aristotle, the work of the Italian philosopher Thomas Aquinas (1225-74) “proclaimed the compatibility of Christian doctrine with Aristotelianism.”⁴⁴ Like Aristotle, the concept of “community” was central to Aquinas’ view of proper human conduct.⁴⁵

35. DAVID SELBOURNE, *THE PRINCIPLE OF DUTY* 100 (2001) (citing ARISTOTLE, VIII(i) THE POLITICS 1337a (T.A. Sinclair trans., 1962)).

36. *Id.* at 162.

37. HODGSON, *supra* note 3, at 8.

38. *Id.* (citing ARISTOTLE, I POLITICS 1253).

39. *Id.* at 9.

40. SELBOURNE, *supra* note 35, at 94.

41. *Id.* at 110.

42. *Id.*

43. *Id.* (emphasis added).

44. HODGSON, *supra* note 3, at 10.

45. *Id.* at 11.

Also like Aristotle, Aquinas believed that the human ability to reason allowed people to identify principles of natural law.⁴⁶ Aquinas, however, emphasized the position of human beings as creations of God with a more divine destiny than they had in Aristotle's secular city-state. For Aquinas, natural law is a "rational participation in the eternal law of God."⁴⁷ By linking the human ability to identify natural law principles with the human status as a creation of God, Aquinas' philosophy closely parallels the Islamic concept of vicegerency (stewardship) examined later in this Article.⁴⁸

Writing in sixteenth-century Italy, Niccolo Machiavelli (1469-1527) also made significant contributions to the status of individual duty and community-mindedness in Western thought. He believed that "no republic can remain independent of its neighbours and free within its borders unless citizens accept civic obligations as an integral component of their individual liberty."⁴⁹ The tying of citizens' civic obligations to the international relations of the republic in Machiavelli's work foreshadows the third generation solidarity right to peace and makes clear the individual-duty component of this right. Central to both of Machiavelli's treatises is the concept of *virtu*, most accurately translated as "public spiritedness."⁵⁰ He believed that this public spiritedness "is what secures independence, prevents corruption and keeps the people free."⁵¹

The social contractarians of the sixteenth through eighteenth centuries profoundly influenced the Western understanding of the relationship between the individual and the State. Although their predecessors had emphasized the importance of community and civic-mindedness, it was the writings of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau that truly "shifted the social dimension of human existence to the notion of the private and autonomous individual."⁵² For the purposes of this Article, what is particularly remarkable about this shift are the efforts of these scholars to continue emphasizing the importance of community even as they brought the individual to prominence, thus establishing the principle of individual duty within individual autonomy.

Although Hobbes (1588-1679) emphasized individual liberty existing in a state of nature free from civic duties,⁵³ he declared that the purpose of the law itself was, "*inter alia*, to encourage men to serve the commonwealth."⁵⁴ Similarly, Locke (1632-1704) emphasized individual

46. *Id.* at 10.

47. *Id.* at 11 (citing THE ENCYCLOPEDIA OF PHILOSOPHY 112 (1967)).

48. See *infra* notes 239-243 and accompanying text.

49. HODGSON, *supra* note 3, at 12.

50. *Id.* at 12.

51. *Id.*

52. HODGSON, *supra* note 3, at 13.

53. *Id.* at 14-15.

54. SELBOURNE, *supra* note 35, at 162 (citing T. HOBBS, LEVIATHAN, Ch. XVIII (1651)). Or, as Thomas More wrote a century earlier, "all laws [are] made and published only to the intent that, by them, every man should be put in remembrance of his duty." *Id.* at 162 (citing T. MORE, II UTOPIA Ch. 7 (1516) (R. Robinson trans., n.d.)).

liberty but believed that certain rights could be exercised better collectively and should be surrendered to the government through individual consent.⁵⁵ Jean-Jacques Rousseau (1712-78), one of the most influential thinkers of the eighteenth century, called for a rebuilding of the social contract to adapt ancient collectivism to eighteenth-century society, thus combining the concepts of individual freedom and collective good.⁵⁶ Professor Hodgson notes that “[f]or Rousseau, individual civil rights and freedoms are important, but they must be interpreted and enforced in the context of, and even sometimes subordinated to, the General Will or collective good.”⁵⁷ Indeed, Rousseau declared that “[a]s soon as men cease to consider public service as the principal duty of citizens . . . we may pronounce the State to be on the very verge of ruin.”⁵⁸ Thus, if Aristotelian Greece solidified the importance of community in Western thought, Rousseau’s social contract brought this community-mindedness into synergy with individual freedom, liberty, and autonomy.

Although commonly regarded as a founder of modern English liberalism emphasizing individual liberty, dignity, and autonomy, John Stuart Mill (1806-1873) “appeared to recognize that the principle of individual duty is not antithetical to, nor even incompatible with, liberal ideals.”⁵⁹ In *On Liberty*, Mill made the fulfillment of duty to others synonymous with “social morality.”⁶⁰ Mill believed it reasonable to compel the citizen to bear a “fair share” in “joint work necessary to the interest of the society of which he enjoys the protection” and that “things which [are] . . . obviously a man’s duty to do, he may rightfully be made responsible to society for not doing.”⁶¹ He wrote that “the contented man, or the contented family, who have no ambition . . . to promote the good of their country or their neighbourhood . . . excite in us neither admiration nor approval.”⁶²

Finally, Mazzini contrasted the “blind seductions of Egoism” to the “path of Duty.”⁶³ “[W]oe to you and your future,” he wrote, “if the respect which you owe to what constitutes your *individual* life should ever degenerate into fatal *egoism*” or if liberty should ever be reduced to a “mean, immoral *individualism*” in which “Ego is everything.”⁶⁴

Thus, from even this brief sampling of the ideas of some key thinkers in the Western political tradition, and the etymology of its words, the

55. HODGSON, *supra* note 3, at 15-16.

56. *Id.* at 17-19.

57. *Id.* at 19.

58. SELBOURNE, *supra* note 35, at 260 (citing J.J. ROUSSEAU, *THE SOCIAL CONTRACT* (C. Frankel trans., 1947); at Bk. III, Ch. 15)).

59. HODGSON, *supra* note 3, at 22-23.

60. SELBOURNE, *supra* note 35, at 178 (citing J.S. MILL, *ON LIBERTY* 150 (1859)).

61. *Id.* at 252 (citing J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 50 (Harper 1962) (1862)).

62. Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 584 (2001) (citing MILL, *supra* note 60, at 50).

63. JOSEPH MAZZINI, *THE DUTIES OF MAN AND OTHER ESSAYS* 74 (Ella Noyes trans., 1907), cited in SELBOURNE, *supra* note 35, at 53.

64. *Id.* at 81.

importance of individual duty to the larger social group is incontestable. Unfortunately, as Hodgson has argued, this rich history of individual duties was gradually eroded by a redefinition of liberty emphasizing individual autonomy rather than the sharing of social power,⁶⁵ a redefinition of rights as “trumps” rather than limited freedoms,⁶⁶ and the emergence of an omnipotent “politics of dutiless rights.”⁶⁷ Yet, with such strong foundations in the Western social and philosophical discourse, I believe that duties could resurface once again in the international legal discourse. The remainder of this Part contrasts the decline of duties in IHR law with the strong presence of duties in Islamic law, before attempting later in the Article to reintegrate rights and duties using Islamic law as an example.

C. The Decline of Duties in International Human Rights (IHR) Law

The historical significance of duties has not carried over into the theory and practice of the modern human rights movement.⁶⁸ In terms of theory, Western scholars have relegated most duties to the supporting role of correlative duties grounded by rights. For example, Joseph Raz argues that “[t]o say a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty.”⁶⁹ Although this provides an important role for duties – indeed Raz’s definition of rights depends on correlative duties – it is nevertheless decidedly rights-centric and altogether removed from the concept of a separate, duties-based paradigm, perhaps where duties act as grounds for rights or are independent of correlative rights. Although Wellman argues that “not all duties are grounded on rights”⁷⁰ and emphasizes that “[t]he theory of rights is only one portion of legal or moral theory,”⁷¹ his correlativity discussion largely assumes a rights-based model.⁷² An independent duties paradigm has been explored by Western scholars in the context of criminal

65. HODGSON, *supra* note 3, at 24-25.

66. By conceiving of individual rights as “trump cards” with which individuals can set limits on the action of society, American legal philosopher Ronald Dworkin transformed the very meaning of rights themselves. In the words of Amitai Etzioni: “Soon, ‘I can do what I want as long as I do not hurt others’ becomes ‘I can do what I want, because I have a right to do it.’” HODGSON, *supra* note 3, at 209-211 (citing AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 8 (1995)).

67. The phrase is coined by David Selbourne. SELBOURNE, *supra* note 35 *passim*.

68. MARTINEZ REPORT, *supra* note 4, ¶¶20-29. See also STEINER & ALSTON, *supra* note 4, at 323. But see Saul, *supra* note 62, at 565, 588-91 (arguing that “the recognition of concepts of duty in Western legal theory carries over into an express recognition of duties in international human rights instruments”). This broad assertion, however, is based on little more than Article 29 of the Universal Declaration of Human Rights and preambular references in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

69. Joseph Raz, *Legal Rights*, 4 OXFORD J. LEG. STUD. 1, 5 (1984). See also Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 195 (1984).

70. CARL WELLMAN, *REAL RIGHTS* 263 (1995).

71. *Id.*

72. *Id.* at 183-86.

law,⁷³ and more recently international criminal law,⁷⁴ but the concept of independent duties within the human rights movement itself has remained foreign indeed.

The reticence to permit a greater role for duties within the human rights paradigm was evident during the drafting of the Universal Declaration of Human Rights (UDHR). As Special Rapporteur Erica-Irene Daes made clear in her exhaustive, 8-year study on the individual's duty to the community under Article 29 of the UDHR (the sole duties provision of that instrument),⁷⁵ the debate over duties within the Commission on Human Rights during the drafting processes leading up to the Universal Declaration of Human Rights was long and protracted. Although "it was emphasized that it was not possible to draw up a declaration of rights without proclaiming the duties implicit in the concept of freedom which made it possible to set up a peaceful and democratic society,"⁷⁶ attempts to enumerate such duties could not find agreement,⁷⁷ and the weak and undefined general duty of the individual under Article 29 is all that emerged.⁷⁸ The references to duties in the preambular paragraphs of the ICCPR and the ICESCR represent the similarly insignificant results of equally protracted debates.⁷⁹

Controversy surrounding the concept of international duties was rekindled in response to the human responsibilities movement of the late 1990s, particularly the proposed draft Universal Declaration of Human Responsibilities⁸⁰ written by the Inter-Action Council for possible adoption by the UN General Assembly on the fiftieth anniversary of the Universal Declaration of Human Rights in 1998. Because of the harsh criticism of the draft declaration by leading scholars such as Theodore Van Boven,⁸¹ and

73. See, e.g., H.L.A. HART, *ESSAYS ON BENTHAM* 182-86 (1982).

74. HODGSON, *supra* note 3, at 61-84.

75. THE INDIVIDUAL'S DUTIES TO THE COMMUNITY AND THE LIMITATIONS ON HUMAN RIGHTS AND FREEDOMS UNDER ARTICLE 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CONTRIBUTION TO THE FREEDOM OF THE INDIVIDUAL UNDER LAW, STUDY PREPARED BY ERICA-IRENE DAES, SPECIAL RAPPORTEUR OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/432/Rev.2 (1983) [hereinafter DAES STUDY].

76. *Id.* ¶29, cited in MARTÍNEZ REPORT, *supra* note 4, ¶47.

77. For a discussion of the various formulations debated within the Drafting Committee, see DAES STUDY, *supra* note 73, ¶¶ 11-25.

78. MARTÍNEZ REPORT, *supra* note 4, ¶48. Article 29 of the U.D.H.R. states: "Everyone has duties to the community in which alone the free and full development of his personality is possible." Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., at 76, U.N. Doc A/810 (1948).

79. *Id.* at 12, ¶¶ 49-52.

80. INTER-ACTION COUNCIL, A UNIVERSAL DECLARATION OF HUMAN RESPONSIBILITIES (Sept. 1, 1997), <http://www.interactioncouncil.org/udhr/declaration/udhr.pdf>. For an alternative conception of what a list of international human duties might look like, see INTERNATIONAL COUNCIL OF HUMAN DUTIES, THE CARTA OF HUMAN DUTIES: A CODE OF ETHICS AND OF SHARED RESPONSIBILITIES, <http://www.units.it/~ichd/> (last visited Mar. 25, 2005).

