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ISLAMIC FINANCE AS A MECHANISM FOR BOLSTERING FOOD SECURITY IN THE MIDDLE EAST:

FOOD SECURITY *WAQF*

by Hdeel Abdelhady, Esq.*

INTRODUCTION

This article proposes the establishment of a multilateral food security *waqf*, a type of Islamic trust or endowment, as a vehicle of investment in the future food security of the Middle East. Sections II through IV briefly discuss global food insecurity, Middle East food insecurity, and the need for a regional food security strategy for the Middle East. Sections V through VIII discuss contemporary Islamic Finance generally, the essential objectives of *Shari'ah*, historical *waqf* practice, Islamic perspectives on agriculture, and the proposed food security *waqf*. This article focuses on the rationale and objectives of *waqf*-based and other agricultural investment frameworks that are currently under development by the author, for application by governments, institutions, and private entities. The structures under development combine the *waqf* (as a foundational framework to allocate funding and other assets) with Islamic financing structures, Islamic and conventional asset management approaches, *Shari'ah* and civil law-based legal frameworks, and effective governance and operational models to achieve measurable impact, in a manner that equitably and rationally distributes rights and responsibilities among parties across the food supply chain, from government consumers to small farmers.

While this article focuses on the use of the *waqf* structure to advance food security, its premises and objectives have broader application. As discussed below, the *waqf* structure has been used successfully in the past to promote public objectives, such as education, aid to the poor, healthcare, public access to water, and food aid. While the use of the *waqf* has declined in modern times, its history suggests strongly that the structure was and can again be a powerful vehicle through which resources are organized and allocated to advance development objectives.

I. GLOBAL FOOD INSECURITY: A SNAPSHOT

Food insecurity is a global threat.¹ The nature of food and the means of its production make food insecurity a uniquely complex problem, with social, political, economic, and ethical dimensions. Serious efforts to promote food security and sustainability must respond to the complexities of the challenge.

According to the Food and Agricultural Organization of the United Nations (“FAO”), “in order to feed a population of more than 9 billion [the projected world population in 2050] and free the world from hunger, global food production must nearly double by 2050.”² Competition for food and for the means of food production is increasing, without commensurate rises in

supply.³ Owing to population growth, increased food purchasing power and demand in emerging economies, climate change, land degradation, price volatility, and other factors, the global food supply-demand imbalance is expected to widen.⁴ The world’s governments have taken note. Acting independently and multilaterally, they have devoted resources to assess the food insecurity threat, and have taken steps to mitigate the risk.⁵ As yet, however, no comprehensive solutions are on the horizon.

II. FOOD INSECURITY IN THE MIDDLE EAST

The Middle East is particularly susceptible to food insecurity.⁶ While the region does not face any foreseeable near-term threat of famine or widespread malnutrition,⁷ the Middle East presently lacks the means to produce adequate food supplies due to water scarcity, insufficient arable land, and man-made hurdles.⁸ These hurdles include land and crop misallocations, under-utilization of food production means, inadequate investment in agriculture, poor stock management, sub-optimal distribution networks, and other factors.⁹

According to the World Bank, as of 2008, the Middle East imported fifty percent of its food.¹⁰ “High food prices and international market volatility mean domestic agriculture has taken on strategic importance in all the food producing countries in the region.¹¹ Non-food producing countries, such as member states of the Gulf Cooperation Council (“GCC”), are looking at ways of securing land in third party countries to produce part of their food needs.”¹²

By 2030, the combined Muslim population in the Middle East is expected to grow to 439,453,000.¹³ Today, the Muslim population is estimated at 321,869,000.¹⁴ This projection, a 36.5% net increase in population in less than twenty years, is staggering. The consequences of such population growth for food security in the Middle East will be profound.

At the country level, Middle Eastern countries have attempted to address food insecurity risks through food subsidies, export bans, price ceilings, and other policy measures, as well as by acquiring rights to farmland overseas.¹⁵ For instance, food exporting countries like Egypt, Yemen, and Djibouti

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impose *ad hoc* export restrictions in response to global price rises.¹⁶ The governments of the Middle East, as in the cases of Egypt, Morocco, Tunisia, Djibouti, and Yemen, employ government subsidies as a primary means of facilitating domestic food affordability.¹⁷

Arab countries, and particularly GCC states, which lack the arable land and water resources necessary to produce food sustainably, also pursued other avenues such as acquisition of long-term agricultural land rights overseas.¹⁸ Between 2006 and 2009, Arab governments, government-owned companies, and private entities (primarily in the GCC states) were particularly active in acquiring agricultural land overseas.¹⁹ According to one compilation, forty-nine agricultural land deals and land-related investments were initiated or concluded between 2006 and 2009.²⁰ Of those, twenty-one (45%) involved Arab countries (most by governments with limited private companies) as investors.²¹ The countries involved in these transactions were Saudi Arabia (five), the United Arab Emirates (four), Qatar (three), Bahrain (three), Kuwait (two), Libya (two), Jordan (one), and Egypt (one).²² The majority of these investments were made in Africa and Asia, and eleven of the twenty-one were made in majority Muslim countries.²³ This data is illustrative, and reflects only a fraction of overseas agricultural land investments that are understood to have been made by Arab and non-Arab countries and private parties in recent years.²⁴

While the logic of these land acquisitions is clear, their sustainability is not. Acquisitions of overseas land and land-use rights by Arab countries and other parties have not been without controversy.²⁵ These transactions are very likely to pose significant legal and political risks, an expectation that is borne out by the inhospitable reception they have received both inside and outside their host countries.²⁶ They have been characterized as “land grabs”—modern scrambles for resources reminiscent of nineteenth-century colonization.²⁷ The terms of these land acquisitions and their details are often, if not always, undisclosed.²⁸ This opacity has fueled suspicion that the deals are opportunistic usurpations of scarce resources by relatively wealthy countries at the expense of relatively poor countries and their small farmers.²⁹ The lack of transparency and controversy surrounding agricultural land acquisitions raises questions not only about their nature, but about their long-term viability as a means of securing food supplies.

As a practical matter, the acquisition of agricultural land to produce food exclusively for the benefit of acquirer countries is legally and politically risky. It is not difficult to envision scenarios in which yields generated on overseas land would be wholly or partially expropriated, subjected to export bans, or otherwise intercepted, particularly in events of local or global food shortage and political or social unrest. Think tanks and other organizations have called for the regulation of overseas investments in agricultural lands.³⁰ For example, the International Food Policy Research Institute has suggested that investors should refrain from exporting crop yields in the case of food shortage in a host country.³¹ Such concerns, and the political and legal risks associated with overseas land acquisitions, will likely increase over

time, as global competition for food increases, exacerbated by demographic and environmental strains.³²

The governments and companies that invest in agricultural lands overseas can, and likely have, put into place agreements to achieve optimal commercial and legal conditions. But under extraordinary circumstances, these agreements will be insufficient to overcome the very real risks stemming from political and social tensions that surround food, agricultural land, and the reality or perception of exploitation associated with overseas agricultural land investments. In worst-case scenarios, Arab governments and other investors in overseas agricultural land might find themselves with recourse only to international tribunals and money damages, and without access to the very crop yields for which they bargained.³³ Money damages would hardly be compensatory in such cases, as these investments are not made for profit, but for specific performance—*i.e.*, the enforcement by host governments of investors’ rights to produce on agricultural lands and repatriate agricultural yields.

More immediately, overseas land acquisitions by some Arab countries are detrimentally impacting the food (and water) security of other Arab countries. For example, Arab countries including Saudi Arabia, Qatar, Kuwait, and the United Arab Emirates, are believed to have acquired agricultural land or land use rights in the Sudan (prior to the establishment of South Sudan as an independent nation).³⁴ These acquisitions (and those by non-Arab countries and private parties) in the Sudan and other Nile Basin countries directly threaten Egypt’s “ability to put bread on the table because all of Egypt’s grain is either imported or produced with water from the Nile River, which flows north through Ethiopia and Sudan before reaching Egypt.”³⁵ In addition to being flawed in a practical sense, these Nile River-related land (and water) acquisitions present risks and interesting legal questions, such as whether state parties to an agreement for the use of a common and vital resource like the Nile River may contract out access to the resource to third parties for profit, to the detriment of other state parties to the same agreement. Indeed, such scenarios should prompt examinations of the nature and limits of relevant legal concepts, such as sovereignty over natural resources, particularly where a third-party state benefits from a shared natural resource at the expense of one or more states with direct and assertable rights of access.

