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# Liability for Withholding Assistance: General Clause or Closed List? A Review of Competing Models in Arab Legislations\*

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## ABSTRACT

This study reviews two main approaches for dealing with omission of assistance in the criminal laws of Arab jurisdictions. The first approach adopts a general clause on the crime of withholding assistance. This approach, following the model of the French Code pénal, prioritises the right to life and bodily integrity over individual freedom, and has been adopted in Algeria, the UAE, Qatar, Lebanon, Bahrain, Morocco, and Sudan. The second approach restricts criminal omission of assistance to a closed list of cases, in which it mandates a duty to intervene. The Palestinian Criminal Code follows this alternative model, with origins in English criminal law, prioritising individual freedom. The study presents the viability of a general omission clause in criminal law. It contrasts this with the absence of a comparable clause in civil liability, where Arab jurisprudence has instead codified a set of requirements for simple omission to result in civil liability.

**KEY WORDS:** Omission, Palestinian Criminal Code 1936, Code pénal, vehicle liability, medical liability, civil liability

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## **Responsabilidad por omisión de asistencia: ¿Cláusula general o lista cerrada? Un análisis de los diferentes modelos en las legislaciones árabes**

### **RESUMEN**

Esta investigación examina dos de los más comunes enfoques para formular la omisión de asistencia en las leyes penales de las jurisdicciones árabes. El primero adopta una cláusula general sobre el delito de retención de asistencia. Este enfoque, siguiendo el modelo del Código francés, prioriza el derecho a la vida y la integridad corporal sobre la libertad individual, y se ha adoptado en Argelia, los Emiratos Árabes Unidos, Qatar, Líbano, Bahrein, Marruecos y Sudán. El segundo enfoque restringe la omisión criminal de asistencia a una lista cerrada de casos, en los que exige el deber de intervenir. El Código Penal Palestino sigue este modelo alternativo, con orígenes en el derecho penal inglés, que prioriza la libertad individual. El estudio explora la viabilidad de una cláusula general de omisión en el derecho penal, y contrasta esto con la ausencia de una cláusula comparable en la responsabilidad civil, donde la jurisprudencia árabe ha codificado una lista de requisitos para que una simple omisión constituya una responsabilidad civil.

**PALABRAS CLAVE:** Omisión, Código Penal Palestino de 1936, Code pénal, responsabilidad civil del vehículo, responsabilidad médica, responsabilidad civil.

## I. Introduction

Conduct susceptible of giving rise to a criminal offence may fall into either of two categories: positive (undertaking an action) or negative (refraining from action). The dominant image of a criminal offence is usually a positive conduct: this reflects the underlying intention in criminal legislation to prevent the commission of harm, rather than to mandate good deeds. This is why criminal provisions generally adopt inhibitory formulations, which proscribe what *ought not to be done*, over peremptory formulations that mandate what *ought to be done* (Badawi, 1938, p. 709). However, negative conduct may also fall within the scope of criminal prohibitions. In the jurisprudence of the Arab jurisdictions that form the point of departure for this study, such a conclusion has been established after lively debate between two opposing positions. The first treated omission as a purely negative category, a non-action, from which followed the conceptual impossibility for something that does not exist to induce a positive result, such as death in the crime of murder. The second position suggested instead that both positive conduct and omission are equally disclosive of human will, so that both can be treated as displays of intentional behaviour susceptible of giving rise to a criminal offence. Explicit legislative provisions have subsequently confirmed omission as a source of criminal liability – either through a general clause or in named circumstances only – so as to make this earlier doctrinal debate obsolete.<sup>1</sup> This study is concerned precisely with the legislative provisions on omission that have been enacted in several Arab jurisdictions, and their models of origin.