81. See generally Theodore Van Boven, *A Universal Declaration of Human Responsibilities? in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, A FIFTIETH ANNIVERSARY ANTHOLOGY* 73 (1998).

human rights NGOs such as Amnesty International,⁸² the International Commission of Jurists, and others,⁸³ plans to present the draft for adoption by the UN General Assembly were tabled.⁸⁴ As explained by Ben Saul in his article critical of the international duties movement:

The human rights movement originated in struggles against traditional forms of duty towards the church, feudal lords, and the monarchy. As these struggles were slowly won, new forms of duty and obligation arose against which the human rights movement continued to struggle: the exclusions, hypocrisies, and omissions in the early human rights movement; the emergence of ethnic nationalism; the growth of industrial economic dependence; and colonial and patriarchal domination. While the human rights movement frequently betrayed its ideals or framed its original ideals in exclusionary terms, over time the movement has adapted its tactics and refocused its resistance against new forms of oppressive duty and obligation. In doing so, human rights advocates have vigilantly learned to treat the language of duty and obligation with deep and well-justified suspicion.⁸⁵

Human rights advocates were concerned that duties would be overpowering rather than complementary to rights, that they would be used as an alternative force for evil, rather than as an additional force for good. However, this fear oversimplifies the respective roles of right and duty, significantly limiting the potential paradigms for societal interaction by excluding all duties-based models. Contrary to the above critics, Professor Selbourne argues that the principle of duty does not “represent any serious peril to the moral doctrines which underlie the politics of rights. . . . On the contrary, observance of the principle of duty, by strengthening the civic bond, sustains the *fons et origo* of right itself.”⁸⁶ This Article aims to push the theory of international duties beyond international criminal law, beyond correlative duties, to a generalized theory of inter-individual duties by re-examining the paradigm of third generation human rights.

82. Amnesty International, *Muddying the Waters: The Draft “Universal Declaration of Human Responsibilities”: No Complement to Human Rights* (1998), <http://web.amnesty.org/library/%20Index/engIOR400021998>.

83. See MARTÍNEZ REPORT, *supra* note 4, at n. 52 (listing specifically Amnesty International, the Carter Center, the International Commission of Jurists, and the International Federation of Human Rights).

84. Saul, *supra* note 62, at 578.

85. *Id.* at 616.

86. SELBOURNE, *supra* note 35, at 33-34 (arguing that the rights paradigm is more threatened by the misuse of the rights themselves than by any enforcement of the principle of duty).

D. The Importance of Duties in Islamic Law

Duties in Islamic law are of fundamental importance. Marcel A. Boisard explains:

Islam offers a unifying and integrated vision of humankind, of society, and of the world. In this framework, *individual duties trump individual rights*. Social virtue is preeminently collective rather than inter-individual. The Western notion of individual self-interest as the antithesis of general welfare is thus theoretically absent in Islamic social thought.⁸⁷

The Islamic emphasis on duties over rights is so pronounced that one scholar characterized Islamic law as “an endless discussion on the duties of a Muslim.”⁸⁸ This Islamic notion of social improvement is a combined effort, whereby “[i]ndividuals, communities and indeed the state, act as the instruments by which these ideals are translated into practice.”⁸⁹

Three major declarations on Islam and human rights have emphasized the importance of duties in the Islamic conception of human rights. First, the *Cairo Declaration on Human Rights in Islam* accentuates individual and collective responsibility in its preamble and cites human duties in Articles 1 (non-discrimination), 2 (right to life), 6 (equality of the sexes), 8 (legal capacity), and 9 (education).⁹⁰ Second, the *Rome Declaration on Human Rights in Islam*, composed of five principles, dedicates one of them to the importance of individual duties.⁹¹ Third, the *Universal Islamic Declaration of Human Rights* states in its preamble that “duties and obligations have priority over . . . rights”⁹² and concludes with an explanatory note that “[e]ach one of the Human Rights enunciated in this declaration carries a corresponding duty.”⁹³

87. Marcel A. Boisard, *Existe-t-il une conception islamique spécifique des droits de l'homme?*, in ISLAM & DROITS DE L'HOMME 131, 132-33 (Emmanuel Hirsch ed., 1984) (translation by the author).

88. See FAZLUR RAHMAN, ISLAM & MODERNITY 32 (1982) (crediting Professor Santillana with the quotation, no source cited).

89. Azim Nanji, *The Right to Development: Social and Cultural Rights and Duties to the Community*, in PROCEEDINGS OF THE SEMINAR ON ISLAMIC PERSPECTIVES ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 345, 346, UN Doc. HR/IP/SEM/1999/1 (PART II Sec. 2), (1999).

90. *Cairo Declaration on Human Rights in Islam*, Nineteenth Islamic Conference of Foreign Ministers, UN Doc. ST/HR/1/Rev.5 (Vol. II) (Aug. 5, 1990).

91. *Rome Declaration on Human Rights in Islam*, World Symposium on Human Rights in Islam (Feb. 27, 2000), reprinted in ABDULAZIZ OTHMAN ALTWAIJRI, HUMAN RIGHTS IN ISLAMIC TEACHINGS, <http://www.isesco.org.ma/pub/Eng/humanrights/page8.htm> (website of the Islamic Educational, Scientific, and Cultural Organization, last visited Mar. 25, 2005). The second principle reads: “Necessity to link rights with obligations through a concept based on a balance between man’s functions and his needs to construct a family and society and populate the earth in a way that would not run counter to Allah’s Will.”

92. *Universal Islamic Declaration on Human Rights*, Preamble (Sept. 19, 1981), <http://www.alhewar.com/ISLAMDECL.html> (last visited 25 Mar. 2005).

93. *Id.* at Explanatory Notes. The importance of individual duties to the group in Islamic

IV. THIRD GENERATION SOLIDARITY RIGHTS AND ISLAMIC LAW
(SUBSTANTIVE RMR)

In Part III I argued that a better social governance paradigm is clearly possible through a combination of both rights and duties, but Western human rights theorists and advocates are reluctant to let duties enter the picture. How best to escape from this conundrum? I believe it is by bringing duties into the rights paradigm within the context and definition of certain, specified rights. For example, despite his vehement criticism of individual duties,⁹⁴ even Saul recognizes the element of duty present in the third generation solidarity right to a healthy environment.⁹⁵ This is a step in the right direction, because it finds an acceptable place for duties not complementary or additional to rights, but *within* the definition of a specific class of rights. Narrowing this place for duties so significantly should allay the concerns that some have expressed about duties,⁹⁶ while allowing the benefits of the duties paradigm to become part of international human rights.

If third generation solidarity rights could serve the purpose of uniting the rights-based and duties-based paradigms into a single, unified theory, they would go from theoretical abstractions to extremely valuable theoretical tools. This Part attempts to re-open the dialogue on third generation solidarity rights – and positively contribute to the debate on the universality of human rights – through substantive RMR in the Islamic context. First, I examine the definition of third generation solidarity rights as established by the international human rights movement in the early 1980s. Second, I argue that the element of individual duty contained in their original definition has been de-emphasized. Third, I practice substantive RMR by establishing that these rights, although new to IHR law, have long existed in Islamic law, and that to the extent IHR law moves towards these rights it could be considered to be moving towards a standard that is more Islamic. The Part ends by briefly addressing some of the most common criticisms launched against third generation solidarity rights.

Although I will show that third generation solidarity rights are indeed more developed in Islamic law than in international law – a successful attempt at substantive RMR – they are nevertheless still not completely developed in Islamic law. Thus, this successful attempt at substantive RMR cannot be elevated to methodological RMR (actively transposing tools from one paradigm to the other) because just as the international conception of these rights over-emphasizes rights to the detriment of duties, the Islamic conception is completely grounded in duties with little emphasis on rights. Thus, in the area of third generation solidarity rights,

law has also been emphasized by numerous commentators. See, e.g., MAYER, *supra* note 6, at 59-65.

94. Saul, *supra* note 62, at 602-616.

95. *Id.* at 599.

96. See *supra* notes 81-85 and accompanying text.

neither paradigm effectively balances rights and duties. This Article goes on in the next Part, therefore, to examine more thoroughly how duties are used in Islamic law, in an effort to transpose some of these tools into the IHR paradigm (methodological RMR).

A. What are Third Generation Solidarity Rights?

Human rights law has historically placed a strong emphasis on the individual, leading Professors Henry Steiner and Philip Alston to conclude in their authoritative text on human rights that “[o]bservers from different regions and cultures can agree that the human rights movement . . . stems principally from the liberal tradition of Western thought . . . [and n]o characteristic of the liberal tradition is more striking than its emphasis on the individual.”⁹⁷ Professor Selbourne criticizes this reality as a mutation from the original theoretical balance of rights and duties:

The notion, a contractual notion, of the need for reciprocity or “balance” between rights and duties has survived in the corrupted liberal order, despite the attenuation of the principle of duty in practice, but in a mutant and a-civic form: under the rule of dutiless right and demand-satisfaction, the citizen-turned-stranger insists upon his *dutiless or absolute rights as citizen*, or ostensible citizen, on the one hand and upon the *rightless duties to him of the civic order*, or of its instrument the state, on the other.⁹⁸

This imbalance was finally corrected with the advent of the third generation rights,⁹⁹ otherwise known as solidarity rights. These rights come amidst an historical tradition recognizing “first generation” civil and political rights of individuals and “second generation” economic, social, and cultural rights of individual.¹⁰⁰ They develop a language of social solidarity containing individual *duties* alongside individual rights, an international legal language which combines rights and duties, consistent with its predecessors in Western political theory and philosophy. Although the emphasis on individual duty and group solidarity that underlie third generation solidarity rights has long been present in other legal traditions,¹⁰¹ the concept of a third generation of human rights first

97. STEINER & ALSTON, *supra* note 4, at 361-62.

98. Selbourne, *supra* note 35, at 188-89 (emphasis in original).

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

100. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 95-96 (2001). The “first generation” rights are the civil and political rights, such as “freedom from slavery, torture, the right to recognition and equality before the law, freedom from arbitrary arrest and the guarantee of fair criminal procedures, and respect for rights of worship and expression.” *Id.* at 95-96. The “second generation” rights are the economic, social, and cultural rights, including “the right to work, to rest and leisure, to education, and to participation in cultural life.” *Id.* at 96.

101. See works cited at *supra* note 4. Indeed, it is precisely for this reason that third

entered Western human rights discourse with Professor Karel Vasak's 1979 inaugural lecture at the International Human Rights Institute in Strasbourg.¹⁰² Vasak explained:

[Third generation solidarity rights] are new in the aspirations they express, are new from the point of view of human rights in that they seek to infuse the human dimension into areas where it has all too often been missing, having been left to the State, or States. . . . [T]hey are new in that they may both be *invoked against* the State and *demand*ed of it; but above all (and herein lies their essential characteristic) *they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community.*¹⁰³

Considering this complete cooperation between individuals and groups, the term "solidarity rights" is indeed appropriate. Although the notion of solidarity is present in all human rights "in the sense of a sharing of purpose and an agreeing on modes of action among various elements of society," it is "the key feature of the rights of the third generation."¹⁰⁴

Professor Carl Wellman has recently engaged in a rigorous examination of Vasak's third generation rights model.¹⁰⁵ Although it has become fashionable to create "new" human rights, and many third generation human rights have now been proposed,¹⁰⁶ both Wellman and the present article limit analysis of third generation solidarity rights to three of the five solidarity rights discussed by Vasak: the right to development, the right to a healthy environment, and the right to peace.¹⁰⁷ First, the right to development is the notion that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."¹⁰⁸ First articulated by Senegalese jurist

generation solidarity rights are an ideal topic for a reverse moderate relativist study.

102. See Cees Flinterman, *Three Generations of Human Rights*, in *INDIVIDUALS & COLLECTIVITIES*, *supra* note 5, at 77.

103. Karel Vasak, *Pour une troisième génération des droits de l'homme*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 837, 839 (Christophe Swinarski ed., 1984).

104. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1990s?*, 33 *RUTGERS L. REV.* 435, 441 (1981).

105. Carl Wellman, *Solidarity, the Individual, and Human Rights*, 22 *HUM. RTS. Q.* 639 (2000). For additional treatments of third generation solidarity rights, see generally *INDIVIDUALS & COLLECTIVITIES*, *supra* note 5. See also Marks, *supra* note 104; Jack Donnelly, *Third Generation Rights*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 119 (Catherine Brölmann et al. eds., 1993); Douglas Sanders, *Collective Rights*, 13 *HUM. RTS. Q.* 368 (1991).

106. See, e.g., Marks, *supra* note 104 (suggesting other potential third generation rights such as the right to food, the right to humanitarian assistance, the right to the satisfaction of basic needs, and the right to disarmament).

107. Vasak also proposed a right to communicate and a right of ownership in the common heritage of humanity. Vasak, *supra* note 103, at 842.

108. African Charter on Human and Peoples' Rights, art. 22(1), *opened for signature* 27 June 1981, *entered into force* 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 *I.L.M.*

Keba M'Baye in 1972,¹⁰⁹ the right to development was codified in 1986 in the non-binding United Nations Declaration on the Right to Development.¹¹⁰ Since the Declaration on the Right to Development, it has become increasingly common to embody development norms in international legal instruments,¹¹¹ and the Secretary General of the United Nations has created a list of eighty-one international instruments codifying a commitment to social development.¹¹²

Second, the right to a healthy environment is the notion that humans have a right to live "in an environment of a quality that permits a life of dignity and well-being, and [that they bear] a solemn responsibility to protect and improve the environment for present and future generations."¹¹³ As discussed by Wellman,¹¹⁴ a growing number of international conventions in the past twenty years have attempted to codify a right to a healthy environment. Take, for example, the Stockholm Declaration on the Human Environment in 1972,¹¹⁵ the African Charter on Human and Peoples' Rights in 1981,¹¹⁶ the United Nations World Charter for Nature in 1982,¹¹⁷ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.¹¹⁸

Third, the right to peace is the notion that "everyone has the right to live in conditions of international peace and security and fully to enjoy economic, social and cultural rights and civil and political rights."¹¹⁹ Of the three most common third generation solidarity rights, the right to peace is the least defined and developed in international human rights law.¹²⁰ Although the preservation of peace is a primary purpose of the United Nations, and figures prominently in the UN Charter, the international

58 (1982) [hereinafter African Charter].