As an important matter of national policy (if not national security), Arab governments must pursue food security solutions that are economically, politically, socially, and ethically sustainable. Measures taken by Arab countries thus far fail to address food insecurity comprehensively or at its root. At the regional level, Arab governments have yet to take coordinated steps to combat food insecurity. This likely is a symptom of a more general reality, which is that Arab countries, for a variety of reasons, trade more with countries outside, rather than within, their region.

III. THE CASE FOR A REGIONAL FOOD SECURITY STRATEGY

“There is no way around the reality that MENA [Middle East and North Africa] countries will need to buy a significant- and increasing- share of their food on international markets... the key is to manage this exposure in new and innovative ways to reduce the potential for food prices shocks without going bankrupt in the process.”

—WORLD BANK, APRIL 2009³⁶

The quoted statement describes key challenges of food insecurity in the Middle East. However, the gravity of the long-term food insecurity threat to the region requires much more than management of exposure to international markets. As the global food supply-demand imbalance widens over time, the difficulties and risks associated with food security will intensify in the Middle East unless effective coordinated action is taken now.

The political, social, cultural, and historical ties that bind Middle Eastern countries favor the pursuit of a regional food security strategy, as do the geographic, demographic, and economic differences between them. As recent political uprisings have shown, major events in even one Arab country have the potential, if not the likelihood, to produce similar or follow-on events in others.³⁷ The consequences of food insecurity, if it intensifies in the region or any of its major countries, will have regional impact: whether in the form of economic migration, spillover social and political unrest, or the need for food and other aid from neighboring states.³⁸

Bolstering regional food production and supply in a coordinated fashion also would serve as a defensive measure, to the extent that Middle Eastern countries limit the need to compete for food in the global marketplace. Beyond politics and market exposure, the Middle East, for the sake of its development, has a fundamental interest in creating conditions in which its inhabitants live in an environment conducive to progress in all spheres.³⁹ Other than the related issue of access to water, no single issue is more essential to the creation and long-term maintenance of such conditions than is food security.

The GCC states, while comparatively cash rich, desperately lack the arable land, water resources, human resources, and depth of agricultural experience necessary to produce food sustainably and at appreciable levels.⁴⁰ By comparison, the relatively cash poor countries of the region, including Egypt, the Sudan, Algeria, Morocco, and the countries of the Levant, individually and together possess the agricultural land, climate conditions, human resources, and agricultural experience to produce food in appreciable quantities, and in any case at higher than present output levels.⁴¹ But this latter group of countries has yet to realize its agricultural production potential for a number of reasons.⁴²

As a region, the Middle East has not explored its potential to sustainably bolster food security by marshaling its combined monetary, natural, and human resources for the long-term benefit

of its inhabitants. It is in the region’s best interest to identify and pursue strategies to bolster food security, through increased regional production and other means, in ways that are not only economically, legally, and environmentally sustainable, but also are politically, socially, and ethically sound. The food security *waqf* proposed in this article would serve as a vehicle through which the region’s collective resources can be allocated and deployed to advance sustainable regional food security.

IV. ISLAMIC ECONOMICS AND FINANCE

The principles and objectives of *Shari’ah*, which favor real economic activity, profit and loss sharing (rather than risk remoteness), and the creation and multiplication of wealth, its productive use, and its allocation for the common good, are uniquely suited to food security and development generally.⁴³ As used today, Islamic modes of finance and investment have proven effective and attractive in the commercial realm.⁴⁴ Yet in contemporary practice, Islamic Finance has not been used meaningfully and consistently for development finance and social investment. As an industry and discipline, Islamic Finance has an interest in expanding its scope and impact, substantively and geographically.

Islamic Finance is a burgeoning financial services segment that is expected to continue to grow in volume and expand geographically.⁴⁵ Current accepted estimates indicate that the size of the Islamic Finance industry is \$1.4 trillion, with the potential to reach \$4 trillion within five years, assuming continued growth at current rates.⁴⁶ Regardless of its exact size or value (however measured), it is widely accepted that the industry has grown tremendously in the past thirty years, and that demand will support its continued rapid growth.⁴⁷

Arab jurisdictions, such as Bahrain, Dubai, and Qatar, have invested significantly to position themselves as centers of Islamic Finance.⁴⁸ Saudi Arabia, which offers relatively vast domestic retail and commercial opportunities, through private efforts and more recently with government support, is in the early stages of building its Islamic Finance industry.⁴⁹ Egypt, the most populous Arab country, has only recently taken steps to promote Islamic Finance, even though the first Islamic bank was established in Egypt nearly forty years ago.⁵⁰ Outside of the Middle East, non-majority Muslim jurisdictions, most notably London and Hong Kong, have invested political, economic, and regulatory capital to position themselves as global Islamic Finance hubs.⁵¹

Notwithstanding the impressive growth and burgeoning popularity of Islamic Finance, common perceptions of its essence are limited, due in no small part to the fact that Islamic Finance is often framed in the one-dimensional, negative terms of what it prohibits—*e.g.*, *riba* (a broad concept often described as interest)—and not in terms of what it permits and encourages, which broadly is the creation and multiplication of wealth, its productive use, and its allocation and distribution for the public interest.

The Islamic Finance industry, its stakeholders and proponents (including governments) have an interest in demonstrating the potential real economy impact of Islamic Finance. The

development and social finance spheres, the objectives of which are compatible with *Shari'ah* objectives, provide a platform for such a demonstration.⁵² Further, governments that have invested in Islamic Finance have an interest in its promotion beyond their borders and the commercial spaces that contemporary Islamic Finance has thus far occupied. The association of Islamic investment and financial mechanisms with endeavors of global significance, such as food security and development generally, would provide a platform for the expansion of Islamic Finance from a niche financial services segment to a discipline having wide applicability and potential impact beyond the commercial realm.

V. PROMOTING ETHICALLY SUSTAINABLE FOOD SECURITY INVESTMENT: *MAQĀSĪD AL-SHARĪ'AH*

The need for enhanced ethics in the pursuit of food security investment is clear. Ethics, as much as monetary, land, and human resources, will be essential to the long-term success of food security strategies, particularly those that span multiple countries.⁵³ The infusion of and adherence to *maqāṣid al-Shari'ah*, or the goals and objectives of Islamic Law, in the pursuit of food security is one effective way to fill the ethics deficit, particularly in the Middle East.⁵⁴ A brief look at the core objectives of *Shari'ah* demonstrates this.

Leading classical scholars of *Fiqh* (*fuqaha*) and *uṣūl al-Fiqh* (*uṣūllīyyīn*) delineated five “essential” objectives advanced by Islamic Law that are accorded the highest weight among the objectives of Islamic Law (*maqāṣid al-Shari'ah*).⁵⁵ In order of importance, the five essentials are the preservation of: (1) the religion of Islam; (2) human life; (3) progeny; (4) the faculty of reason; and, (5) material wealth.⁵⁶ According to modern scholars, these five “essential” objectives of Islamic law were established by Imam al Ghazali of the *Shafi'te* School, and later adopted by classical scholars of the Malki and Hanafi Schools of Islamic law.⁵⁷

In contextualizing the five “essentials” of *maqāṣid al-Shari'ah*, classical scholar Izz al-Din ibn Abd al-Salam's commentary is helpful. He is reported to have written that “all legal rulings in the areas of jurisprudence are contained within” the following Qur'anic verse: “Behold, God enjoins justice and the doing of good, and generosity towards [one's] fellow-men, and He forbids all that is shameful and that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind.” (QUR'AN 16:90).⁵⁸ The point, essentially, is that in Islam, as enjoined by the Qur'an and illustrated by the *Hadith* and *Shari'ah* interpretations, service of humankind, consistently with Islamic law, is an act of worship.⁵⁹ In other words, it is fundamentally Islamic—an act of “preserving the religion”—to utilize and protect worldly resources, including human life, progeny, the faculty of reason, and wealth.⁶⁰ Classical scholar Sayf al-Din al-Amidi, in his defense of giving the highest priority to the preservation of religion, offered this formulation:

[w]hatever is intended to preserve the root of religion should be given priority over all else, since [the Islamic] religion's aim and ultimate outcome is the attainment

of eternal happiness in the presence of the Lord of the worlds. All other objectives, including the preservation of human life, the faculty of reason, material wealth and anything else, are in the service of this overriding interest. As God Almighty declares, ‘I have not created the invisible beings and men to any end other than that they may [know and] worship Me.’ (Qur'an 51:56).”⁶¹

Classical scholar Ibn Abd al-Salam explained that Islamic law provides an equally potent summation of *maqāṣid al-Shari'ah* and that Islamic legal rulings have one central purpose, which is to promote human well-being. Specifically, he stated:

All divine commands and prohibitions are founded upon the [pursuit of] benefit for human beings both in this world and in the next. God Himself has no need of anyone's worship. He is not benefited by the obedience of the obedient, nor is he harmed by the disobedience of the disobedient.⁶²

In other words, the promotion of human well-being is not only encouraged, but required. This includes the creation, protection, and deployment of wealth in the service of individuals, families, and society at large. Intrinsicly, the objectives of *Shari'ah*, and therefore *Shari'ah*-compliant finance, are compatible with the objectives of development finance and social investment, which, in principle, advance the well-being of mankind. “In the Islamic system there is no such thing as a [charitable] dedication ‘solely to the worship of God.’”⁶³ It is appropriate then that Islamic Finance, which is *Shari'ah*-based, be employed to advance the public interest.⁶⁴

VI. FOOD SECURITY *WAQF*

This article proposes the establishment of a multilateral food security *waqf* as a mechanism for investment in the future food security of the Middle East.⁶⁵ As envisioned, the food security *waqf* would serve as a vehicle for allocating and organizing capital and other resources for investment in agriculture and the financing of essential activities such as research, technological innovation and transfer, agricultural production capacity building, and income-generation. Importantly, the food security *waqf* envisioned would directly or indirectly facilitate much needed access to finance, including by small farmers, small and medium enterprises, and other parties across the food supply chain.

The *waqf* structure (rather than a conventional conduit, such as a fund or corporation) is proposed primarily to mitigate the political and legal risks (real and perceived) that tend to deter investment in the region, particularly on a multilateral basis and for regional benefit.⁶⁶ *Waqf* assets, relative to assets associated with conventional investment vehicles, have enjoyed relative freedom from governmental interference, due both to the general respect accorded to *awqaf* and the relative vigilance of the public and *waqf* custodians against undue interference.⁶⁷

Therefore, for the purposes of diminishing legal and political risk in the context of multilateral Middle East investment, the *waqf* structure (properly crafted and with strong legal frameworks to diminish the likelihood of government

interference) provides an attractive alternative to conventional investment modalities. Further, the *waqf* structure is proven as an effective and administratively convenient mode of investment and finance, particularly for large-scale projects. As discussed below, *awqaf* have been used successfully (by Muslims and non-Muslims) to promote the public interest and facilitate investment throughout culturally and geographically diverse countries. The potential of the *waqf* as a modern development and investment tool is borne out by history and should neither be overlooked nor underestimated.

AGRICULTURE: ISLAMIC PERSPECTIVE AND EARLY PRACTICE

The promotion of food security is compatible with *Shari'ah* objectives and the distribution of agricultural resources in early Muslim communities. Reverence for agricultural endeavor and ethical practices in agricultural production and distribution are well-documented, and a few examples from *Hadith* are sufficient to briefly make the point.⁶⁸

According to a narration of Anas bin Malik, the Prophet Mohammed said: "There is none amongst the Muslims who plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift from him."⁶⁹ The Prophet Mohammed was equitable in contracting for food and the means of food production.⁷⁰ Various *ahadith* indicate also that while the Prophet was believed to have preferred the giving of land outright⁷¹, he approved share-cropping provided that such arrangements were not speculative and yields were divided equitably.⁷²

As narrated by Abdullah bin Omar: the Prophet concluded a contract with the people of Khaibar to utilize the land on the condition that half the products of fruits or vegetation would be their share."⁷³ The Prophet is also said to have prohibited speculative sharecropping arrangements, such as agreements giving parties rights to yields from specific tracts of agricultural land or specific produce from sharecropped land. Rather, the Prophet required that parties agree to apportion the total agricultural produce, whether in percentages or by other measures.⁷⁴ This approach, which diminished speculation and more equitably distributed risk and reward, is consistent with the principles of Islamic Finance, which requires risk-sharing and the avoidance of *gharar* (undue speculation).⁷⁵

These *ahadith* illustrate two important Islamic principles: first, the productive cultivation of land is encouraged and rewarded⁷⁶; and second, the equitable use and distribution of agricultural products and the means of their production are consistent with the teachings of Islam.

BASIC ELEMENTS OF WAQF AND CONSEQUENCES OF ESTABLISHMENT⁷⁷

The *waqf* is a kind of trust or endowment through which assets are allocated and preserved for a designated period of time or in perpetuity for specified beneficiaries for charitable, social welfare, development, or intra-family wealth distribution purposes.⁷⁸ Stated more succinctly, *waqf* is the "[bequeathing] of property and dedicating the fruit."⁷⁹ Analogous to the *waqf* in non-Islamic law is the Anglo-American common law trust,

which is considered by some to be "among the most important creations of the [common] law of equity... [and has] for hundreds of years...played a vital role in organizing transactions of both a personal and a commercial character."⁸⁰

The essential legal requirements for the establishment of a valid *waqf* are straightforward and well-established. The donor of assets (*waqif*) must have legal and mental capacity.⁸¹ The *waqif* must have the right to legally transfer the assets and the nature of the assets must not be repugnant to *Shari'ah*.⁸² The pledge to transfer *waqf* assets must be outright, without condition or contingency.⁸³ The permissible purposes for which the *waqf* is established (*e.g.*, charitable or interfamily wealth transfer) must be clearly stated.⁸⁴ The primary beneficiaries of the *waqf* (which may include the *waqif*) must be identified.⁸⁵ A *waqf nazir* (trustee or administrator) must be designated.⁸⁶ And the terms of the *waqf*, according to the majority of scholars, must be in writing.⁸⁷

Upon a valid declaration of *waqf* (*i.e.*, an informed statement, freely made, of intention to commit certain assets to *waqf*), the declaration, and therefore the *waqf* established by it, becomes irrevocable.⁸⁸ After establishment, a *waqf* enjoys independent legal personality under Islamic law and may, *inter alia*, enter into transactions, acquire assets, and engage in other activities permitted under *Shari'ah* and other applicable law.⁸⁹

HISTORICAL USES OF WAQF

The efficacy and legal legitimacy of the *waqf* structure are well-established. *Awqaf* have been used as vehicles for charity, the promotion of social welfare, the provision of public utilities, the building of rural and urban infrastructure, the provision of education, the building and maintenance of mosques, the provision of community medical services, and to advance other projects of public value.⁹⁰ *Waqf* capital has also been a source of commercial credit.⁹¹

An early example of *waqf* is the endowment of the Ruma Well as a public utility.⁹² It is reported that, upon arriving in Madina, the Prophet realized that the Ruma Well was one of the few sources of potable water for the city. "He asked: '[w]ho will purchase...[the Ruma Well] [and] equally share the water drawn therefrom with his fellow Muslims.'⁹³ The Ruma Well was purchased and bequeathed as *waqf* property, to provide drinking water for the people of Madina.⁹⁴ The Prophet is said to have advised Omar Ibn al-Khattab, a companion of the Prophet at the time and later his second successor (the second of the four Rightly Guided Caliphs), to bequeath land in Khaibar as *waqf*, which he did.⁹⁵ Consistent with the Prophet's practice, the Companions continued to establish *waqf* in the public interest. "Since the Prophet instructed his Companions about bequest and its benefits, they never stopped attending to it and putting their money and property into it, so much so that. . . [a]ny of the Prophet's Companions who could afford it made endowments."⁹⁶

Conterminously with the spread of Islam, *waqf* practice expanded in scope, size and impact⁹⁷ through the Ottoman period, with the volume and quality of activity diminishing after that point and through the present time.⁹⁸ At times, *awqaf* were

used so pervasively that they “contributed towards shaping the economic, religious, political and social landscape of urban areas in the Islamic world.”⁹⁹ Thousands of *awqaf* were in operation in the Fatimid period (909-1171).¹⁰⁰ And in the lifetime of the Ottoman Empire, *awqaf* had grown to a “staggering size, amounting to about one third of the Islamic Ottoman Empire and a substantial part of Muslim lands elsewhere.”¹⁰¹