Indeed, the aim of this article is to offer a deeper understanding of the legislative models underpinning the treatment of omission in the criminal legislations of Arab countries such as Algeria, the UAE, Qatar, Lebanon, Bahrain, Morocco, and Sudan. These countries have introduced norms that sanction the omission of assistance, so as to shift the withholding of help from being merely contrary to a moral duty to being the infringement of a veritable legal duty (Awad, 1981, p. 149; Al Kilani, 2005). The goal underpinning such intervention has been to move beyond peer pressure as a mechanism for enforcing duties (which include helping others in distress) that an individual bears towards the society of which he/she is a member, with a view to achieving greater social solidarity (Abdul Ghafoor, 2012).<sup>2</sup> Moreover, legislative intervention initiates a process of fine-tuning, whereby what is born as a regulatory theory on the criminal relevance of omission can be made more precise through the confrontation with concrete circumstances, after it has become enshrined in a set of explicit norms that must be applied. This practical reason, too, speaks in favour of the decision to contemplate omission forthrightly in criminal legislation (Benham, 1959-60, p. 43; Ahmed, 2010, p. 24).

<sup>1</sup> For a fuller treatment of this debate, see, among others, Awad (1981, pp. 144ff.), Behnam (1959-60), Belal (2002, p. 268), Abdali (2017, pp. 40ff.), Massoud (2014, pp. 260ff.), Abdul Latif (2008), Hussein (2016, p. 38), and Hosni (1986, pp. 25ff.).

<sup>2</sup> It should be noted, however, that this trend is not unanimous: there exist countervailing views that reject the criminalisation of withholding assistance to persons in need. These views are based on the starting assumption that persons should be free to determine their own conduct so that, if one were obliged to provide assistance, this would violate his/her freedom to determine his/her chosen course of action. See Abdul Ghafoor (2012, p. 216), Awad (1981, p. 143 n. 1), Al-Qahtani (2005, p. 93).

At the same time, it is possible to discern two different approaches that have emerged in the laws of Arab countries. The first one criminalises omission of assistance through a general clause, whereas the second one restricts criminal liability only to named instances of withholding assistance. French criminal law is the origin of the first approach: the French model has been followed in the laws of Arab countries such as Algeria, the UAE, Qatar, Lebanon, Bahrain, Morocco and Sudan. English criminal law, instead, exemplifies the second orientation, which has formed the basis for other Arab legislations, such as the Palestinian Criminal Code Ordinance No. 74 of 1936 (hereinafter 'Palestinian Criminal Code 1936').<sup>3</sup>

In the light of this, the present study endeavours critically to examine these two approaches for dealing with the withholding of help in criminal legislation. Moreover, one of the main aims of this study is to establish the feasibility of an approach centred on a general clause to sanction omission of assistance, also with respect to jurisdictions – like Palestine – that take a more restrained approach and sanction omission only in named circumstances. In so doing, the study seeks to contribute to the knowledge base on available avenues for affording legal protection to individuals in danger and in need of assistance, exploring how an approach centred around a general clause differs from one that restricts liability only to named instances of omission. Moreover, the paper contrasts the criminal treatment of omission through a general clause, with the almost unanimous absence – in the same Arab jurisdictions – of a comparable clause on omission in matters of civil liability.

In order to address the foregoing questions, the paper focuses on two paradigmatic cases that exemplify either legislative model for the criminal treatment of omission. These cases are explored through an analytical methodology, in which a problem is posed and then discussed in light of the law, judicial sources, and doctrinal elaboration, in order to achieve a robust understanding of the relevant legal treatment. Specifically, Section 2 dissects the French-based approach centred on a general clause against the omission of assistance (which has been retained by such Arab jurisdictions as Algeria, the UAE, Qatar, Lebanon, Bahrain and Morocco). Section 3 delves instead into the details of the 'closed list' approach exemplified by the Palestinian Criminal Code 1936, which in turn is rooted in English criminal law. Section 4 contrasts the use of a general clause in criminal law with the comparable absence of such a general clause on omission in civil liability. Finally, the concluding section reviews the arguments put forth in this paper and advances some suggestions concerning the desirability of a legislative policy based around a general criminal clause on omission.