109. See generally, Keba M'Baye, *Le droit au développement comme un droit de l'homme*, 5 REVUE DES DROITS DE L'HOMME 503 (1972).

110. G.A. Resolution 41/128 (Dec. 4, 1986).

111. See James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 309-10, 312 (1995).

112. Outcome of the World Summit for Social Development: Draft Declaration and Draft Program of Action, Review of Existing International Commitments Relevant to Poverty, Employment and Social Integration, U.N. Doc. A/Conf.166/PC/16 at ¶ 259 (1994).

113. Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 1, *adopted* June 16, 1972, U.N. Doc. A/CONF. 48/14/Rev.1, *reprinted* at 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

114. Wellman, *supra* note 105, at 646-48.

115. Stockholm Declaration, *supra* note 113.

116. African Charter, *supra* note 108, art. 24: "All peoples have the right to a general satisfactory environment favorable to their development."

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

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

119. Sohn, *supra* note 99, at 57 (citing U.N. Commission on Human Rights Res. 5(XXXII), 60 U.N. ESCOR Supp. (No. 3) at 62, U.N. Doc. E/5768 [E/CN.4/1213] (1976)).

120. Wellman, *supra* note 105, at 648-49.

community did not begin framing peace as a third generation solidarity right until several decades later.¹²¹ At first, the UN Human Rights Commission framed it as a right in a controversial 1976 resolution.¹²² In 1978, it was codified as an individual and collective right by the UN General Assembly Declaration on the Preparation of Societies for Life in Peace.¹²³ The 1984 Declaration on the Right of Peoples to Peace further codified the right.¹²⁴ Although the right has been recognized in international law, its contours are still vague,¹²⁵ and the above efforts met with harsh protest from several Western powers who argued that general promotion of peace should be left to other branches of the UN, particularly the Security Council, not added to the list of more-established, classic human rights.¹²⁶

B. Individual Duty in Third Generation Solidarity Rights

According to Wellman, third generation solidarity rights bring several new aspects to the international human rights paradigm. First, they impose joint obligations among states, as opposed to the mere several obligations of first and second generation human rights.¹²⁷ In other words, they can only be fulfilled when states and other groups work together. Second, solidarity rights involve a group right that is unique from and additional to the classic individual right paradigm.¹²⁸ Third, in addition to the group (state) duty present in traditional human rights, third generation solidarity rights recognize an individual duty towards their fulfillment. Whereas the first and second generation rights impose obligations primarily upon states, third generation solidarity rights can “not be realized without the concerted efforts of all the actors on the social scene [including] *the individual*. . . .”¹²⁹ It is this last aspect of third generation solidarity rights—the notion of individual duty—that is of interest to this Article.

Every human right is associated with concomitant or correlative duties; the element of duty in third generation solidarity rights differs in three

121. *Id.* at 648.

122. Further promotion and encouragement of human rights and fundamental freedoms, including the question of a long-term programme of work of the Commission, ESCOR Res. 5 (XXXII), at ¶1, *Report of the Thirty-Second Session of the Economic and Social Council*, 60 U.N. ESCOR Supp. No. 3, at 60-62, U.N. Doc. E/CN.4/1213 (1976) (“[E]veryone has the right to live in conditions of international peace and security and fully to enjoy economic, social and cultural rights and civil and political rights.”).

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

124. Declaration on the Right of Peoples to Peace, *adopted* 12 Nov. 1984, G.A. Res. 39/11, U.N. GAOR, 39th Sess., 57th plen. mtg., U.N. Doc. A/Res/39/11 (1984).

125. Wellman, *supra* note 105, at 649.

126. Sohn, *supra* note 99, at 57-58.

127. Wellman, *supra* note 105, at 643.

128. *Id.*

129. *Id.* at 642-43 (emphasis added).

respects. First, in the traditional human rights paradigm, an individual right generally correlates to a group (state) duty. Third generation solidarity rights expand this model by also recognizing a notion of individual duty. Second, the notion of individual duty in third generation rights has been recognized by Western intellectuals as an integral part of the right. Although some scholars have correctly recognized that second generation or even first generation rights are best realized when associated with an element of individual duty, the generalized definition of second generation rights does not contain an element of individual duty as do emerging definitions of third generation solidarity rights. Third, the notion of individual duty in third generation rights is incumbent not just on those in a position to help the right-holder realize the right, but also on the very individual that holds the right. For example, an individual's second-generation right to education is associated with a duty incumbent upon others in the society to become teachers. Compare this to the individual duty component of the third generation right to a healthy environment. In that case, an individual's right to a healthy environment correlates to a state duty to protect the environment, the individual duty of others to protect the environment, and an individual duty *of the right-holder herself* to protect the environment.

Despite this newfound place for individual duty in the international human rights paradigm, the prevailing Western conception of these rights focuses almost exclusively on the "group right" component, rarely mentioning the "individual duty" component.¹³⁰ Professor Wellman, who finally brings this "individual duty" component back in to public scrutiny, also chooses to reject it:

Would it be desirable to expand the range of dutybearers under human rights law to include individuals and both public and private groups as Vasak proposed? Now it may well be true that all the actors on the international social scene have moral obligations implied by human rights taken as the fundamental moral rights of all human beings. But it does not follow that all of these moral duties ought to be enforced as obligations in international human rights law.¹³¹

Although Wellman's rejection of the individual duty component in third generation solidarity rights is consistent with the general historical

130. See, e.g., Koo VanderWal, *Collective Human Rights: A Western View*, in *INDIVIDUALS & COLLECTIVITIES*, *supra* note 5, at 83; Jack Donnelly, *Human Rights, Individual Rights and Collective Rights*, in *INDIVIDUALS & COLLECTIVITIES*, *supra*, at 39, 43-54; Peter R. Baehr, *Human Rights and Peoples' Rights*, in *INDIVIDUALS & COLLECTIVITIES*, *supra*, at 99; Theo van Boven, *Human Rights and Rights of Peoples*, 6 *EUR. J. INT'L. L.* 461, 470-72 (1995). Even when An-Na'im follows a reverse moderate relativist approach and discusses the potential universality of collective rights, he treats these rights almost exclusively from the "group right" and not "individual duty" perspective. See generally Abdullahi A. An-Na'im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, *supra* note 16.

131. Wellman, *supra* note 105, at 652.

tendency at the international level to favor the rights paradigm over the duties paradigm, it ignores a historical opportunity to begin bringing duties back into the human rights discourse. Reverse moderate relativism provides a tool to correct this de-emphasis of individual duties: By looking to Islamic law, where individual duty to the group is emphasized, this Article will attempt to expand the international understanding of individual duty as a component of third-generation solidarity rights. In so doing, it not only brings third generation solidarity rights back into line with Vasak's original definition, but it also finds a home for duties in the Western human rights paradigm.

First, by examining Islamic notions of third generation solidarity rights in this Part, I practice a substantive form of RMR, showing that while duty is a new and fragile part of third generation solidarity rights in their international conception, the Islamic view of these same rights is based in duties. Then, I go on in the next Part to practice a methodological form of RMR, examining the role of duties in Islamic law and attempting to transpose some of this paradigm to international human rights for the betterment of the latter.

This Article does not mean to suggest that the role of individual duty in international human rights should be limited to third generation solidarity rights. On the contrary, many second and first generation rights could also be strengthened by a renewed emphasis on individual duty. Rather, this Article recognizes the historic opportunity presented by third generation solidarity rights. As expressed by Western intellectuals in the 1980s, these rights recover the lost emphasis on duty as part of the very definition of the right. This could become an important point of departure towards recognizing an increased role of individual duty in all human rights. Manifestly, all human rights are solidarity rights. Third generation solidarity rights, however, represent the point at which the importance of individual duties is first recognized by international human rights scholars as a part of a specific right. Whereas a notion of duty was previously discussed in the context of correlative duty – something outside of but complementary to the right – the element of duty in third generation solidarity rights is integral to the right itself.

Third generation solidarity rights not only bring individual duty into the human rights paradigm, but they also do so in a way that should be palatable to the critics of individual duty. Rather than a wholesale replacement of human rights by human duties, or even a human responsibilities movement that emphasizes the need for individual duties separate and complementary to human rights, the overall paradigm of third generation solidarity rights is still rights-based. The de-emphasis of the role of individual duties in third generation solidarity rights is harmful not only for distorting the true nature of these rights, but also because it denies an acceptable place for duties within human rights, a place where duties do not overpower *all* rights (as the critics of duties fear) but rather are integral to the definition of *certain* rights.

C. The Strong Support for Solidarity Rights in Islamic Law

At least a decade before Vasak made his famous “discovery” of third generation human rights, a group of eminent jurists from Saudi Arabia described the concept in almost identical terms in their efforts to explain Islamic conceptions of human rights at The Vatican Colloquium on Economic, Social, and Cultural Rights in Islam.¹³² In their concluding observations, they stated:

We note that cultural rights as codified in the international conventions are personal and subjective rights, not general and imperative duties. We further note that these rights are framed in ‘negative’ terms only. . . . [In contrast,] cultural rights in Islam have an obligatory character that cannot be renounced, contrary to the international conception which considers them as a personal and discretionary right which can be renounced by the beneficiary. *They are both individual and collective obligations, the execution of which is incumbent on both the individual and the collectivity.*¹³³

Although made in the context of economic, social and cultural rights (i.e., second generation rights), these comments come very close to describing the combination of individual and collective rights and duties inherent to Vasak’s definition of third generation solidarity rights described above. Whereas third generation solidarity rights are weak and aspirational in the international legal discourse, these Saudi jurists cite them as a basic principle in the Islamic notion of human rights, discussing them prior to their “discovery” by the international human rights movement. Just as Wellman expounds three decades later, these scholars emphasized the importance of coexisting individual and collective obligations that is characteristic of third generation solidarity rights. Because of these parallels between the conceptions of Islam and the foundations of solidarity rights, it should come as no surprise that strong support exists for the three most commonly proposed solidarity rights – the right to a healthy environment, the right to development, and the right to peace – in the Islamic tradition.

This Section explores Islamic notions of these rights in turn. Having established earlier in this Part that international notions of these rights are weak and theoretical, this Section finds their Islamic counterparts to have longstanding historical pedigree. The combination of the first three sections of this Part will thus conclude a substantive RMR argument: Beginning by isolating a new, under-developed set of rights in IHR law, it

132. COLLOQUES DE RIYAD, DE PARIS, DU VATICAN, DE GENEVE, ET DE STRASBOURG SUR LE DOGME MUSULMAN ET LES DROITS DE L’HOMME EN ISLAM: ENTRE JURISTES DE L’ARABIE SAOUDITE ET EMMINENTS JURISTES ET INTELLECTUELS EUROPEENS 109, 132-34 (Beyrouth, Dar Al-Kitab Allubnani, n.d.) [hereinafter COLLOQUES] (translation by the author).

133. *Id.* (emphasis added).

shows those rights to be more developed in Islamic law, thus making the case that as third generation solidarity rights become more accepted in IHR law, that law is moving towards a standard that is more Islamic.

1. The Right to a Healthy Environment in Islamic Law

As discussed above, the right to a healthy environment is a new development in international human rights law, first discussed in the 1970s and codified in international human rights instruments in the past twenty years. Against these recent developments on the international level, a right and duty towards environmental protection have existed in Islam since the time of the Prophet Mohammed,¹³⁴ present in both of the foundational Islamic textual sources (the Qur'an and the *Sunna*). This section will analyze some of the bases for environmental protection in Islam.

The environment is discussed in numerous verses of the Qur'an,¹³⁵ a common characteristic of these being the view that "the concept of environment is broad and is used in many different ways,"¹³⁶ including the natural environment,¹³⁷ the social environment,¹³⁸ and the economic environment.¹³⁹ This general notion of environmental protection manifests itself in several specific areas. First, in the area of pollution, the Prophet Mohammed stated: "No one shall urinate on stagnant water, [and] avoid thou the abhorrent act of emptying your bowels near water sources, in the middle of the road, and in the shade."¹⁴⁰ Al-Khayyat notes that "[w]hat is striking in these commands is the use of the word 'la'n' (curse) or one of its derivatives. 'La'n' entails exclusion, repudiation, and banishment from the community. The implications are evident: he who deliberately pollutes the environment to the detriment of the community becomes liable to banishment."¹⁴¹ The use of such strong language reinforces the importance of environmentalism in the Islamic tradition.¹⁴²

Second, Islam takes a definite stand in the area of water conservation. The Prophet Mohammed forbade excessive use of water, even for cleaning

134. In every reference regarding the Prophet Muhammad, I ask that God's peace and blessings be upon him.

135. Many of these are reproduced in Dr. Amina Muhammad Nasir, *Islam and the Protection of the Environment*, 13 ISLAM TODAY 67 (1995).

136. *Id.* at 68.

137. *Id.* at 87-96.

138. *Id.* at 84-85; Nanji, *supra* note 89, at 355.