Waqf practice was dynamic. As the needs of society and Islamic jurisdictions changed and evolved, so did *waqf* practice. “[T]he extent of endowment usages along with their legal framework and practices . . . varied significantly throughout the centuries in response to the fluctuating needs of society, taking on different and distinct forms around the Islamic world, often assimilating local customs which frequently preceded the advent of Islam or were contemporaneous with it.”¹⁰² This is borne out by historical practice, where *awqaf* assets and purposes included revenue-generating, mixed asset *awqaf*,¹⁰³ revenue-generating agricultural land,¹⁰⁴ the funding of large-scale commercial property developments over large areas of land for mosque construction,¹⁰⁵ and the bequest of real properties sited in multiple jurisdictions for the benefit of a single beneficiary in another jurisdiction.¹⁰⁶ Other historical examples of *waqf* practice include provisioning for asset substitution (*istibdal*) to ensure the continuation and flexibility of *awqaf*,¹⁰⁷ the joint establishment of *waqf* by spouses for themselves and their children, the establishment of *awqaf* by guilds to support guild members’ families,¹⁰⁸ and the establishment of multi-party *awqaf* to support Islam’s holiest places of worship and its most significant institutions, such as the Two Holy Mosques, Al-Aqsa Mosque, and Al-Azhar.¹⁰⁹ “*Awqaf* cover the Islamic world, from monuments such as the Indian Taj Mahal to the Bosnian Mostar bridge . . . from the Shishli Children’s Hospital in Istanbul to the Zubida’s Waterway in Mecca.”¹¹⁰ The successful use of *awqaf*, across jurisdictions, for diverse purposes, and with various assets, speaks to the flexibility, stability, and appeal of the *waqf* structure.

This brief recitation of some of the historical uses and the dynamism of the *waqf* structure illustrates its significance in the development of Islamic jurisdictions. The *waqf* was so successful in some jurisdictions that British colonial administrations “exerted huge efforts in the nineteenth and first half of the twentieth century . . . to bring these assets under state control.”¹¹¹ In hindsight, this attempt at appropriation showed how highly valued these structures had become, and it reinforces the efficacy of the public *waqf* as a successful vehicle of investment and asset management for diverse purposes.

VII. ADAPTATION OF *WAQF* FOR FOOD SECURITY INVESTMENT: LEGAL FRAMEWORKS AND REMOVAL OF PUBLIC ADMINISTRATION

As discussed, the *waqf* structure has been used successfully to promote the public interest. Regional food security is a matter of public interest of the highest order in the Middle East and elsewhere. The causes of food insecurity are various and numerous, but the challenges are not insurmountable. With


proper investment, resource allocation, and management, many of these causes can be addressed, including poor agricultural practices;¹¹² water pollution and misuse;¹¹³ lack of effective land use planning;¹¹⁴ inaccessibility of finance for small farmers;¹¹⁵ and insufficient public investment in research, development, and technological innovation.¹¹⁶ The *waqf* structure is one avenue through which these challenges can be met, for example, through the allocation of land for specific agricultural purposes, the appropriation of capital and other resources for research, development, and technological innovation (including innovations for sustainable cultivation of dry lands), the education and training of parties across the food supply chain (such as stock managers and small farmers), building and improving infrastructure to facilitate efficient delivery and storage of food and agricultural staples, and the provision of finance to small farmers based on profit and loss sharing through the Islamic financing modalities.¹¹⁷

To accommodate multilateralism and regional food security objectives, and to further the political stability objectives for which the *waqf* structure has specifically been proposed herein, any *waqf*-based structure should be adapted to suit the participating parties and the scale of objectives agreed by them. The *waqf* asset composition and operating framework should incorporate modern asset classes and best operating practices, as well as *Shari’ah* and civil law based frameworks that mitigate legal risk and deter government or other interference. Importantly, the *waqf* structure contemplated requires freedom from direct administration or management by any general *awqaf* authority, in order to promote effective *waqf* management and mitigate the real or perceived political and legal risk associated with direct government participation. The *waqf*-based structures under development, for example, provide for the appointment of a *waqf nazir* or *waqf nuzzar* (an individual, group, or entity) to administer the *waqf* and maximize *waqf* assets, subject to customized and clearly defined performance benchmarks and governance standards.¹¹⁸ This approach not only would diminish legal and political risk, but would provide the flexibility needed to appoint parties with the expertise necessary to effectively, efficiently, and profitably administer the *waqf*, without undue interference. With these and other modifications, the objectives of mitigating political and legal risks would be served, clearing the way for the pursuit of regional food security, innovatively and effectively.

VIII. CONCLUSION

The utilization of the *waqf* structure to bolster food security is legally, administratively, and politically compelling. The legal rights and responsibilities attendant to *awqaf* are clear—from the requirements of establishment, to the relinquishment of legal title to *waqf* assets, to the role and duties of the *waqf nazir*, to the purposes of the *waqf* and the identity of its beneficiaries. Because the framework and mechanics of *awqaf* are established and have, more often than not, been respected, the administrative costs of *awqaf*, compared to other structures, are relatively low as a general matter.¹¹⁹

The religious origins of the *waqf* and its treatment historically make it a comparatively safe vehicle for the investment of assets, particularly in the context of multi-party agricultural investment with significant sovereign involvement. Compared to other legal structures (e.g., the corporation, partnership, etc.), the *waqf* is less susceptible to political or other interference that might frustrate the *waqf* purpose or diminish the value of *waqf* assets through misappropriation or mismanagement.

Middle Eastern countries, institutions, and private parties would serve the food security needs of their region, as well as Islamic Finance, by adopting a *waqf*-based strategy for regional food security. The *waqf* structure is a proven and established structure in the Middle East, and is well-suited to garner the political will, monetary resources, and cooperation necessary to effectively advance food security on a multilateral basis at the regional level. 

Endnotes: Islamic Finance as a Mechanism for Bolstering Food Security in the Middle East: Food Security *Waqf*

¹ See Claire Schaffnit-Chatterjee, *The Global Food Equation: Food Security in an Environment of Increasing Scarcity* 4, DEUTSCHE BANK RESEARCH, September 21, 2009.

² *Id.* at 13.

³ See *id.* at 22, 26.

⁴ See *id.* at 11-13.

⁵ U.N. FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF FOOD INSECURITY IN THE WORLD: ADDRESSING FOOD INSECURITY IN PROTRACTED CRISES, 27 (2010).

⁶ In this article, the Middle East includes the countries that are geographically situated in the Middle East and North Africa and are member states of the League of Arab States. See Schaffnit-Chatterjee, *supra* note 1, at 13, 14.

⁷ Notably, however, that the region's malnutrition rates are strikingly high relative to its income levels. See, e.g., Ruslan Yemstov, *The Global Food Crisis: Global Perspectives and Impact on MENA, Fiscal and Poverty Impact*, WORLD BANK GROUP; Clemens Brisinger et al., *Economics of the Arab Awakening: From Revolution to Transformation and Food Security*, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE (IFPRI) POLICY BRIEF 18, May 2011 at 2.

⁸ Clemens Brisinger et al., *supra* note 7, at 3.

⁹ See Yemstov, *supra* note 7, at 5.

¹⁰ WORLD BANK GROUP, AGRICULTURE & RURAL DEVELOPMENT IN MENA 1 (Sept. 2008).

¹¹ *Id.* at 1.

¹² *Id.* at 2.

¹³ PEW RESEARCH CENTER FORUM ON RELIGION AND PUBLIC LIFE, THE FUTURE OF THE GLOBAL MUSLIM POPULATION 14 (Jan. 2011).

¹⁴ *Id.* at 14. The projection and current figures count only the Muslim populations of Middle Eastern states because Muslims are overwhelming majorities in the countries surveyed. The food security *waqf* proposed would not be limited to Muslim beneficiaries, but would serve food security needs of involved states and their inhabitants and other designated beneficiaries, if any. It should be noted that *awqaf*, their administrators, and beneficiaries, have and may involve non-Muslims. For example, “[a] *waqf* supported many churches and synagogues and these were equally admissible in the Muslim courts of law.” SIRAJ SAIT & HILARY LIM, LAND LAW & ISLAM: PROPERTY & HUMAN RIGHTS IN THE MUSLIM WORLD 156-57 (2006).