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<sup>3</sup> Palestinian Criminal Code Ordinance No. 74 of 1936, published in the Palestine Gazette, Supplement 1, No. 652, 14 December 1936. This law was enacted during the course of the British mandate over Palestine (1920-1948) and is still in force in the Gaza Strip today. The full text of the Palestinian Criminal Code 1936 is available in the English-language pre-promulgation draft published in the Palestine Gazette, No. 633, 28 September 1936, taken from [https://www.nevo.co.il/law\\_html/law21/PG-e-0633.pdf](https://www.nevo.co.il/law_html/law21/PG-e-0633.pdf)

## 2. The crime of withholding assistance: the French model of a general clause

The French legal system deals with the offence of withholding assistance to a person in danger in Article 223/6 of the amended French Penal Code of 1994 (*'Code pénal'*).<sup>4,5</sup>

Prior to 1945, there was no general clause to deal with the withholding of assistance in the *Code pénal de 1810* in force at the time. However, the question on the appropriateness of a provision concerning omission of assistance surfaced in response to the judgment of the Court of Poitiers of 20 January 1901, in which the defendant was acquitted of a charge of withholding assistance on grounds that the one existing norm that could have been applied only contemplated the omission of assistance towards children under the age of fifteen and not towards adults.<sup>6</sup>

Up to that point, opposition to such a clause had been premised on the idea of protecting individual freedom. Eventually, however, the French legal system criminalised omission of assistance upon weighing which interest ought most to be favoured in the law, in this case the fundamental interest to life and bodily integrity over the preservation of personal freedom (Menlowe, 1993; Ashworth, 1999, p. 50).

A similar approach to that pursued in the *Code pénal* has been adopted in the legal systems of such Arab countries as the UAE,<sup>7</sup> Morocco,<sup>8</sup> Algeria,<sup>9</sup> Lebanon,<sup>10</sup> Bahrain,<sup>11</sup> Qatar,<sup>12</sup> Sudan,<sup>13</sup> as well as finding favour in other jurisdictions such as Russia,<sup>14</sup> Germany,<sup>15</sup> and Argentina.<sup>16</sup>

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<sup>4</sup> Article 223/6 has an interesting history, which it is worth briefly summarising. A criminal provision against omission of assistance was first included in Article 108 of a 1934 draft reform bill to the French Penal Code of 1810 (*'Code pénal de 1810'*). This draft provision was subsequently included in the *Code pénal de 1810*, through an ordinance of 25 June 1945, at Article 63. Despite a lukewarm reception on grounds of difficulty in applying one such provision on criminal omission, judicial practice in France has proven the effectiveness of a general clause. Article 63 of the *Code pénal de 1810* belonged to the general section, which led to a discussion on whether a more appropriate location ought to be in the special section. In response to this, the *Code pénal* substantially reworked the structure of the provision that was originally found at Article 63 of the *Code pénal de 1810*. Namely, Article 63 contemplated three instances of omission. The first (failing to intervene to prevent a criminal injury being brought against another, when it would not entail a risk to oneself or others) and the second (failure to intervene to assist a person in danger) were moved to Chapter III on 'Endangering Other Persons' in the *Code pénal*, where they have been included in Article 223/6. The third instance of omission consists in failure to testify to prevent wrongful conviction, and it has been moved in Chapter IV on 'Perverting the Course of Justice' in the *Code pénal*, in the Section on 'Obstructing the Course of Justice', at Article 434/11 (Levasseur, 1968-69, 2018). See also Ashworth and Steiner (1990).

<sup>5</sup> All English-language quotations from the *Code pénal* have been drawn from J.R. Spencer's translation taken from the Legifrance website: [https://www.legifrance.gouv.fr/content/download/1957/13715/.../Code\\_33.pdf](https://www.legifrance.gouv.fr/content/download/1957/13715/.../Code_33.pdf)

<sup>6</sup> Poitiers, 20 November 1901, D 1902, 2, 81, note Le Poittevin. See also Levasseur (1968-69).

<sup>7</sup> See Article 342 of uae Federal Law No. 3 of 1987 on Issuing the Penal Code.

<sup>8</sup> See Article 431 of Dahir No. 1-59-413 of 26 November 1962 on Issuing the Penal Code (Morocco).