139. Nasir, *supra* note 135, at 83-84.

140. Mohamed Haitham Al-Khayyat, *On the Preservation of the Environment: An Islamic Perspective*, 1998 THE HASSANIAN LECTURES 152, 165.

141. *Id.*

142. It is also worth noting the importance of personal cleanliness in Islam. A *hadith* of the Prophet on the authority of Abu Malik al-Ash'ari states, "The Prophet, Peace and Blessing be upon Him, said: 'Cleanliness is half of faith.'" Nasir, *supra* note 135, at 100. Nasir emphasizes that "Islam links faith and belief (*iman*) to cleanliness. Some of the pillars of Islam, such as prayer (*salat*) and the pilgrimage (*Hajj*) can only be performed in a state of purity and washing in pure, clean water, free of any contamination. This article of faith and others teach us to protect sources of water from pollution and to keep them clean." *Id.* at 99-100.

or ablutions, setting the example himself by bathing in two liters (one *sa'*) of water and performing ablutions with half a liter.¹⁴³ According to Imam Abu 'Ubeid in his treatise *Kitab at-Tuhur*, the Prophet also returned unused clean water to the river after ablutions, stating, "Let (this water) reach a human, an animal, or any living creature so that they may, by the Grace of *Allah*, benefit from it."¹⁴⁴ The Qur'an also states: "Waste not through excess, for God does not love the wasteful."¹⁴⁵

Third, Islam takes a stand on the preservation of other natural resources, such as plants and animals. As Imam Muhammad bin Hazm stated in his treatise *al-Muhallak*: "Beneficence to animals is an act of righteousness and piety. Any failure to assure and assist in their well-being is tantamount to sin and offense."¹⁴⁶ The Prophet reportedly stated, "He that unduly cuts down a tree shall be directed to hell."¹⁴⁷ Similarly, he established the first environmental sanctuary, an area extending to twelve miles around Madinah: he restricted fishing in some areas, restricted logging within twelve miles of Madinah, and restricted hunting within four miles.¹⁴⁸ Al-Khayyat notes: "Some Ulemas [scholars] see in such interdictions a keen desire to preserve the environment. Such an awareness soon became deeply engrained in the minds of Muslims."¹⁴⁹

Fourth, Islam rewards efforts to rekindle the natural environment. The Prophet Mohammed is said to have promised: "Every Muslim who plants a tree or plants a crop from which birds, people or animals eat shall have a reward for a beneficent act."¹⁵⁰

Environmental care in Islam "stands on the basis of faith . . . [and] any kind of corruption whatsoever—whether in the natural or social environment—is considered a violation of God's law[.]"¹⁵¹ Because the duty to protect the environment is rooted in Divine orders, it easily exceeds duties present in third generation human rights, which are at best intangible, and at worst unknown to laypeople. Environmentalism in Islam is firmly rooted in the human role as vicegerent (steward), and the responsibility *Allah* placed in humans in the form of trust (*amanah*).¹⁵² In his paper submitted to the United Nations Conference on Islamic Perspectives on the Universal Declaration of Human Rights, Dr. Nanji notes that "[t]he

143. Al-Khayyat, *supra* note 140, at 165-66.

144. *Id.* at 166.

145. Nanji, *supra* note 158, at 356 (citing Qur 'anic ayah 6:141).

146. Al-Khayyat, *supra* note 140, at 166.

147. *Id.* See also Mohammed Taha Sabounji, *Islam and the Environment*, 1991 THE HASSANIAN LECTURES 68, 73. Noting that the Prophet Mohammed "forbade the cutting of trees for no purpose or burning of enemy trees," Sabounji writes, "Islam prohibits the disfigurement of nature. It calls for its cleanliness and vigour." *Id.*

148. Al-Khayyat, *supra* note 140, at 166.

149. *Id.*

150. *Hadith* on the authority of Anas B. Malik, quoted in Nasir, *supra* note 135, at 96.

151. Nasir, *supra* note 135, at 73.

152. *Id.* at 82 (noting that under Islamic law, the right of ownership is not absolute, but is "a kind of vicegerency from the True Owner – God. Thus, man should respect, in the use of this right, the purpose and wisdom for which God made him a vicegerent of His Property."). For a discussion of vicegerency see *infra* notes 239-243 and accompanying text.

role of stewardship entrusted to human beings also necessitates an ethical stance towards the development of natural resources and the public space inhabited by human beings.¹⁵³ This stewardship, thus defined, is both a right and a duty to perpetuate these gifts of *Allah*.¹⁵⁴

The role of humans as vicegerents profoundly affects the meaning of exploitation of natural resources, when it occurs. In the capitalist model based on self-interested individuals, "exploitation" carries the negative connotation of using the environment for individual self-interest. In the Islamic model based on vicegerency, exploitation carries the positive connotation of a trusteeship with God meant to benefit the group. Thus, Dr. Nasir notes that in Islamic law (*Shari'a*) "ownership is a social responsibility, a fact which confirms the relationship between community and land, and the extent of Islam's interest in regulating it."¹⁵⁵ Similarly, Jose Abraham notes that although some scholars translate the Arabic word *sakhhara* in Qur'anic verses (*ayat*) on the environment to mean subjection, subservience, or exploitation, "the relationship between human and non-human is not of domination or exploitation but that of the trust (*amanah*) placed with human beings by God," making any attempt at human domination a "mockery to *Allah*."¹⁵⁶ Thus, through both the doctrine of vicegerency and the trust (*amanah*) placed in humans by *Allah*, exploitation becomes a divinely-motivated duty of group improvement, not a self-motivated form of destruction.

2. The Right to Development in Islamic Law

Like the right to a healthy environment, the right to development has only recently been codified in international human rights law, but there is solid evidence that it has existed in Islamic law since the revealed texts. The emphasis on socioeconomic justice and human egalitarianism is, in fact, so strong in Islam that Professor Fazlur Rahman identifies it as "[t]he basic élan of the Qur'an."¹⁵⁷ Dr. Azim Nanji notes that "[t]he Qur'an is explicit in stating that human conduct and aspirations have relevance as acts of faith within the wider human, social and cultural context."¹⁵⁸ For

153. Nanji, *supra* note 89, at 355 (citing Qur'anic *ayah* 10:14: "We have made you heirs in the land after them, to see how you will behave").

154. See, e.g., Sabounji, *supra* note 147, at 73 ("[T]he care, preservation, improvement and beautification of the environment is part . . . of man's great responsibility as *Allah's* viceroy on earth.").

155. Nasir, *supra* note 135, at 82.

156. Jose Abraham, *An Ecological Reading of the Qur'anic Understanding of Creation*, BANGALORE THEOLOGICAL FORUM, Vol. XXXIII, No. 1 (2001), <http://www.religion-online.org/showarticle.asp?title=1632> (citing Abd-al-Hamid, *Exploring the Islamic Environmental Ethics*, ISLAM AND THE ENVIRONMENT 47-48 (A.R. Agwan, ed. 1997)) (last visited April 25, 2005).

157. RAHMAN, *supra* note 88, at 19.

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

example, the Holy Qur'an states that "[t]he righteous are those who . . . give from what they have, to: relatives, orphans, those in need, the ones away from home, those who ask, and in order to free the enslaved."¹⁵⁹

Parallel to the international conception of third generation solidarity rights, Professor Belkhoja argues that the right to development under Islamic law is based in both individual and collective responsibility:

Individuals are definitely responsible for the achievement of development for the individual has been mandated to discharge the trust (*amanah*) entrusted to him by Almighty Allah.

. . . .

Likewise, society is equally responsible because it is required to establish cooperation and solidarity.

. . . .

The role of the State is far more extensive because it . . . must shoulder the burdens which cannot be borne by the individuals in view of their limited resources.¹⁶⁰

This wording parallels the international conception almost to the letter. The Declaration on the Right to Development states: "All human beings have a responsibility for development, individually and collectively," but also that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."¹⁶¹

Although one may conclude from this language that the balance of obligations in the right to development is similar in its international law and Islamic law formulations, the element of individual duty is much more clearly enunciated in Islamic law, which has adopted individual duty as a paradigm-establishing fundamental concept. For example, the Declaration on the Right to Development is almost completely worded in terms of state duties, with only one clear reference to individual obligations.¹⁶² By comparison, the role of individual duty in the Islamic conception of the right to development is clearly stated, as evidenced in practices such as almsgiving (*zakat*), one of the five pillars of Islam.¹⁶³ Similarly, the saying, "[w]hoever sleeps satiated whilst his neighbour is hungry does not belong

159. Nanji, *supra* note 158, at 345 (citing Qur 'anic *ayah* 2:177).

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

161. Declaration on the Right to Development, *supra* note 110, at Art. 2.1, 3.1.

162. *Id.* at Art. 2.1.

163. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 217 (1991); Morgan-Foster, *supra* note 17, at 49-53.

to our community,"¹⁶⁴ contains individual duty language so powerful that failure to contribute to the group right to development results in banishment from the community itself. The brief reference to individual duty in the Declaration on the Right to Development pales by comparison.

Once again, Islamic scholars trace this high level of duties language in the Islamic conception of the right to development to the human role as vicegerent. For example, Professor Ammara notes that, as a vicegerent of God, each Muslim individual assumes a duty to the development of others, as is clear in the Qur'anic verse *Iron 7* tying vicegerency ("heirs") with almsgiving: "[S]pend in charity out of the substance whereof He has made you Heirs."¹⁶⁵ In order for international human rights law to parallel this model, it needs to rediscover the individual duty of Rousseau's social contract as a basis for rights. Recognizing the social contract as the functional equivalent to Islamic vicegerency, the language and logic of individual duties can re-enter the international human rights paradigm as an element of the third generation right to development.

3. The Right to Peace in Islamic Law

Although the right to peace is the most controversial of the third generation solidarity rights at the international level, the notion of peace is fundamental to Islamic law and religion. It is present in the salutation exchanged between Muslims at each meeting: *salaam 'alekom*, "peace be upon you." A peace greeting is repeated twice at the end of each of Muslims' five daily prayers.¹⁶⁶ Indeed, the very word "Islam" shares its root with the word for "Peace" in Arabic,¹⁶⁷ and peace is one of the ninety-nine attributes of *Allah*.¹⁶⁸ There are over one hundred Qur'anic verses discussing the importance of peace.¹⁶⁹ This ever-presence of Peace in Islam led Professor Mohammed Yessef to state: "The alpha and omega of Islam is peace."¹⁷⁰

Professor Yessef finds an individual responsibility to promote peace in the following *hadith*,¹⁷¹ narrated by Imam Muslim in his treatise *Sahih*, one of the seminal treatises of Islamic law: "You shall not enter Paradise until you believe (in *Allah*), and you shall not believe (in *Allah*) until you love one another; shall I tell you something which, if you were to do it, you would love one another? Disseminate (and disclose) peace among

164. *Hadith* as quoted by Belkhoja, *supra* note 159, at 198 (no source cited).

165. Mohammad Ammara, *The Vicegerency of Man*, 13 ISLAM TODAY 59, 62 (1995).

166. JOHN L. ESPOSITO, ISLAM THE STRAIGHT PATH 89 (3d ed. 1998).

167. Idris Alaoui Abdallaoui, *The Bases of Neighbourliness in Islam*, 1990 THE HASSANIAN LECTURES 217, 224.

168. *Id.* at 224 (quoting the Qur'an: "He is *Allah*, than Whom there is no other God, the Sovereign Lord, the Holy One, Peace.")

169. *Id.*

170. Mohammed Yessef, *Foundations of Peace and Security in Islam*, 1996 THE HASSANIAN LECTURES 224.

171. For a discussion of the collections of *hadith* and their role in Islamic law, see *infra* notes 222-224 and accompanying text.

yourselves."¹⁷² Thus, this *hadith* elevates the dissemination of peace to a condition precedent to belief in *Allah*, one of the Five Pillars of Islam. Because the five pillars represent "the core and common denominator, the five essential and obligatory practices all Muslims accept and follow,"¹⁷³ it would be literally impossible for Imam Muslim to create a stronger statement regarding the duty to disseminate and disclose peace than to make one of these five pillars dependent on it. Peace is also a theme of the *hadith* narrated by Al-Bukhari, Muslim, and Ibn Hanbal: "The Prophet [Peace be upon Him], says 'You only have faith when you desire for your brother what you desire for yourself.'"¹⁷⁴

This peace manifests itself in different ways and on different levels, all the way from simple daily acts such as greetings, to kind offerings of food, to financial assistance and charity, to peace on a global scale.¹⁷⁵ In expounding his vision of Peace and Security in Islamic law, Professor Yessef follows a model very similar to Carl Wellman's conception of third generation human rights, in which "[e]ach segment of the population, each category of people, indeed each individual has his own way of spreading peace."¹⁷⁶ Just as Vasak argued that the "essential characteristic" of third generation solidarity rights was that they require "the concerted efforts of all the actors on the social scene,"¹⁷⁷ Yessef recognizes that the burden to strive for social peace "must not be shouldered by the state alone. The private sector must help the public authorities."¹⁷⁸

One issue commonly raised in the context of tolerance is holy struggle (*jihad*), a concept frequently misunderstood by non-Muslims and misapplied by a select group of Muslim fundamentalists completely outside the context of Islamic law.¹⁷⁹ According to Al Jirari, "Islam considers that the basic attitude of man is his inclination toward peace, and that recourse to war occurs only in absolutely necessary situations." Al Jirari supports this proposition with the prophetic saying (*hadith*) reported by Al-Bukhari and Muslim, which states, "He (Peace be Upon him) said 'Do not wish to fight your enemy and ask for God's forgiveness, if you do encounter him, call the name of God and be firm.'"¹⁸⁰ Similarly, the Qur'an states, "Oh You who believe, . . . cooperate in good and in pity, and do not cooperate in bad and aggression."¹⁸¹ Interpreting holy struggle (*jihad*) as recourse to war in the solitary case of self defense makes it the functional equivalent of Article 51 of the UN Charter,¹⁸² a fundamental component of

172. Hadith of Abu Al Hassan Muslim Bin Abu Shiba, reproduced in Yessef, *supra* note 170, at 215.

173. ESPOSITO, *supra* note 166, at 88.

174. Abbas Al Jirari, *The Concept of Coexistence in Islam*, 14 ISLAM TODAY 14, 28 (1996) (italics in original).

175. See Yessef, *supra* note 170, at 222-24.

176. *Id.*

177. Marks, *supra* note 104, at 441 (citing Karel Vasak, unpublished source).

178. Yessef, *supra* note 170, at 223.

179. Al Jirari, *supra* note 174, at 43.

180. *Id.* at 44 (citing Hadith of Al-Bukhari and Muslim on the authority of Abu Hurayrah).