¹⁵ U.N. FOOD AND AGRICULTURE ORGANIZATION, COUNTRY RESPONSES TO THE FOOD SECURITY CRISIS: NATURE AND PRELIMINARY IMPLICATIONS OF THE POLICIES PURSUED 27-28 (2009).

¹⁶ See Yemstov, *supra* note 7, at 10, 13 (Showing price fluctuations and responses).

¹⁷ Yemstov, *supra* note 7, at 13.

¹⁸ Saudi Arabia embarked on an ambitious government-mandated and subsidized effort to achieve self-sufficiency in key food staples and succeeded, but at a high cost to government coffers and the country's scarce water resources. According to the Saudi Arabian government, the Kingdom built its first grain silos in 1978, and in 1984, became wheat self-sufficient. See *Agricultural Achievements*, ROYAL EMBASSY OF SAUDI ARABIA, WASHINGTON, D.C., available at http://www.saudiembassy.net/about/country-information/agriculture_water/Agricultural_Achievements.aspx (last visited Dec. 19, 2012). Saudi Arabia spent between SR60 billion to 70 billion to subsidize wheat production over the “long term” and significantly depleted water resources in the process. Recognizing the prohibitively high cost of domestic wheat production, the government announced that Saudi Arabia will phase out wheat production by 2016. See *Saudis to Phase Out Wheat Production*, FINANCIAL TIMES, April 11, 2008, available at <http://www.ft.com/intl/cms/s/0/a686f2b0-0753-11dd-b41e-0000779fd2ac.html#axzz2BUJ3ApwV>.

¹⁹ Alexandra Spieldoch & Sophia Murphy, *Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 39, 42 (Michael Kugelman & Susan L. Levenstien eds., 2009).

²⁰ See Joachim von Braun & Ruth Meinzen-Dick, *Land Grabbing by Foreign Investors in Developing Countries: Risks and Opportunities*, IFPRI Pol'y Brief No. 13, Apr. 2009, at 5.

²¹ *Id.*

²² *Id.*

²³ The Sudan (seven), Egypt (one), Turkey (one), Mali (one), and Pakistan (one). *Id.*

²⁴ For example, Qatar is known to have invested in farmland in Australia. See, e.g., Cameron Houston & Royce Millar, *Qatar Land Grab Angers Bush*, THE AGE, (June 19, 2011), available at <http://www.theage.com.au/victoria/qatar-land-grab-angers-bush-20110618-1g99l.html>

²⁵ Numerous reports scrutinizing “land grabs” have been critical of the practice. And land acquisitions have been received with hostility in various jurisdictions. For example, the acquisition by Qatar of farmland in Australia has sparked controversy. See *id.* In Madagascar, a proposed land acquisition by South Korea triggered political unrest, leading to the eventual ouster of Madagascar's president and the cancellation of the transaction by his successor. Sebastian Berger, *Madagascar's New Leader Cancels Korean Land Deal*, THE TELEGRAPH, Mar. 18, 2009, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/madagascar/5012961/Madagascars-new-leader-cancels-Korean-land-deal.html>.

²⁶ See, e.g., Houston & Millar, *supra* note 24.

²⁷ See Michael Kugelmen, *Introduction and Acknowledgements*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 1, 3 (Michael Kugelman & Susan L. Levenstien eds., 2009).

²⁸ See Houston & Millar, *supra* note 24 (Deal described as “secretive”).

²⁹ Kugelmen, *supra* note 27, at 16-18.

³⁰ See Kugelmen, *supra* note 27, at 18.

³¹ Schaffnit-Chatterjee, *supra* note 1, at 15.

³² See Schaffnit-Chatterjee, *supra* note 2, at 13.

³³ Indeed, it is understood that in most cases, agreements for the outright purchase or long-term lease of agricultural land overseas are made with host nation governments without participation or input from farmers or other segments of local populations that are dislocated or adversely impacted in other ways. See, e.g., U.N. FOOD AND AGRICULTURE ORGANIZATION, FROM LAND GRAB TO WIN-WIN SEIZING THE OPPORTUNITIES OF INTERNATIONAL INVESTMENTS IN AGRICULTURE, ECONOMIC AND SOCIAL PERSPECTIVES POLICY BRIEF 2 (June 2009).

³⁴ See, e.g., von Braun & Meinzen-Dick, *supra* note 20.

³⁵ Lester R. Brown, *When the Nile Runs Dry*, N.Y. TIMES, June 1, 2011, § A, at 29 (explaining that “[t]he Nile Waters Agreement, which Egypt and Sudan signed in 1959, gave Egypt seventy-five percent of the river's flow, Sudan twenty-five percent and none to Ethiopia. This situation is changing abruptly as wealthy foreign governments and international agribusinesses create land acquisition deals to for large swaths of arable land along the Upper Nile. Consequently, Egypt must deal with several governments and commercial interests that were not party to the 1959 agreement. However, Egypt too has acquired agricultural land and/or land-use rights in the Sudan. As for the Sudan, there is no publicly available evidence to suggest that the state or Sudanese farmers have realized appreciable net monetary, know-how, or other gains from foreign acquisitions or use of Sudanese land. The adverse consequences to some Arab countries illustrate the need for a coordinated regional food security strategy”).

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¹⁴¹ See, e.g., Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc.A/32/144, Annex I, reprinted in 16 I.L.M. 1391 (1978).

¹⁴² See ICCPR, Van Boven, *supra* note 89 (and accompanying text).

¹⁴³ ICCPR, *supra* note 67, art. 4, 24, and 26. See, e.g. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁴⁴ See *supra* note 54 (and accompanying text) (explaining the root of the human rights concept back to founding texts which unanimously uphold the idea of protecting human dignity and preserving personhood).

¹⁴⁵ According to Human Rights Watch, the Lake Bogoria region over which the *Endorois v. Kenya* judicial battle centered is considered to have great tourism potential due to its hot springs and abundant wildlife, including one of Africa's largest populations of flamingos. *Kenya: Landmark Ruling on*

Indigenous Rights, HUMAN RIGHTS WATCH (Feb. 4, 2010), <http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>.

¹⁴⁶ See American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art. 63(1) (“[I]f the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”).

¹⁴⁷ Banjul Charter, *supra* note 101, art. 21.

¹⁴⁸ This is equivalent to the notion of specific performance, as it would require the Kenyan government to bring the Endorois back onto their land, with full legal title to it. *Endorois*, *supra* note 9, ¶ 209.

¹⁴⁹ See ICCPR, Van Boven, *supra* note 89 (and accompanying text).

Endnotes: ISLAMIC FINANCE AS A MECHANISM FOR BOLSTERING FOOD SECURITY IN THE MIDDLE EAST: FOOD SECURITY WAQF continued from page 35

³⁶ THE WORD BANK, FOOD SECURITY IN THE MIDDLE EAST AND NORTH AFRICA, INTERVIEW WITH JULIAN LAMPIETTI, LEAD RURAL DEVELOPMENT SECTOR, April 2009, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/0,,contentMDK:22148641~pagePK:146736~piPK:146830~theSitePK:256299,00.html>.

³⁷ See Brisinger et al., *supra* note 7, at 1.

³⁸ Unmanageable (or ill managed) rises in food prices in countries like Egypt have long been a key cause of public disaffection. In the case of Egypt, progressively decreasing food purchasing power—a stark reminder to any consumer of economic hardship—contributed to the uprisings of January 2011. The adverse impacts of rising food prices and the reliance on government subsidies for basic food staples by the poor in Egypt was illustrated most tragically in 2008, when at least 11 people died while standing in line for government-subsidized bread. The level of frustration with government subsidies and food prices was powerfully described by an Egyptian man who said of the subsidized bread system (and unemployment) in Egypt: “This is a rotten system . . . I come here every day. I have no work, so this is my job. Waiting for bread.” Cynthia Johnson, *In Egypt, Long Queues for Bread That’s Almost Free*, REUTERS, (Apr. 6, 2008), available at <http://www.reuters.com/article/2008/04/06/us-agflation-subsidies-idUSL0404033220080406>.