<sup>9</sup> See Article 182 of Ordinance No. 66-156 of 8 June 1966 on Issuing the Penal Code (Algeria).

<sup>10</sup> See Article 567 of Legislative Decree No. 340 of 1 March 1943 on the Criminal Code (Lebanon).

<sup>11</sup> See Article 305 of Amiri Decree No. 15 of 1976 on Issuing the Penal Code (Bahrain).

<sup>12</sup> See Article 187 of Law No. 11 of 2004 on Issuing the Penal Code (Qatar).

<sup>13</sup> See Article 75 of the Criminal Act 1991 (Sudan).

<sup>14</sup> See Article 125 of Federal Law No. 64-FZ of 13 June 1996 on the Enforcement of the Criminal Code of the Russian Federation.

<sup>15</sup> See Section 323/c of the German Criminal Code.

<sup>16</sup> See Article 106 of Law No. 11-179 on the Penal Code (Argentina).

## 2.1. Constituent elements of the crime of withholding assistance

Article 223/6 of the *Code pénal*<sup>17</sup> reads as follows:

Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.

Focusing specifically on the case of omission of assistance to a person in danger, the second paragraph of this article clarifies that two elements are necessary for an event to fall within the purview of this norm: one is material, the other moral. The subsections that follow dissect each in turn, and provide context on how the French model has been received in the Arab legislations that have taken it up.

### 2.1.1. The Material Element in the Crime of Withholding Assistance.

As a starting point, the Arabic word for omission (*aimtinae*) designates a withholding, which is the opposite of giving or providing something. Therefore, plain language already reveals a central feature of omission, namely the delay or refusal to provide some intervention or help, whatever form it may take – whether by providing some material means of assistance, or by performing an action, or by a spoken disclosure or warning (al-Din Ibn Manzour, n.d., ch. 47).

Building on this plain language use, omission has been clarified in Arab legal doctrine as being 'the failure by a person to perform a certain positive action that the legal system would expect of him in certain circumstances, provided that there be a legal duty that binds him to perform that act and that the person is in a position to perform it' (Hosni, 1986, p. 5).

For an omission to be punishable, there has to be a withholding of action in the presence of a duty to act (Ahmed, 2010, p. 31; Ramadan, 1961). Hence, inaction will not normally be treated as omission, unless it amounts to inertia in the face of a rule mandating, as a duty, that some intervention be offered. This implies that the crime of omission presupposes necessarily a legal duty to act: a moral duty is not sufficient in this regard. Even if the demands that can be made of a person on grounds of ethics are broader than those that the realm of law can put forth, they are based purely on gallantry and moral fibre, not compulsory in a legal sense (Ahmed, 2010, pp. 74-5).

There is a varied range of possible sources of a legal duty to act. In many of the Arab jurisdictions contemplated here, duties to act have typically been codified in

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<sup>17</sup> As amended by Decree No. 916/2000 of 19 September 2000.

the Penal Code and/or in its accompanying legislation. This is precisely the case of all the general clauses that criminalise omission of assistance, following the model of Article 223/6 of the *Code pénal*. Another source of duties to act could be found in a country's Code of Criminal Procedure, such as the Palestinian Penal Procedure Law No. 3 of 2001 (hereinafter 'Code of Criminal Procedure'),<sup>18</sup> where Article 24 stipulates that any person who is aware of the commission of a crime has a duty to report it to the office of the public prosecution service, unless it consist of an offence that can only be prosecuted upon receipt of a request, complaint or authorisation beyond the initiative of the public prosecutor.