181. COLLOQUES, *supra* note 132, at 252.

182. Al Jirari, *supra* note 174, at 44 (citing UN Charter, *supra* note 121, at Art. 51).

the international understanding of peace and security.

Several experts have discussed the Islamic conception of the elements of the right to Peace. For example, in his 1990 Hassanian lecture,¹⁸³ Professor Idris Alaoui Abdallaoui developed a right to international neighborliness with Islamic sources, beginning with the following *hadith* narrated by Imam Al Bukhari: "Gabriel has recommended that I should take care of my neighbour so often that I began to think that he (Gabriel) wanted to make a [sic] heir of him (the neighbor)."¹⁸⁴ Similarly, Dr. Abbas Al Jirari has discussed the right to Peace under the concept of coexistence in Islam.¹⁸⁵ In combination, these analyses emphasize three distinguishing elements of the right to peace in Islamic law. First, both Abdallaoui and Al Jirari discuss mutual understanding, an area that cannot be underestimated. Abdallaoui states that "[t]he Almighty Creator justifies the fact of creating mankind by His desire that they know one another, as knowing one another leads to cooperation and fraternity. There are different ways of getting to know one another and they all call for political, economical [sic] social and cultural cooperation in general."¹⁸⁶ The mutual understanding element is exemplary of the strong component of duty in the Islamic conception of the right to peace, for mutual understanding is more a duty than a right.

Related to mutual understanding, the second component of the right to peace in Islam is tolerance. This is based in the belief by Muslims that the existence of cultural difference was the will of *Allah*, an idea which finds support in the Qur'an: "And if the Lord had willed, He verily would have made mankind one nation, yet they cease not differing,"¹⁸⁷ and "of His signs is the creation of the heavens and the earth, and the differences of your languages and colours."¹⁸⁸ Based on these verses, Al Jirari concludes that "God's rule on earth is based upon the differences between human beings, be they race, language or religious differences or any other difference in any one of the components of civilization and culture."¹⁸⁹ Like the mutual understanding element, the tolerance element also emphasizes duties over rights, in contrast to corresponding rights in IHR law, such as equal protection.

Finally, the third component in the Islamic conception of the right to peace, as outlined by Abdallaoui, is the importance of compliance regardless of weak enforcement mechanisms—a group (state) duty. Abdallaoui notes Islam's emphasis on "keeping one's vow, which is one of the principles of Islam and one of the bases of faith."¹⁹⁰ He states that "If

183. A series of lectures related to Islam and delivered before the King of Morocco each year during the Holy month of Ramadan.

184. Abdallaoui, *supra* note 167, at 216.

185. Al Jirari, *supra* note 174, at 14.

186. Abdallaoui, *supra* note 167, at 224 (citing Qur'anic *ayah* 49:13). See also Al Jirari, *supra* note 174, at 22-23.

187. Al Jirari, *supra* note 174, at 24 (citing Qur'anic *ayah* 11:118-19).

188. *Id.* (citing Qur'anic *ayah* 30:22).

189. *Id.*

190. Abdallaoui, *supra* note 167, at 226.

the jurists see that the international laws lack an important element which is compulsion, because there is no authority which is above all the nation and which can guarantee the respect of those international laws by force when it is necessary, Islam considers contracts and covenants of any kind as binding on the level of individuals as well as communities.¹⁹¹

Abdallaoui's focus on compliance strikes at international law's perpetual Achilles heel: enforcement. Since the League of Nations, the international legal order has consistently struggled with convenient breaches of international law by self-interested States situated to exact more benefit through breach than through adherence. This trend has continued in the "new world order," in which the world's only superpower has failed to ratify human rights treaties¹⁹² and even denied access to a UN Special Rapporteur.¹⁹³ In a religious paradigm, such as Islamic law, compliance pull for otherwise non-justiciable moral duties is present and strong – it is *Allah*.¹⁹⁴ Because the secular human rights movement lacks any remotely comparable unifying force, enforcement has been a constant problem.¹⁹⁵

Thus, there is strong evidence that all three of the most common third generation solidarity rights – the right to a healthy environment, the right to development, and the right to peace – hold a strong presence in Islamic law. This alone is a significant victory for the universality of human rights because it presents a clear case of substantive RMR: A new, undeveloped set of rights in their international conception proves old and comparatively well-developed when examined in the non-dominant paradigm of Islamic law. The goal of substantive RMR is to seek out potential universal rights that have historical roots outside the dominant, international paradigm; after an examination of Islamic notions of these rights, third generation solidarity rights would appear a prime example. Moreover, strong evidence of these rights in Islamic law helps us to better understand the

191. *Id.* at 227-28.

192. See, e.g., Paula Donnolo and Kim K. Azzarelli, *Essay: Ignoring the Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203 (1996); Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299 (1995). In other cases, human rights treaties have been ratified but severely limited by reservations, understandings, and declarations. See Timothy K. Kuhner, Note, *Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419 (2003).

193. See *Report of the Mission of the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, addendum to REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, MS. RADHIKA COOMARASWAMY, IN ACCORDANCE WITH COMMISSION ON HUMAN RIGHTS RESOLUTION 1997/44, ¶9, UN Doc. E/CN.4/1999/68/Add.2 (1999) (describing refusal by Virginia and Michigan state prison officials to permit the Special Rapporteur to visit women's prisons).

194. See, e.g., Ibrahim Kafi Dounmez, *Muslim Scholars' attitude Towards the Meaning of Duty*, 1990 THE HASSANIAN LECTURES 287; RAHMAN, *supra* note 88, at 14.

195. It is critical to distinguish that this third element concerns a state, not individual, duty. Weak enforcement mechanisms have no bearing whatsoever on any inability of the international human rights structure to enforce individual duties. The lack of binding enforcement mechanisms is an equally large problem in the enforcement of individual rights. The lack of duties language, rather, is due to the fact that international human rights law has chosen "rights," not "duties," as its fundamental, paradigm-establishing word.

rights themselves: By comparing the strong notions for these rights in Islamic law to their weak counterparts in international law, it becomes clear that such rights respond better to a duties paradigm than a rights paradigm. Thus, the de-emphasis of individual duty in the international conception of these rights prevents their full development.

From an examination of these rights alone, however, it is difficult to see how the international human rights system could more fully integrate duties alongside rights, because the Islamic conception of these rights emphasizes duties almost exclusively, to the detriment of rights, just as human rights law does the opposite. Thus, a full attempt at methodological RMR (transposing parts of the Islamic paradigm to IHR law) will have to wait until the next Part, where a more complete examination of the Islamic system of duties is undertaken.

D. Defending Third Generation Solidarity Rights

The generational paradigm of human rights in general, and the third generation of human rights in particular, have been criticized by several commentators, most often from the Western World,¹⁹⁶ on multiple levels.¹⁹⁷ These critiques generally fall into one of the following four themes: that such generational terminology typically implies a preference for certain rights, that third-generation rights are unnecessary because they can already be protected by the existing generations, that third-generation rights are useless because they are non-justiciable, and that such aspirational rights threaten the legitimacy of existing human rights. This section will treat, and reject, each in turn.

First, some criticize that the generational terminology implies a preference for some rights over others. Yet, while some of these critics argue that such terminology prefers the earlier generations, “plac[ing] Europe at the pinnacle of global development,”¹⁹⁸ others make the opposite claim that the word generation “connotes a succeeding generation replacing an older one.”¹⁹⁹ The fact that these critics have not even agreed which rights the generational terminology prefers is good evidence that the generational terminology does not, in fact, prefer particular rights at all. Rather than implying a preference for certain rights over others, the generational terminology represents variations in the balance between individual and collective rights and duties. These variations are valuable, indeed a full recognition of them is fundamental to the question of the universality of human rights, but this additional approach in no way affects the important role of previously established and important human

196. Flinterman, *supra* note 102, at 78-79.

197. See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984); Otto, *Rethinking Universality*, *supra* note 17, at 38-39; Sohn, *supra* note 99, at 62; Wellman, *supra* note 105, at 649-56; Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT’L L. 1209, 1226-28 (2003).

198. Otto, *Rethinking Universality*, *supra* note 17, at 38.

199. Sohn, *supra* note 99, at 62.

rights.

Second, specific to third generation rights, the critique is raised that “because the coordinated action of states is required, given contemporary global interdependence, to secure first and second generation human rights . . . new joint obligations can be derived directly from the existing human rights of individual persons without the emergence of any additional rights of solidarity.”²⁰⁰ But this critique ignores the entire legitimacy concern upon which this Article is based. Since efforts to universalize rights based consistently in Western conceptions of the individual will lack legitimacy in many cultures and therefore be ineffective, there should be a concurrent dialogue examining other rights paradigms, such as solidarity rights.²⁰¹ In the words of An-Na’im, “collective rights as a conceptual category are so important that the human rights movement is much more weakened by their wholesale exclusion than the inclusion of some of them.”²⁰² Moreover, this critique also ignores another fundamental theme of this Article: that third generation rights are different because the level of individual duty they require is higher than the other generations.

Third, some are critical of the non-justiciable character of third generation solidarity rights,²⁰³ a critique also frequently mounted against second-generation rights. This argument is weak for three reasons. First, it ignores the current dialogue in the human rights community about the potential to make latter-generation rights justiciable by focusing on arbitrariness and discriminatory denial of such rights.²⁰⁴ Kenneth Roth, Executive Director of Human Rights Watch, argues convincingly—and indeed the recent practice of Human Rights Watch in this area has shown—that NGOs can use such an approach to protect latter-generation human rights in the same way it is often used to protect first generation rights.²⁰⁵ Second, to the extent that individual duties take precedence over individual rights in the latter generations—as I will show *is* the case in Islamic notions of solidarity rights and *should be* the case in international notions of these rights—justiciability becomes more realistic.²⁰⁶ Third, there is much to be gained from incorporating concepts into human rights which may not be fully justiciable. As critical legal scholars have noted, “legal discourse offers, at best, limited and precarious tools for” social change.²⁰⁷ To achieve true universality, Professor Dianne Otto argues, “[w]e must be

200. Wellman, *supra* note 105, at 651.

201. See *supra* notes 16-17 and accompanying text.

202. An-Na’im, *supra* note 15, at 16.

203. Flinterman, *supra* note 102, at 79.

204. Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUMAN RIGHTS Q. 63 (2004) [hereinafter *Defending Rights*]; Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth*, 26 HUMAN RIGHTS Q. 845 (2004); Kenneth Roth, *Response to Leonard S. Rubenstein*, 26 HUMAN RIGHTS Q. 873 (2004).

205. Roth, *Response to Leonard S. Rubenstein*, *supra* note 204.

206. See *supra* note 21 and accompanying text and *infra* Part V(e).

207. See Otto, *Rethinking Universality*, *supra* note 17, at 42 (characterizing the critiques of Michel Foucault and Carol Smart).

careful that the discourse of rights does not silence other languages—of needs, obligations, community, empowerment, ethics, economic justice, and material equity.”²⁰⁸

Finally, and relatedly, some argue that because third generation rights “cannot realistically be satisfied at present and are not readily susceptible to legal codification, . . . [they move] the entire human rights idea to the level of utopian aspiration, to which governments need to feel little present obligation.”²⁰⁹ From a positivist legal standpoint, there is little substance to the argument that new rights could harm the implementation of old rights, because obligations in human rights law are disaggregated, with each State’s obligations a function of its ratifications and reservations to the existing human rights treaties. Non-binding codifications of third generation rights thus have no consequence on State obligations under the existing binding human rights treaty mechanisms, the latter obligations being specific and rooted in the specific treaties elaborated and developed by the relevant treaty body. The argument is also questionable from the perspective of legal history. Human rights law specifically, and international law generally, have always been marked by a progressive codification process, beginning with non-binding declarations and progressing towards binding obligations when and if support exists in the international community. Professor Sohn notes that “[l]ike the economic, social, and cultural rights, the new rights, even if not immediately attainable, establish new goals that can be achieved progressively, by one laborious step after another.”²¹⁰

Rather than mere utopian aspirations, third generation solidarity rights are “the pivot, on which both human rights and rights of state hinge.”²¹¹ In this regard, Flinterman notes that the right to development “works as a corrective to the direction of development . . . concerned with the quality of development . . . [and making] individual development its ultimate goal.”²¹² Similarly, according to Flinterman, general protection of the environment is useless “if one does not start from the basic right of the individual to a clean and balanced environment.”²¹³ Third generation rights, according to Vasak, “infuse the human dimension into areas where it has all too often been missing, having been left to the State, or States.”²¹⁴ Furthermore, their acceptance may go a long way towards solving the universality question in the international human rights movement. The critiques outlined in this section can largely be distilled into an over-all fear that acceptance of solidarity rights will threaten existing individual rights. This fear should be taken for what it is—an effort to keep the human rights movement Western-centric—and disregarded.