³⁹ GCC member states, which rely heavily on expatriate labor, have a clear interest in ensuring food affordability and balance of overall cost-of-living among expatriate residents, who, with the exception of Saudi Arabia, Oman, Bahrain, significantly outnumber, or in the case of Kuwait, are nearly equal in number to, native residents. Michael Strum & Nikolaus Siegfried, *Regional Monetary Integration in the Member States of the Gulf Cooperation Council*, EUROPEAN CENTRAL BANK OCCASIONAL PAPER SERIES No. 31, June 2005, at 20.

⁴⁰ Von Braun & Meinzen-Dick, *supra* note 20.

⁴¹ See Spieldoch & Murphy, *supra* note 19, at 42.

⁴² For example, in Egypt and Morocco, farmers account for 60% of the poor, but earn only 40% of their income through farming. Yemstov, *supra* note 7.

⁴³ For an introductory discussion of Islamic Finance and the economic principles and objectives of *Shari’ah*, see Muhammad Ayub, UNDERSTANDING ISLAMIC FINANCE 21 (2007).

⁴⁴ See, e.g., Camilla Hall, *Islamic banking: Impressive Growth Underscores Success*, FINANCIAL TIMES, (March 27, 2012), available at <http://www.ft.com/cms/s/0/09a99422-7291-11e1-9be9-00144feab49a.html#axzz2JjKEfCH>.

⁴⁵ See Salman Syed Ali & Ausaf Ahmad, *An Overview*, in ISLAMIC BANKING AND FINANCE: FUNDAMENTALS AND CONTEMPORARY ISSUES, 1, 2 (Salman Syed Ali & Ausaf Ahmad eds., 2007).

⁴⁶ KUWAIT FINANCE HOUSE, About KFH, Growth of Islamic Finance <http://www.kfh.com/en/about/index.aspx> (last visited February 4, 2013).

⁴⁷ See Ali & Ahmad, *supra* note 45, at 2-3.

⁴⁸ See GOLDEN OPPORTUNITY: THE SHARIA-COMPLIANT FINANCE INDUSTRY IS POISED FOR A SEA CHANGE, OXFORD BUSINESS GROUP, (2011) available at www.oxfordbusinessgroup.com/news/golden-opportunity-sharia-compliant-finance-industry-poised-sea-change.

⁴⁹ Robert B Gray, *Islamic Finance: Is the Time Ripe for a Private Sector Trade Association?*, THE WORLD FINANCIAL REVIEW (2012), available at www.worldfinancialreview.com/?p=238.

⁵⁰ Mit Ghamr Savings Bank, established in Egypt in 1963, was the first twentieth century Islamic financial institution. Notably, the Islamic Development Bank was born of an Egyptian study presented to the Organisation of the Islamic Conference (OIC). See, e.g., NAZIH N. AYUBI, POLITICAL ISLAM: RELIGION AND POLITICS IN THE ARAB WORLD 136-37 (Routledge 1991).

⁵¹ See, e.g. Massoud Hayoun, *Who’s Afraid of Islamic Finance?*, THE ATLANTIC, Mar. 30, 2012, available at www.theatlantic.com/business/archive/2012/03/whos-afraid-of-islamic-finance/255265/.

⁵² This is not to say, and should not be construed to suggest, that Islamic economic principles prohibit or discourage profit-making. Indeed, lawful (e.g., non-usurious, transparent) trade and investment for profit are encouraged by Islam. See, e.g., Abu Umar Faruq Ahmad & M. Kabir Hassan, *The Time Value Concept of Money in Islamic Finance*, 23 THE AMERICAN JOURNAL OF ISLAMIC SOCIAL SCIENCES 66, 67-68 (2011). The Prophet Mohammed, who was himself a businessman, is reported to have said: “There is no harm in riches for the one who has piety.” Abdul-Azeem Badawi, *infra* note 74, at 456.

⁵³ See, e.g., U.N. FOOD AND AGRICULTURE ORGANIZATION, *supra* note 15, at 27-28 (Pointing out the drawbacks of conventional economic thought in solving the food crisis). The *waqf*-based and other frameworks under development by the author address the ethics deficit in various ways, including with positive and negative incentives, such as: (1) including farmers as financial stakeholders in agricultural investment structures; (2) enhancing investment value (by favorable regulation, transactional incentives, or other means) for investors who commit to supporting auxiliary benefits for impacted communities (e.g., infrastructure development, etc.); (3) incorporating mechanisms to directly and indirectly raise transaction costs to investors and host governments where investments displace or disenfranchise local farmers or other parties without compensation; and, (4) where feasible, encouraging relevant entities (e.g., development banks) to incorporate into development assistance eligibility and terms criteria, factors that discourage host governments from conducting transactions that displace or undermine the land interests of local populations, or are inconsistent with key agricultural investment principles, such as The Principles for Responsible Agricultural Investment (PRAI) developed jointly by the UNCTAD, FAO, IFAD and the World Bank.

⁵⁴ See generally Ahmad Al-Raysuni, IMAM AL-SHATIBI’S THEORY OF THE HIGHER OBJECTIVES AND INTENTS OF ISLAMIC LAW 421 (Nancy Roberts trans., The International Institute of Islamic Thought 2005) (defining *maqāṣid al-Shari’ah*).

⁵⁵ In this article, the terms “Islamic Law” and “*Shari’ah*” are used interchangeably. And the following definitions are used herein: *Fiqh* is the “study and application of Islamic legal rulings as based upon detailed evidence; the corpus of practical legal rulings in Islam”; *Faqīh* (pl. *fuqahā*) is “a scholar of Islamic jurisprudence who concerns himself with the details of Islamic legal rulings and their legal bases”; *Maqāṣid* or *Maqāṣid al-Shari’ah* is the “higher objectives of Islamic law in general”; *uṣūl al-Fiqh* is “the principles or fundamentals of Islamic jurisprudence”; and, *Uṣūlī* (pl. *uṣūllīyyīn*) is a “scholar who devotes himself to the study of the principles of Islamic Jurisprudence (*uṣūl al-Fiqh*).” See *id.* at 421-25.

⁵⁶ *Id.* at 22-25.

⁵⁷ *Id.* at 22-23. According to some sources, there was some disagreement amongst influential classical scholars as to the ordering of the third and fourth categories of “essentials”, specifically whether the preservation of the faculty

of reason should trump the preservation of progeny. *Id.* at 26. It should be noted further that with respect to the preservation of “progeny”, Hanafi school thinkers used the often referred to the preservation of “family lineage” or *nasab*, rather than “progeny”—but the terms appear to have been used interchangeably. *Id.*

⁵⁸ *Id.* at 31 (discussing commentaries on a book written by Izz al-Din ibn Abd al-Salam and attributing to him the statement that all Islamic legal rulings are “contained within” the quoted Qur’anic verse (*aya*)). A reference, such as the foregoing, to specific Qur’anic text (*i.e.*, QUR’AN 16:90) corresponds with a numbered chapter (*sura*) and verse(s) (within chapters) of the Qur’an.

⁵⁹ *Id.* (discussing service of mankind as a component of preserving the religion).

⁶⁰ *Id.*

⁶¹ *Id.* at 23 (discussing the contribution of *uṣṭlī* Sayf al-Din al-Amidi to the development and refinement of the five “essentials” of *Maqāṣid*).

⁶² *Id.* at 32.

⁶³ LAW OF WAQF IN ISLAM 78 (Tauqir Mohammad Khan et al. eds., Pentagon Press 2007) (discussing the religious significance of a charitable or waqf contribution as an act of religious worship *because* such a contribution constitutes a service to humankind. “A dedication ‘solely to the worship of God’ is . . . [not a meaningful] phrase in Islam . . . Everything which is dedicated to God is in reality for the good of mankind; and everything which is dedicated for the good of human beings, individually or collectively, . . . [is] for the service of God.” Al-Raysuni, *supra* note 54, at 32.

⁶⁴ In this article, the *waqf* structure is considered an instrument of Islamic Finance. Islamic Financial Institutions are required to contribute a portion of their profits to *zakat* (charity). Beyond that, profits obtained by Islamic Finance Institutions in violation of *Shari’ah* (*e.g.*, through interest) are also donated to charity. Public *awqaf* are among the parties eligible to receive *zakat*, and in a coordinated environment, a food security or other *waqf* could benefit from the *zakat* contributions of Islamic Financial Institutions, companies, individuals, and other parties.