208. *Id.* at 43 (citing MICHEL FOUCAULT, *POWER/KNOWLEDGE* 108 (1980)).

209. Flinterman, *supra* note 102, at 79. See also Sohn, *supra* note 99, at 62.

210. Sohn, *supra* note 99, at 63-64.

211. Flinterman, *supra* note 102, at 77.

212. *Id.*

213. *Id.* at 78.

214. Vasak, *supra* note 103, at 839.

V. TRANSPOSING ISLAMIC MODELS OF DUTY TO IHR LAW
(METHODOLOGICAL RMR)

Because the rights-based perspective and the duties-based perspective form such deep-seated paradigm-establishing assumptions in their respective legal cultures, it is not easy to reconcile the two approaches into a universally acceptable international theory. This Article has argued that the critical point where the two legal cultures converge is third generation solidarity rights, because it is here that IHR law creates a place for duties within rights. After an examination of how Islamic scholars view these rights, it can safely be said that there is a strong basis for third generation solidarity rights in Islamic law. Not only is this a significant victory for the universality of human rights, but it is a substantive form of RMR: Beginning with a newly-minted set of rights in IHR law, it has shown that the same rights have existed in Islamic law since Qur'anic times and that IHR law is now moving towards a standard that is more Islamic.

This final Part goes one step further, attempting a methodological application of RMR by engaging in an analysis of duties in Islamic law and then attempting to incorporate this explicit recognition and jurisprudence of duties into the IHR paradigm in order to better realize third-generation solidarity rights, and to address the justiciability of both second- and third-generation rights.

A. Jurisprudential Methodology of Islamic Law

As Abdal-Haqq explains, Islamic law is an all-encompassing system combining religion, ethics, inter-personal values, standards of behavior, and duties.²¹⁵ The term "Islamic law" is generally used to refer to the entire system of jurisprudence associated with Islam, including primary sources of law (*Shari'a*) and secondary subordinate sources of law and methodology used to deduce and apply this law (*fiqh*).²¹⁶ Both primary and secondary sources create duties for Muslims, but *Shari'a* duties are hierarchically superior.²¹⁷

The primary sources of *Shari'a* Law are: (1) the Holy Qur'an; and (2) the traditions and sayings of the Prophet Mohammed, known as the *Sunna* and *hadith*.²¹⁸ Muslims consider the Holy Qur'an to be the incontestably infallible literal word of *Allah*, revealed directly to the Prophet Mohammed over a period of 22 years (610-632 C.E.), and meticulously preserved ever

215. Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 1 J. ISLAMIC L. 1, 3 (1996).

216. *Id.* at 5; BADERIN, *supra* note 31, at 33-34.

217. Abdal-Haqq, *supra* note 215, at 7-11.

218. *Id.* at 6-7. The terms *Sunna* and *hadith* are often used interchangeably. In reality, *hadith* is a report specifically of what Muhammad said, whereas *Sunna* is a report of all of his traditions, including his sayings, actions, attitudes, and judgments. Thus, *hadith* technically forms part of the *Sunna*, since Mohammed's sayings are part of his tradition and way of life. *Id.* at 21-22.

since.²¹⁹ It is not a code of law in itself—the total number of Qur’anic injunctions not exceeding five hundred—but rather a cornerstone upon which all other sources of Islamic law are based.²²⁰ The science of interpreting the Qur’an (*tasfir*) is an exhaustive, comprehensive exercise in which each word and phrase is studied in great detail.²²¹

The traditions (*Sunna*) and sayings (*hadith*) of the Prophet Mohammed form the second tier of the primary sources. Rather than one tangible document, the *hadith* comprise many collections by various scholars of Islamic law, often reaching great length and many volumes.²²² Because these sayings were not recorded under Mohammed’s direct supervision like the Qur’an but rather over a period of 300 years by many scholars using varied methodologies, the threshold question regarding any such saying is its authenticity.²²³ In the period between 850-915 C.E., a group of scholars known as the “authentic” or “true” (*sahih*) movement attempted to verify the authenticity of the more than one million existing sayings - distilling from this six acclaimed collections by Al-Bukhari, Muslim, Abu Dawud, al-Tirmidhi, al-Nasai, and Ibn Majah Muhammad bin Yazid.²²⁴

Deduced jurisprudence (*fiqh*) covers issues which are not specifically addressed in the primary sources (*Shari’a*), based on the following saying of the Prophet Mohammed: “According to what shalt thou judge? [Mohammed] replied: According to the Book of Allah. *And if thou findest nought therein?* According to the Sunnah [traditions] of the Prophet of Allah. *And if thou findest nought therein?* Then I will exert myself to form my own judgment.”²²⁵ This requires a level of individual reasoning, known in Islamic law as *ijtihad*. At least nineteen different schools of jurisprudential thought developed with slightly different practices in areas such as reasoning based on consensus of the community (*ijma*), reasoning based on analogical deduction (*qiyas*), selecting one of two acceptable solutions based on a public interest rationale (*istihsan*), and consideration of local custom (*urf*).²²⁶ Five of these schools now remain: the Hanafi school (found in Afghanistan, Guyana, India, Iraq, Pakistan, Surinam, Syria, Trinidad, Turkey, and parts of Egypt); the Maliki school (found in Algeria, Bahrain, Chad, parts of Egypt, Kuwait, Mali, Morocco, Nigeria, Qatar, and Tunisia); the Shafii school (found in Egypt, Indonesia, Kenya, Malaysia, Philippines, Sri Lanka, Surinam, Tanzania, and Yemen); the Hanbali school (found in Saudi Arabia); and the Jafari school (found in Iran, Iraq, and Lebanon).²²⁷ The first four schools – representing ninety percent of the population – practice Sunni Islam and the last Shia Islam. Sunni’s do not require the leader of the Muslim community to be a direct descendant of

219. *Id.* at 19-21.

220. *Id.* at 21.

221. *Id.* at 27.

222. *Id.* at 8-10, 21-25; BADERIN, *supra* note 31, at 35-36.

223. Abdal-Haqq, *supra* note 215, at 22-23, 29.

224. *Id.* at 23, 29.

225. *Id.* at 9 (citing RAMADAN, ISLAMIC LAW, ITS SCOPE AND EQUITY 75 (1970)).

226. *Id.* at 30-35, 44.

227. *Id.* at 44-54.

the Prophet Mohammed; Shia's believe that the leader of the Muslim community must be a descendant of the Prophet Mohammed, but accept interim leadership by representatives (*ayatollahs*) until this is realized.

Although these schools disagree primarily on rather specific rules of interpretation and construction, it can sometimes lead to vastly different results.²²⁸ Although this Article was researched in Morocco (Maliki school), it attempts to compare general principles of Islamic law to international human rights law. The substantive differences between the Islamic schools of interpretation does not generally affect this comparison, because the overwhelming importance of individual duties in Islam transcends the differences between the schools of interpretation. One area, however, deserves special mention: Whereas Shia's allow the current use of Islamic legal reasoning (*ijtihad*) by their leader (*Imam*),²²⁹ Sunni's forbid it. This infamous "closing of the doors of *ijtihad*" in 1258 C.E. has resulted in a 700-year controversy over the legitimacy of legal reasoning.²³⁰ This controversy continues to rage among Islamic legal thinkers today,²³¹ but amidst a practical reality in which scholars such as An-Na'im, cited repeatedly in this Article, unquestionably practice Islamic legal reasoning (*ijtihad*). This Article is a work of legal theory, exploring arguments and legal comparisons beyond those typically accepted and entrenched. One of the theoretical assumptions of this Article is that the "doors of *ijtihad*" are not closed, and that works such as An-Na'im's are legitimate.

B. Islamic Bases for Individual Duties

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

[H]uman rights in Islam are *Allah's* rights and should be observed and exercised in the best manner possible, in order to achieve purity of worship, total subjugation and obedience to the Almighty, and full compliance with His Teachings. The Islamic concept of human rights thus ascends to the sublime status of an act of worship, these rights being in Islamic Sharia no less than religious duties. This degree of obligation to obey the law (*taklif*) [sic] lays a heavy responsibility on the human being vis-à-vis *Allah*, himself, the community, and humanity as a whole.²³²

228. *Id.* at 26-28.

229. Abdal-Haqq, *supra* note 215, at 17, 30.

230. *Id.* at 16-17, 36-37.

231. See, e.g. Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE EAST STUD. 3 (1984), reprinted in LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM (Wael B. Hallaq ed., 1994); BADERIN, *supra* note 31, at 40.

232. ABDULAZIZ OTHMAN ALTWAIJRI, HUMAN RIGHTS IN ISLAMIC TEACHINGS 15 (2000), available at <http://www.isesco.org.ma/pub/Eng/humanrights/page4.htm>.

This religious weight, Dr. Altwaijri argues, makes individual responsibility “the cornerstone that upholds Muslim society.”²³³ In contrast to mere constitutional or political rights schemes, individual duties “are not the intellectual result of a phase in the development of the human mind. . . . They are, in fact, *duties of the faith*, entrusted to the individual and the society; each within their domain and depending on their degree of responsibility.”²³⁴ Similarly, Professor Fazlur Rahman argued:

Just as in Kantian terms no ideal knowledge is possible without the regulative ideas of reason . . . so in Qur’anic terms no real morality is possible without the regulative ideas of God and the Last Judgment. Further, their very moral function requires that they exist for religiomoral experience and cannot be mere intellectual postulates to be “believed in.”²³⁵

In fact, the sense of obligation created is so strong, that several Islamic scholars prefer the term “human necessities” to human rights.²³⁶ Under Islamic law, the sovereign is *Allah*, “the absolute arbiter of values,”²³⁷ and “[t]he sovereignty of the people, if the use of the word ‘sovereignty’ is at all appropriate, is a delegated, or executive sovereignty (*sultan tanfidhi*) only.”²³⁸ A full examination of the bases for this sense of individual obligation under Islamic law, which literally permeates the entire Qur’an and Sunna, is beyond the scope of this Article. Nevertheless, two specific manifestations deserve special mention: the doctrine of vicegerency and trust (*amanah*).

The doctrine of vicegerency, rooted in The Holy Qur’an 2:30,²³⁹

233. *Id.*

234. *Id.* (emphasis added).

235. RAHMAN, *supra* note 88, at 14.

236. In his book, aptly titled *Islam and Human Rights: Requisite Necessities rather than Mere Rights*, Dr. Muhammad Amara explains that “due to its belief in the . . . sacred nature of . . . rights,” Islam considers them “‘necessities,’ and made them part of the ‘obligations.’” MUHAMMAD AMARA, *ISLAM AND HUMAN RIGHTS: REQUISITE NECESSITIES RATHER THAN MERE RIGHTS* (Mimoun Mokhtari trans., 1996). See also Altwaijri, *supra* note 91, at 1920 (“If the Universal Declaration on [sic] Human Rights . . . has covered the rights of contemporary men, the Islamic conception of these rights goes beyond the time difference, Islam having affirmed them fourteen centuries ago and elevates them from a status of ‘rights’ to that of ‘necessities’ and to the level of ‘duties and obligations.’”); Joëlle Entelis, Note, *International Human Rights: Islam’s Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women’s Equality and Islamic Law*, 20 FORDHAM INT’L L.J. 1251, 1290 (1997) (“In Islam, rights are the equivalent of duties owed to God and to others. Human rights, thus, exist only in regard to human duties, which shari’a prescribes. Individuals may obtain rights only by meeting such obligations.”) (citing Donna E. Arzt, *The Application of International Human Rights in Islamic States*, 12 HUM. RTS. Q. 202, 205-06 (1990)).

237. KAMALI, *supra* note 163, at 7. See also THE KORAN, 57:2 (N.J. Dawood trans., Penguin Books Ltd., 5th ed. 1999) (“It is He that has sovereignty over the heavens and the earth. He ordains life and death, and has power over all things.”).

238. *Id.* (citing ABD AL-KARIM ZAYDAN, *AL FARD WA’L-DAWLAH FI’L-SHARI’AH AL-ISLAMIYYAH* 29 (International Islamic Federation of Student Organizations, 1970)).