⁶⁵ As noted below, the *waqf* is a kind of trust or endowment through which assets are allocated and preserved for a designated period of time or in perpetuity in the service of specified beneficiaries for charitable, social welfare, development, or intra-family wealth distribution purposes. The author has developed tailored *waqf*-based and equity-based financing and investment frameworks designed to advance food security and other public objectives. The use of other, commercial and capital markets, Islamic finance forms for agriculture investment and food security will be discussed in a separate writing.

⁶⁶ A high ranking Arab diplomat in Washington, D.C. recently reminded me of the deterrent power of political and legal risk associated with sovereign and private agriculture and food security investment across borders in the Middle East. In no uncertain terms, the official described the skepticism with which some Arab governments and officials view agriculture and food security cooperation among Arab governments. The official informed me that agriculture and food security investment in non-Middle East jurisdictions (such as in Asia), while financially and geographically less advantageous, is viewed as a politically and legally stable alternative to Middle East investment risk, which the official believed had intensified in the wake of the “Arab Spring.”

⁶⁷ It is important to note that while instances of government interference with *waqf* assets are relatively infrequent (when compared with interference with purely commercial vehicles), the administration of *awqaf* by government is widely practiced; and in some cases, the administration of private *awqaf* have been overtaken by government authorities, often after decades or more since initial *waqf* establishment. The supplanting of private administration with government administration has more often occurred in connection with public or general-purpose *awqaf* (*e.g.*, general purpose *waqf* for the poor), usually through the transfer of *waqf* administration from originally designated trustees to the state, through its ministries or departments of *awqaf*. But in the case of *awqaf* (as opposed to non-*waqf* structures), *awqaf* properties and purposes typically are preserved—only the administration of the *waqf* is nationalized or rendered a government function. In the case of nationalization of commercial or other assets held, for example, by a corporation, the assets themselves are appropriated.

⁶⁸ The Arabic term *Hadith* (*pl. ahadith*) refers in this context to the collective authenticated accounts of the deeds and utterances of the Prophet Mohammed. The deeds and utterances of the Prophet, collectively, are *Sunnah*.

⁶⁹ Dr. Muhammad Muhsin Khan, *Summarized Sahih Al-Bukhari* (Arabic-English) 505 (1st ed. 1996).

⁷⁰ *Id.*

⁷¹ *Id.* at 508.

⁷² *Id.* at 507.

⁷³ *Id.*

⁷⁴ Abdul-Azeem Badawi, THE CONCISE PRESENTATION OF THE FIQH OF THE SUNNAH AND THE NOBLE BOOK 476-78 (Jamaal al-Din M. Zarabozo trans., International Islamic Publishing House 2007).

⁷⁵ See generally *Gharar – Explained*, ISLAMICBANKER.COM, <http://www.islamicbanker.com/educationarticles/gharar> (last visited Jan. 11, 2012) (discussing the various definitions of *Gharar*, including uncertainty, risk, hazard and deceit).

⁷⁶ Badawi, *supra* note 74, at 478-79 (The Prophet Mohammed encouraged the cultivation of “dead lands”, where the land was not being cultivated and the previous owner was unknown. On this subject the Prophet is reported to have stated: “Whoever cultivates the land that does not belong to anyone has the *most* right to it.” (emphasis added). The preference for the productive use of land, rather than its waste, is well established in Islamic law and custom, and underpins the doctrine of *ihya’ al mawat* (literally, “revival of the dead”, referring to land). This encouragement of land cultivation and its association with preferential rights seems compatible with common law legal doctrines like adverse possession, which also encourages the development of land and property).

⁷⁷ THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC, 1278-80, 81 (JM Cowan, ed., Spoken Language Services, Inc. (1994) (1961). (The Arabic term *waqf* means to stop or to halt, and in the case of the Islamic endowment, the term *waqf* (*pl. awqaf*) refers to sequestration of assets for charitable purposes by donation, bequest, grant, or the establishment of a religious endowment. *Waqif* (*pl. waqif*) is the donor or grantor of *waqf* assets (or the *waqf* corpus) and is analogous to the donor or grantor of a trust. A *waqf* is administered by a *waqf nazir* (one or more natural or juridical persons (*pl. nuzzar*)). The term *waqf* is interchangeable with the term “*habs*”, which means to actively hold (as in hold in custody), apprehend, block, or confine. In the case of property or other assets, *habs* means to “tie up [or] invest inalienably”, “to devote entirely to” or “tie up in inalienably” particularly for “a pious purpose.” The writing in which the *waqf* terms are set forth is typically referred to as a *waqifiyya*.)

⁷⁸ *E.g.*, *Summarized Sahih Al-Bukhari*, *supra* note 69, at 51-52. (There is debate as to whether it is permissible to fix the lifetime of a *waqf*. Historically, *awqaf* have been perpetual (unless extinguished by circumstances, such as the demise of the *waqf* assets) and many scholars and commentators contend that *waqf* must be perpetual, as a matter of *Shari’ah*. Some scholars have stated that it is permissible to establish a temporary *waqf*, but only in the case of familial (*ahli*) *waqf*. Others, particularly in the Maliki School, believe it is permissible to fix the duration of *waqf*, if the duration is specified by the *waqif* in a valid *waqf* establishment declaration.)

⁷⁹ Ahmad Al-Raysuni, *Islamic Waqf Endowment Scope and Implications*, (2012), available at www.isesco.org.ma [hereinafter “AL-RAYSUNI ON WAQF”] (quoting the definition of *waqf* by Hanbali scholar Muwaffiq Addin bin Qudama). This source is not paginated and therefore page references to this source are not provided herein.

⁸⁰ Henry Hansmann and Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 435 (1998).

⁸¹ Dr. Eisa Al-Enzy, *The Environmental Protection in the Islamic Waqf 14* (Selected Works, Sept. 2009).

⁸² Al-Raysuni on *Waqf*, *supra* note 79 (Some scholars and commentators have suggested that only immovable assets (real estate, buildings) are *waqf*-eligible, due to their long life and fixed nature. But it appears that a consensus, if not a majority, of scholars and commentators are of the view that immovable assets are *waqf*-eligible. As explained by one contemporary scholar, “[T]he most comprehensive analysis in this matter is that of Ibn Qudama. . . [who] states [that] ‘in sum, what is permissible for *waqf* endowment is what can be sold and benefited from while it is a capital asset remains linked with its stock such as real estate, animals, arms, furniture and the like. This means what cannot be benefited from while it is a capital asset remains such as dinars, dirhams, food and drink, candles and the like, cannot be *waqf* endowed for most canonists and scholars.’”); LAW OF WAQF IN ISLAM, *supra* note 63, at 3. (A broader and more clearly policy-driven formulation of this view is: “[E]very kind of property, immovable as well as moveable, every object in fact which is capable of being possessed or being reduced to possession actually or constructively, equally with interest in trade, commerce, or investments—is a fit and lawful subject of *Waqf*.”)

⁸³ LAW OF WAQF IN ISLAM, *supra* note 63, at 3.

⁸⁴ LAW OF WAQF IN ISLAM, *supra* note 63, at 3.

⁸⁵ Where the *waqf* declaration does not designate successor beneficiaries, the *waqf* proceeds will be distributed to appropriate beneficiaries, such as the poor or other classes of beneficiaries consistent with the purposes of the *waqf*.