239. THE KORAN, *supra* note 237, at 2:30 (“When your Lord said to the angels: ‘I am placing on the earth one that shall rule as My deputy,’ they replied: ‘Will You put there one

provides a substantial basis for the importance of human duties in Islamic law. As vicegerent, or steward, of God, "the Muslim community is entrusted with the authority to implement the *Shari'a*, to administer justice and to take all necessary measures in the interest of good government."²⁴⁰ Nanji notes that "[t]he concept of custodial trusteeship, expressed in the Qur'an through the notion of the individual's role as *khalifah* – stewardship – and hence accountability for the way in which such a role is undertaken for the betterment of society, and for future generations" exemplifies the importance the Qur'an places on individual duty to the group."²⁴¹

In addition, or in the alternative, individual duties to *Allah* and to the community (*ummah*) are rooted in the trust (*amanah*) which *Allah* has placed in each individual as described in the Qur'an 33:72-73: "We offered Our trust to the heavens, to the earth, and to the mountains, but they refused the burden and were afraid to receive it. Man undertook to bear it, but he has proved a sinner and a fool."²⁴² By accepting this trust, humans have accepted individual responsibility towards each other and toward the whole of society.²⁴³ Thus, even in this brief presentation of the two most basic bases for individual duties in Islam, it is incontestable that the notion of individual duties in Islamic law carries great importance. After further examining the complexity of Islamic duties in the next sub-sections, this Part concludes with an attempt to transpose this rich duties paradigm into international human rights law.

C. Islamic Jurisprudence of Duties

Because duties are so central to Islamic belief and practice, a language and structure of duties has developed in Islamic law that is far more complex than the simple references to duties seen in international human rights treaties. Islamic law is a "comprehensive social blueprint" for all actions of Muslims, most of which are framed as duties.²⁴⁴ These commands of the lawgiver concerning the duties of Muslims (*hukm Shari'a*) fall into five "well known categories of *wajib* (obligatory), *mandub* (recommended), *haram* (forbidden), *makruh* (abominable) and *mubah* (permissible)."²⁴⁵ The importance of duties in this system is

that will do evil and shed blood, when we have for so long sung Your praises and sanctified Your name?' He said 'I know what you know not.'")

240. KAMALI, *supra* note 163, at 7.

241. Nanji, *supra* note 89, at 346 (citing Qur'anic *ayah* 2:30). See also *id.* at 353.

242. THE KORAN, *supra* note 237, at 33:72-73. See also the *hadith* narrated by Al Bukhari and Muslim: "Verily, each one of you is a guardian (shepherd), and each guardian (shepherd) is responsible for his subjects (flock)," discussed in detail in Abbas Al Jirari, *Responsibility in Islam*, 1996 THE HASSANIAN LECTURES 141.

243. See Ridwan Al-Sayyid, *Contemporary Muslim Thought and Human Rights*, expert paper submitted to United Nations Seminar "Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights," UN Doc. HR/IP/SEM/1999/1 (PART II Sect. 2), 253, 260 (Mar. 15, 1999).

244. ESPOSITO, *supra* note 166, at 87-88.

245. KAMALI, *supra* note 163, at 321-23.

unquestionable: Islamic law determines a person's duties in every potential situation using these five qualifications (*al-ahkam al-khamsa*).²⁴⁶ These categorical divisions are highly complex, the subject of many multi-volume treatises on Islamic law, most of which have never been translated from Arabic,²⁴⁷ and a full examination of this subject far exceeds the scope of this Article. Rather than explain the complex categorization of duties in Islam, a task that should only be undertaken by a qualified Islamic legal scholar (*ulm* or *imam*), this section aims simply to emphasize and illustrate the point that duties are Islamic law's paradigm-establishing fundamental word.

1. *Wajib* and *Fard*

The complexity of the language of Islamic duties is evident in its distinction between *wajib* and *fard*, both of which would translate into English merely as "duty."²⁴⁸ Although many Islamic scholars view *wajib* and *fard* as synonymous, the Hanafi school draws a distinction between the two.²⁴⁹ An act is *fard* "when the command to do it is conveyed in a clear and definitive text of the Qur'an or *Sunna* [traditions of the Prophet]." If the command comes from more speculative authority, the Hanafi school considers it *wajib*.²⁵⁰

This distinction is important, according to Islamic jurists, because disobeying a *fard* makes one a disbeliever, whereas one is only a transgressor if one contests the authority of a *wajib*.²⁵¹ According to some, the distinction is also important because disregarding a *fard* nullifies an act, while disregarding a *wajib* merely weakens it. For example, a prayer without obligatory bowing or prostration is void, but without recitation of *al-Fatihah* it is merely deficient.²⁵²

2. *Ayn* and *Kifaya*

The division of Islamic duties into individual (*ayn*) and collective (*kifaya*) provides a highly relevant point of comparison to third generation solidarity rights in international human rights law. Individual duties

246. ENCYCLOPEDIA OF ISLAM, 790 (B. Lewis et al. eds., 1983).

247. A notable exception is Al-Gazali's classic work AL-MUSTASFA MIN 'ILM AL-USUL, originally published 1322 of the Hijra. Ahmad Zaki Mansur Hammad, Abu Hamid Al-Ghazali's Juristic Doctrine in *Al-Mustasfa Min 'Ilm Al-Usul* with a Translation of Volume One of Al-Mustasfa Min 'Ilm Al-Usul (1987) (Ph.D. Dissertation, University of Chicago), available at <http://www.ghazali.org/books/azhmd-p2.pdf> [hereinafter AL-MUSTASFA]. For an in-depth explanation of the five categories of Muslim duties, see *id.* at 351-56.

248. See ENCYCLOPEDIA OF ISLAM, *supra* note 246, at 790.

249. KAMALI, *supra* note 163, at 324; AL-MUSTASFA, *supra* note 247, at 353.

250. KAMALI, *supra* note 163, at 324 (citing prayer (*salah*) and the pilgrimage (*hajj*) as *fard* and performing *salat al-witr* (three units of prayers to conclude the late evening prayer) and recitation of the *sura al-fatihah* as *wajib*).

251. *Id.*

252. *Id.*

(*wajib ayni* or *fard ayni*) are incumbent upon all Muslims individually because of their religious and social significance, such as ritual prayer, fasting,²⁵³ fulfillment of contracts, obedience to one's parents,²⁵⁴ and the duty to understand certain religious rules. Collective duties (*fard kifaya*), on the other hand, are duties "the fulfillment of which by a sufficient number of individuals excuses the other individuals [of the community] from fulfilling" them.²⁵⁵ That is, the community is collectively responsible for ensuring that they are fulfilled. Examples of collective duties include funeral prayer, holy struggle (*jihad*), the promotion of good and prevention of evil (*hisbah*), giving testimony and serving as a judge, building hospitals, extinguishing fires,²⁵⁶ and acquiring full religious knowledge (*ilm al-deen*). These duties are collective (*kifaya*) because, for example, not everyone is capable of acquiring full knowledge of Islam, and not everyone has the means or ability to build a hospital. However, for those who have the means, the collective obligation becomes their personal obligation – the *fard kifaya* becomes *fard ayn*.²⁵⁷

3. *Muwaqqat* and *Mutlaq*

Islam also recognizes contingent or time-specific duties (*muwaqqat*) as well as absolute or non-time-specific duties (*mutlaq*).²⁵⁸ Examples of the former include fasting and obligatory prayers, because there is a specific time in which they are to be performed. On the other hand, the pilgrimage (*hajj*) is an example of a duty free of time limit (*mutlaq*), since it can be performed at any time during one's life. Payment of expiation (*kaffarah*) also fits into this latter category. Other duties free of time limit (*mutlaq*) are absolute in the sense that, every time the relevant occasion arises, the duty must be fulfilled, such as the duty to obey one's parents and to promote good and prevent evil (*hisbah*).²⁵⁹

4. *Muhaddad* and *Ghayr Muhaddad*

Finally, there is also a division in Islamic law between quantified (*muhaddad*) duties and unquantified (*ghayr muhaddad*) duties.²⁶⁰ The former include almsgiving (*zakat*), prayer (*salah*), payment by the purchaser in a sales transaction, payment of a specific rent in a tenancy agreement, and

253. ENCYCLOPEDIA OF ISLAM, *supra* note 246, at 790.

254. KAMALI, *supra* note 163, at 325.

255. ENCYCLOPEDIA OF ISLAM, *supra* note 246, at 790.

256. KAMALI, *supra* note 163, at 325.

257. *See id.*

258. *Id.*; *see also* Dounmez, *supra* note 194, at 280. Related, Al-Ghazali uses the notion of time to distinguish between confined (*mudayyaq*) and latitudinal (*muwassa*) duties. AL-MUSTASFA, *supra* note 247, at 361-65.

259. KAMALI, *supra* note 163, at 325-26.

260. *Id.* at 326; Dounmez, *supra* note 194, at 280-81.

payment of penalties (*hudud*), all of which are quantified and specific.²⁶¹

Unquantified duties, on the other hand, include the duty to give charity to the needy not in time of *zakat* [almsgiving], to feed the hungry not in time of feeding, when the person responsible has to do penance, to do justice, benevolence [sic] and economy in expending, abstinence, to help the sorrowful and the grieved, and all similar duties to which the legislator has not fixed a determined value because *they are meant to meet the needs of the people*.²⁶²

Because unquantified (*ghayr muhaddad*) duties are unquantified specifically because they are meant to meet social demand, they exemplify particularly well the social solidarity goal inherent in Islamic duties. Even quantified (*muhaddad*) duties have a social solidarity component because they are embedded with unquantified (*ghayr muhaddad*) duties as determined by the capacity of the individual. For example, “the school master, the university teacher, after they have finished their duties and works required from them in exchange for a salary, . . . should provide scientific and intellectual assistance to whosoever [sic] is in need of it . . . within the limits of their possibilities.”²⁶³ Similarly, a wealthy Muslim upon giving alms (*zakat*, a quantified duty), must then evaluate his or her means combined with the needs of those around to determine if additional material help is required (an unquantified duty).²⁶⁴ In this way, the end result of both quantified (*muhaddad*) and unquantified (*ghayr muhaddad*) duties is meeting social need to the highest extent possible.

5. Additional Aspects of Duties in Islam

In several other ways, the discourse surrounding duties in Islam is complex. First, Islam has recognized the distinction between positive and negative duties,²⁶⁵ much as the human rights movement recognizes the distinction between positive and negative rights.²⁶⁶ Second, just as human rights scholars analyze conflicts between two rights, noting that one individual’s right only extends as far as it avoids encroaching on the rights of another individual,²⁶⁷ Islam carries out the same analysis in the context of duties. For example, in a hypothetical society in need of 10,000 doctors but

261. KAMALI, *supra* note 163, at 36.

262. Dounmez, *supra* note 194, at 281 (emphasis added). See also KAMALI, *supra* note 163, at 326.

263. Dounmez, *supra* note 194, at 283-84.

264. *Id.* at 283.

265. *Id.* at 282.

266. STEINER & ALSTON, *supra* note 4, at 363-64 (discussing positive and negative rights in liberal theory). The concept of positive and negative duties has only recently been discussed in Western scholarship by Professor Hodgson in his exhaustive work on duties in 2003. See HODGSON, *supra* note 3, at 36-37.

267. For example, a potential conflict exists between one person’s freedom of speech and another person’s right to individual dignity, if the content of the speech is libelous.

which currently has 30,000 doctors, Dounmez argues that too many people are thus meeting the collective duty (*fard kifaya*) to become doctors, and consequently that society has done no better in meeting the collective duty than a society where too few are meeting the duty. Analyzing the issue “in light of the aim of the collective duty,” Dounmez concludes that “the collective duty is not realized, [because] . . . the limit expected is surpassed on account of another collective duty.”²⁶⁸ In other words, the duty to become a doctor is necessarily encroaching on some other duty, such as the duty to become a teacher or the duty to acquire full religious knowledge.

Thus, just as human rights scholars limit an individual right partly based on its potential to encroach on other rights of other individuals, Islamic legal scholars limit duties based on their potential to encroach upon other individual duties to society. The notable difference is in the effect: whereas the focus in the human rights analysis resolves a conflict of one individual against another, the Islamic duties analysis attempts to maximize two simultaneous attempts at societal improvement.²⁶⁹

D. An Effective Duties Paradigm Need Not Be Religious

The above sections have demonstrated the complex jurisprudence of duties in Islamic law. Before attempting to transpose this paradigm to IHR law in the next section, it is the goal of this section to make clear that an effective duties paradigm is not *a priori* religious. Scholarly commentary exists both for and against this proposition. On the one hand, Professor Fazlur Rahman viewed Islamic and secular notions of duty as incompatible:

[*Taqwa*] is usually translated as “piety” or “God-fearingness” . . . which in the various Qur’anic contexts may be defined as “a mental state of responsibility from which an agent’s actions proceed but which recognizes that the criterion of judgment upon them lies outside him.” . . . The idea of a secular law, insofar as it makes this state indifferent to its obedience, which is consequently conceived in mechanical terms, is the very abnegation of *taqwa*.²⁷⁰

268. Dounmez, *supra* note 194, at 286.

269. Professor Douglas Hodgson has recently begun analyzing conflicting duties in Western scholarship in his 2003 treatise on duties. Examining a potential “hierarchy of duties,” Hodgson analyzes the work of Cicero, Epictetus, and Locke which generally endorse a descending priority of duties corresponding to proximity to the duty-bearer. For example, Locke discusses a hierarchy of duties to self, duties to family, duties to local poor, duties to others more distant. HODGSON, *supra* note 3, at 35. Moreover, Hodgson’s “calculus of duty” formula mirroring the “calculus of negligence” factors used by common law judges to decide civil suits, attempts, like Islamic law duty analysis, to maximize social improvement. By considering the four factors of 1) special placement to the need, 2) cost of fulfilling the duty, 3) proximity of duty-bearer to the need, and 4) degree of need, Hodgson’s calculus of duty analysis is designed to maximize duty utility for utmost community benefit. *Id.* at 34-35.