⁸⁶ THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC, *supra* note 77, at 1288 (The *waqf nazir* is also referred to as a *mutawalli*, an Arabic term derived from the root “*waliya*”, which among other meanings, includes to “manage, run, administer” and to “be entrusted.”); SIRAJ SAIT & HILARY LIM, *supra* note 16, at 155 (Vis-à-vis the *waqf*, its assets, and its beneficiaries, the *waqf nazir* is a fiduciary and is required to administer a *waqf*, maintain its assets, serve its beneficiaries, and discharge her duties in accordance with the *waqf* terms, *Shari’ah*, and other applicable law. Researchers of *awqaf* have described cases in which, for example, a *waqf nazir* was sued by “respectable citizens, invariably headed by *ulama* [religious scholars]”, for failure to administer a *waqf* in accordance with its terms, *Shari’ah*, other law, or Islamic principles generally. Specific allegations in such instances, include “failure to provide food measuring up to the traditional standard in the kitchen”, in a case from Turkey, and from the records of twentieth century *Shari’ah* courts in Jerusalem, “neglect, mismanagement, and embezzlement, sometimes leading to the dismissal of the *mutawalli*.”) (discussing Gerber, H., *The Public Sphere and Civil Society*, in THE PUBLIC SPHERE IN MUSLIM SOCIETIES (M. Hoexter, S.N. Eisenstadt and N. Levtzion eds., Albany: State University of New York Press 2002) and Reiter, Y. *The Administration and Supervision of Waqf Properties in Twentieth Century Jerusalem*, in LE WAQF DANS LE MONDE MUSULMAN CONTEMPORAIN (XIXE-XXE SIÈCLES) (F. Bilici ed., Istanbul: Institut Francais d’Etudes Anatoliennes 1994)).

⁸⁷ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 151 (quoting Benthall, J., *Organized Charity in the Arab-Islamic World: A View from the NGO’s*, at 153, in H. Donnan (ed.) *Interpreting Islam*, London: Sage). The verbal declaration of *waqf* terms is acceptable according to some scholars and in some jurisdictions, so long as the declaration is made by a person having the requisite legal and mental capacity. For example, it has been reported that in Oman, “almost all *waqf* property is held on trust by word of mouth tradition...and this tradition continues even in the modern state, though gradually the legal status of *waqf* property is being formalized.”).

⁸⁸ E.g., LAW OF WAQF IN ISLAM, *supra* note 63, at 50.

⁸⁹ See, e.g., SIRAJ SAIT & HILARY LIM, *supra* note 14, at 168-69; See also Ahmed Hamad, *The New Waqf (Islamic Trust) Law in the Emirate of Sharjah Law Update*, (Al Tamimi & Co. June 2011) (The Emirate of Sharjah, United Arab Emirates, recently passed a law that confirms the independent legal status of *awqaf* and expressly permits *awqaf* to hold moveable assets and sue and be sued); News Release, Ernst & Young, Islamic Endowments to Accelerate Growth of Islamic Finance (Dec. 19, 2010). (Laws such as that adopted by the Emirate of Sharjah appear to recognize not only the modern potential of *awqaf* as vehicles for the transfer and management of assets for familial and public purposes, but also the growing interest in *awqaf* among asset managers and other financial services providers. In 2010, Ernst & Young estimated the value of the global “*Waqf* sector” at \$105 billion, with an estimated \$35 billion of that total comprised of cash *waqf* and the remainder in the form of real estate. The firm’s Head of Islamic Financial Services stated: “The opportunity cost in terms of foregone [*waqf*] wealth is staggering. The Cash *Waqf* sector would potentially generate an incremental \$2-3 billion annually, simply by aligning with professional investment managers.”).

⁹⁰ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 155 (citing Yediyildiz, B., *Maessese-Toplum Minisebetleri Cercevesinde XVIII, Asir Turk Tomplumu ve Vakif Mu essesesi*, Vaka, flar Dergisi at 15 (1982)) (This article is concerned with the social and developmental objectives of *waqf*. Therefore, the family (*ahli*) *waqf* will not be discussed herein. According to a study of eighteenth century Ottoman *awqaf* records, no more than seven percent of *awqaf* were family only *waqf*. Without more information about this study, such as the extent to which *waqf* instruments were written, recorded, accurate, the specific time period(s) covered by the records, the representativeness of the records of broader *waqf* practice, etc., it is difficult to know whether, and to what extent, this data reflects *waqf* practice more broadly.); SIRAJ SAIT & HILARY LIM, *supra* note 14, at 150. (Context might explain why, in the eighteenth century Ottoman Empire, public *awqaf* might have so significantly outnumbered family *awqaf*. Ottoman rulers’ viewed the role of government, according to one source, as primarily to provide security, defense, and tax collection. This, perhaps, left a void in public services and social welfare that may have been filled partially by *awqaf* (which Ottoman rulers also actively established)).

⁹¹ See, e.g., Randi Deguilhem, *The Waqf in the City*, THE CITY IN THE ISLAMIC WORLD 926 (Salma K. Jayussi et. al. eds., Brill 2008) (describing the lending of *waqf*-owned funds for profit); Al-Raysuni on *Waqf*, *supra* note 79; See also SIRAJ SAIT & HILARY LIM, *supra* note 14, at 154 (explaining that cash *waqf* “were an important source of credit, with the endowed capital lent to borrowers [for profit].” And profit earned was used for “charitable purposes, after any deductions for expenses incurred by the . . . [*waqf*] nazir and any taxes. Money earned through provision of credit that was not distributed according to the terms of the *waqf* in any particular year was added to the endowed capital.” According to a survey, “about 10 per cent of the total eighteenth-century population of Bursa [in modern Turkey], which averaged about 60,000 inhabitants during that period, borrowed from cash *awqaf*.”)

⁹² Al-Raysuni on *Waqf*, *supra* note 79.

⁹³ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁴ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁵ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁶ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁷ See, e.g. Deguilhem, *supra* note 91, at 930; Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁸ See Deguilhem, *supra* note 91, at 930.

⁹⁹ *Id.* at 928.

¹⁰⁰ *Id.*

¹⁰¹ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 147.

¹⁰² Deguilhem, *supra* note 91, at 930. See also Al-Raysuni, *supra* note 54.

¹⁰³ Deguilhem, *supra* note 91, at 932 (discussing a mid-17th century *waqf* established in Aleppo by its governor Ipshir pasha, which consisted of various types of revenue-generating commercial properties, the earnings from which were used to fund Islamic religious sites).

¹⁰⁴ Deguilhem, *supra* note 91, at 933-34 (discussing the endowment of agricultural land in Central Asia and in Iran, where the endowment of agricultural land is “traditional” and also discussing the endowment of agricultural land in India).

¹⁰⁵ Deguilhem, *supra* note 91, at 934-35 (discussing the construction in Aleppo of commercial buildings over five hectares of land with the rent proceeds going to fund the construction of the architecturally formidable al-Khusrawiyya mosque).

¹⁰⁶ Deguilhem, *supra* note 91, at 935 (discussing “the intertwined nature and large networks of *waqf* assets dispersed over large areas”).

¹⁰⁷ Deguilhem, *supra* note 91, at 939.

¹⁰⁸ Deguilhem, *supra* note 91, at 940-41 (discussing the establishment of *waqf* by a husband and wife for the benefit of themselves and their children and the establishment of “guild *waqf*” in the Ottoman empire for the benefit of needy guild members and their family members).

¹⁰⁹ *Id.* at 942 (discussing various examples including, most notably, various *awqaf* established for the benefit of the Two Holy Mosques, al-Aqsa Mosque, Al-Azhar, and the Great Umayyad Mosque).

¹¹⁰ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 147. “Even a lighthouse on the Romanian coast was established under the *waqf* system.” *Id.* at 150 (quoting Kuran, T., *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, *Law and Society Review*, 35, 4, 2001).

¹¹¹ Deguilhem, *supra* note 91, at 934.

¹¹² Schaffnit-Chatterjee, *supra* note 1, at 9.

¹¹³ Schaffnit-Chatterjee, *supra* note 1, at 10, 16.

¹¹⁴ Schaffnit-Chatterjee, *supra* note 1, at 15.

¹¹⁵ Schaffnit-Chatterjee, *supra* note 1, at 28-30.

¹¹⁶ Schaffnit-Chatterjee, *supra* note 1, at 18-21.

¹¹⁷ That said, the historical treatment and usage of the *waqf* structure has not been without flaws. In contemporary practice, *waqf* assets under state administration have suffered from mismanagement or interference. These realities should be acknowledged and addressed when the *waqf* structure is employed, particularly for public purposes. On balance, however, the benefits of *waqf* practice over time (which remain today) outweigh the burdens of *waqf* misuse.

¹¹⁸ Dr. Eissa Zaki, *A Summary of Waqf Regulations*, 11 (Kuwait Pub. Found., 2006).

¹¹⁹ See, e.g., Hansmann and Mattei, *supra* note 80, at 446-66 (discussing the relatively low transaction costs associated with the trust structure – the same is true of the common law trust).