270. RAHMAN, *supra* note 88, at 155.

Rahman's conclusion that secular law is *ipso facto* devoid of a sense of individual duty comparable to Muslim piety (*taqwa*) must be reexamined. As Professor Selbourne rightly notes, "even without such forms of other-worldly promise and divine sanction, the moral life of the individual is elevated and expanded by the recognition, and acceptance, of responsibilities for self and towards others."²⁷¹ Any perceived inability on the part of the international human rights system to enforce duties is not due to a lack of unifying compliance force equivalent to Islamic piety (*taqwa*); the absence of binding enforcement mechanisms is an equally large problem in the enforcement of individual rights, and the lack of duties language is rather due to the fact that international human rights law has chosen "rights," not "duties," as its fundamental, paradigm-establishing word.

On the opposite side of the spectrum, Professor Selbourne argues that true duty is completely innate, requiring no outside motivating force or presumed governing covenant. Selbourne acknowledges the historical importance of the social contract, but argues that it is "not required in practice to give legitimacy to the principle of duty in itself. . . ."²⁷² Rather, Selbourne believes that:

Those who possess such moral or civic sense require no presumed covenant to justify or explain it, nor to justify to themselves their ethical expectation that the principle of duty will be equitably enforced against all members of the civic order, while those who do not possess such moral or civic sense will not be persuaded to it by having the presumed existence of such covenant urged upon them.²⁷³

Professor Selbourne's approach of innate duties seems equally problematic. In denying the presence of a social contract, it relies on a very formalistic understanding of that contract as a prior covenant binding present actions. Yet, it then goes on to describe an individual's sense of duty in terms that can only be the social contract in other words. What is Selbourne's "moral or civic sense" if not the social contract by another name?

Against these two approaches – Rahman arguing that only the force of an other-worldly piety (*taqwa*) will sufficiently ground individual duties and Selbourne arguing that the individual sense of duty is completely innate – the truth probably lies somewhere in between: Just as Islamic law considers that human beings have duties to other members of the community through the concept of vicegerency (stewardship on behalf of *Allah*), Western political theory which has informed international human

271. SELBOURNE, *supra*, note 35, at 178.

272. *Id.* at 190.

273. *Id.* at 191.

rights law incorporates a similar understanding in the social contract.²⁷⁴ For example, Kant declared that “[h]uman beings are sentinels on earth and may not leave their posts until relieved by another beneficent hand.”²⁷⁵ Similarly, Professor Selbourne himself has argued that the “moral relationship between the individual and his fellows corresponds ethically to that which . . . [religious traditions] hold to be the relationship between man and God.”²⁷⁶ For theoretical purposes, the social contract is similar enough to Islamic vicegerency that one can conclude that an individual duty paradigm need not be *a priori* religious.

E. Methodological RMR Applied

Although substantive RMR provides a valuable tool for conceptualizing the universality debate in a way that more fairly credits non-dominant universalizing forces, it does little to aid in the process itself by which these norms develop. This last section attempts this loftier goal espoused by methodological RMR, transposing tools from Islamic law to IHR law in the area of third generation solidarity rights. As discussed above, one concern launched upon both second and third generation rights is justiciability. This problem is compounded with respect to third generation solidarity rights by the need to distinguish between and assure justiciability of both individual and collective duties. A methodological RMR inquiry can help solve this problem through an examination of Islamic law.

The question of justiciability has long challenged scholars of Islamic law. The Islamic jurist Al-Ghazali notes that:

Al-Qadi has stated that if *Allah* obliged something upon us but did not threaten punishment for abandoning it, it is still an obligation because obligatoriness is [established] solely on the basis of His obliging, not on the basis of punishment. But this is an open question. For there is no sense in attributing obligatoriness to something whose doing and abandonment equiponderate with respect to us, since we do not conceive of obligatoriness [of something] except when its doing preponderates over its

274. See *supra* notes 239-243 and accompanying text.

275. SELBOURNE, *supra* note 35, at 115 (citing I. KANT, LECTURES ON ETHICS 154 (L. Infield, trans., 1963)).

276. *Id.* at 178. At a different point in his work, however, Selbourne argues that the social contract differs from religious law because “it is the calculation of individual interest – not the moral reciprocity of mutual obligation – which is made to determine [the contract’s] content.” *Id.* at 89. See also *id.* at 106 (“[I]n the modern civic order the fulfillment of the citizen’s co-responsibility for its well-being may be dictated to him not by moral scruple but by . . . calculation of interest, or in order to avoid sanction.”) Although this may be a correct characterization of the self-interest in the social contract, it is a misleading account of religious law, because individual self-interest is actually at play in the religious paradigm as well. The “God given” imperative Selbourne describes is based on the self-interested wish for reward in the after-life.

abandonment with respect to our objectives. So if preponderance is negated, there is no meaning for obligatoriness at all.²⁷⁷

Thus, although Al-Qadi believed that all duties are equally obligatory, Al-Ghazali struggled with the notion of justiciability, questioning how a seemingly non-justiciable act could be considered as equally obligatory on an individual as a justiciable one. Islamic law is structured in such a way, however, as to mitigate the justiciability concern. The ideal example in Islamic law is the distinction between individual and collective duties (*Ayn* and *Kifaya*). Al-Ghazali states:

If it is said: . . . [W]hy do you say that a collective obligation [*fard al-kifaya*] is laid upon everyone although its obligatoriness is discharged by the action of one? We shall say: [This is] because obligatoriness is realized by punishment, and it is not possible to punish one of the two persons, unspecified. But it is possible to say that one will be punished for [neglecting] one of two actions which is not specified.²⁷⁸

Thus, rather than a duty performed by the collective itself (i.e., the government on behalf of the people), collective duties in Islamic law are *inter-individual*, performed by individuals on behalf of the collective. Much the same situation presents itself in third generation solidarity rights, where an individual duty component exists that is closely tied to group solidarity. One is apt to conclude that such duties are non-justiciable because of the difficulty in pinning the duty on any one individual. Islamic law, however, regulates such duties by way of an individual means test even though the duty is a collective one. Thus, rather than determining the number of public servants, such as judges or fire-fighters, by policy considerations not justiciable on any one individual, Islamic law turns the question to each individual to answer the call based on individual means and ability. By refocusing the inquiry in this way, Islamic law makes a seemingly theoretical duty on the community into a concrete and potentially justiciable duty on the individual. This provides a model that third generation solidarity rights could follow, if the IHR movement is to truly move these rights beyond theory towards practice.

The structure of quantified (*muhaddad*) and unquantified (*ghayr muhaddad*) duties operates in a similar manner. For example, almsgiving in Islamic law is a quantified duty: Because the amount one must give to the poor is determined by a rule based on income and wealth, it is easily justiciable. Unquantified (*ghayr muhaddad*) duties, on the other hand, are like second and third generation rights meant to meet social needs beyond the quantified duties. Islamic law makes them justiciable upon individuals, however, by refocussing the test from an examination of ends

277. AL-MUSTASFA, *supra* note 247, at 353.

278. *Id.* at 360.

to one of means. Whereas the justiciability of the right to be free from poverty (an ends-based inquiry) proves problematic because of limitations on available resources, it is comparatively easier and more realistic to assess the means of each individual to contribute to the cause beyond the required quantified level of alms.

IHR law could adopt such a means-based practice, as many countries already do in their domestic law. For example, domestic taxation schemes are often based on a sliding scale by which an individual with greater means must contribute a greater percentage of income. The individual duty component of the third generation right to development could similarly be handled by an individual means test which gauged level of requisite duty by level of relative wealth. The full development of third generation solidarity rights in IHR law would require that such individual means tests also become part of the IHR treaty framework. Thus, an effectively drafted treaty on third generation rights would – in addition to the more traditional provisions on state obligations and individual rights – include provisions binding on individuals. Whereas the individual became a right-bearing subject of international law with the birth of IHR law, and specified individuals became duty-bearing subjects of international law with the development of international criminal law, third generation human rights would make *every* individual a duty-bearing subject of international law.

Thus, an examination of Islamic law provides a tool to improve the functionality of third generation solidarity rights in IHR law. First, Islamic law develops legal distinctions (such as individual verses collective, quantified verses unquantified) between truly inter-individual duties binding on the collective and the more traditionally accepted aggregate duty of the collective (state duty) common to all generations of rights. Perhaps international human rights law has already begun to do this in forming a growing list of third generation solidarity rights in the first place, but the specific aspects of these rights which impose duties on individuals could be more clearly elucidated. Second, with respect to this more unique inter-individual duty, Islamic law makes it justiciable by way of an individual means test. Following these two practices, IHR law could better define the individual duties inherent to third generation solidarity rights and increase their justiciability. These practices alone will not completely elaborate the theory of third generation solidarity rights in IHR law, but readers with this expectation have misunderstood the very essence of RMR. If every solution to the problems of IHR law were to come from Islamic law, this would not be RMR but rather the old-fashioned moderate relativism using Islamic law as the dominant paradigm. RMR, on the other hand, is a more nuanced and time-consuming approach. It requires the combined efforts of scholars from every legal tradition to bring wisdom from each to an IHR paradigm that will, eventually, become greater than the sum of its parts. Such a concerted effort will be a lengthy process, but the result will prove much more satisfying, much more genuine, indeed much more *universal*, than any attempt to develop a universal human

rights paradigm in times past. If this Article can contribute a few ideas from Islamic law, it has done its job.

VI. CONCLUSION

Efforts of moderate cultural relativists to develop a core group of universal human rights based primarily on western conceptions are incomplete and should not stand alone. If such a group of universally applicable human rights norms does exist, the search to discover it must begin in multiple legal traditions, for no culture can contain all the universal answers towards which all other cultures should aspire. This Article makes one such attempt, analyzing the extent to which the newest generation of human rights, the third generation solidarity rights, represents developing universal values based in non-western traditions. It finds a strong basis for third generation rights in Islamic law, as well as a rich conceptual understanding of how to implement them. The Article concludes that whereas other scholars have noted the complexities posed by the status of third-generation solidarity rights as “group rights,” the real complexity prohibiting acceptance by the West lies in their individual duties component.

However, the West’s difficulty with accepting “duties” language and logic within the international human rights movement is not due to a cultural ignorance of the concept of individual duty itself. Rather, just as the individual in Islam is the vicegerent of God, a steward responsible for the interests of the community, individual rights in the West are based on a social contract of individual duty to serve the common good. The move towards solidarity rights is remarkable, not because the West is theoretically devoid of individual duties, but because after years of using “rights” as its paradigm-establishing fundamental word, it has finally begun to incorporate “duties” – the fundamental word of Islamic law, Jewish law, Christianity, Hinduism, and Confucianism – into its language and logic. In so doing, it has begun an important revival of its theoretical past, which is a highly advantageous event for the future of human rights. Because rights language and duties language are particularly situated to deal with different social problems, a synergistic combination of both in third generation solidarity rights is desirable. Rather than criticizing the development of third-generation solidarity rights, international human rights commentators should therefore be interested in further developing them.

The Islamic notions of third generation solidarity rights examined in this Article are excellent examples of substantive RMR: Beginning with a new and theoretical area of IHR law, they show this same area to be strong and developed in Islamic law, making the case that as IHR law progressively adopts these rights, it is universalizing towards a standard that is more Islamic than international. But, the examination of these rights alone can do little to improve their international conception. Just as their international version emphasizes rights to the detriment of duties, their

Islamic version is almost entirely framed in duties and devoid of rights. Although the strong Islamic conception of these rights proves that overall duty, and not right, may be their most important ingredient, this helps little in our effort to better understand how to balance both rights and duties within their definition. For this, the Article turns to a more complete examination of the role of duties in Islamic law.

After outlining the duties paradigm in Islamic law and arguing that an effective duties paradigm need not be religious, the Article examines areas of the Islamic duties paradigm potentially transferable to IHR law, in particular to the international conception of third generation solidarity rights. First, it concludes that Islamic law has developed legal terms (such as collective duties and unquantified duties) to define that very category of duties most often ignored in third generation human rights, inter-individual duties incumbent on the collective but required of only some individuals. Second, Islamic law attacks the justiciability problem with relation to such duties by making them justiciable by way of an individual means test. Both of these techniques could be transferred to IHR law to strengthen third generation solidarity rights.

Examining Islamic notions of culturally relevant rights such as solidarity rights can add significantly to the literature on the universality of human rights; by viewing the universality question through these rights, rather than through traditional, negative, civil and political rights, a different picture emerges entirely. As usual, it is a picture in which some cultures are taking longer to "accept" rights viewed by much of the world as fundamental. But, contrary to the well-worn story, this time Islamic culture is not the "backwards" culture but rather the culture whose legal language is admired and emulated. It is the hope of this author that both substantive and methodological RMR can serve not only as a guide and inspiration in further developing the international understanding of IHR law, but also provide a fresh perspective on the universality debate itself.