Other conceivable sources could be found in administrative law, as in the case of the duty of a lifeguard to rescue bathers on a public beach, or in tax law, as with the duty imposed upon one who runs a trading business to submit a tax return, or – for Islamic jurisdictions – in Shari'ah law, as it occurs for example with the duty imposed upon the mother to breastfeed her child and take care of him/her, as spelled out in the Qur'an.<sup>19</sup>

However, the source of a duty to act may also be found in contract, as would be the case of a nurse's duty to care for patients entrusted to him/her. Finally, there could also be extra-contractual sources of a duty to act, whenever a person's inducing of a particular state of affairs held them to taking follow-up action. Duties of this sort are typically a jurisprudential elaboration. Judges' reasoning by analogy to adapt the existing body of law and jurisprudence to novel cases is, to some extent, a feature of every legal system, so that – broadly speaking – case law sources of a duty to act could in practice also be found in civil law jurisdictions. However, this takes on particular centrality in jurisdictions with a binding precedent system, such as English common law. One illustration of an extra-contractual source of a duty to act could be the case of a person falling asleep in another's house with a lit cigarette in his hand, which set fire to the mattress: in the jurisprudence of English common law this event has been held to call the person who caused the fire to take further steps to mitigate it, rather than refraining from further involvement in the train of events he set off.<sup>20</sup> Similarly, purposeful action or volunteer work have also been held to ground a person's duty to remain involved in the situation they have taken up, as in the case of fostering a child on a voluntary basis, which grounds a duty not to discontinue that care.<sup>21</sup> Last, but not least, the specialist customs of a profession can ground a duty to act in conformity to them, e.g., medical norms of good professional practice.

<sup>18</sup> For an English-language translation of the Palestinian Code of Criminal Procedure, see *Penal Procedure Law No. 3 of 2001*, published in Ramallah by the Palestinian Investment Promotion Agency, taken from <[http://legal.pipa.ps/files/server/ENG%20Criminal%20Procedure%20Law%20No\\_%20\(3\)%20of%202001.pdf](http://legal.pipa.ps/files/server/ENG%20Criminal%20Procedure%20Law%20No_%20(3)%20of%202001.pdf)>

<sup>19</sup> See *The Qur'an*, verse 2:233, translation by A. Ali, taken from the Online Qur'an Project website: <http://al-quran.info/#2:233/1Nf>

<sup>20</sup> *R v Miller* [1983] 2 AC 161.

<sup>21</sup> *R v Nicholls* (1874) 13 Cox CC 75.

When contemplating the duty to act as one of the constituent elements of the crime of omission, it can be interesting to ask one further question. Namely, whether such a duty would also extend to the active perpetrator of a criminal injury, who failed to step in to mitigate the distressing consequences of his/her actions for the victim. Faced with the victim's need of assistance induced by the perpetrator's actions, would he/she then be liable just for the offence he/she (positively) committed, or could he/she also be sanctioned for omission of assistance?

Here, a difference is typically made between cases in which the victim's state of danger is induced accidentally and cases in which it is induced intentionally. On the one hand, when danger occurs by accident, there is no doubt that the perpetrator would fall under a duty to provide assistance to the person(s), whom he/she injured: the classic example being of a driver who injures a passer-by and comes under a duty to help him/her, as contemplated for instance in the Palestinian Traffic Law.<sup>22</sup>

On the other hand, when danger is intentionally induced, one argument goes that the perpetrator of the offence that has induced the state of danger would not be doubly responsible, i.e., for the active offence and for infringement of a duty of assistance, since graver punishment for the original crime would absorb the penalty for omitting assistance, and only one criminal norm would apply. According to Levasseur (1968-69), an additional argument can be made that it would be unrealistic to require, of one who is actively seeking to endanger another, that he/she take care of them.

However, contrary to this view, a countervailing suggestion could be put forth, such that omission of assistance to one in need of help would equally obtain in the case of the perpetrator of a crime that intentionally induces the state of danger. In such a case, it is submitted that fact-finding for the infringement of a duty to act could become more discerning through juxtaposition with the prohibition against causing harm to others that is at the root of civil liability, whenever the same material conduct that yields an active criminal offence is simultaneously held up for scrutiny in civil liability (tort). As a matter of fact, when an intentional harmful act is examined against the material requirements of civil liability, this helps bring into focus features of a person's conduct that might suggest a withholding demeanour – by having them stand out against a legal duty actively to mitigate harm originating from one's actions – thereby fulfilling the material element of an omission. This suggestion might avoid the outcome, whereby the omission be routinely erased into the active offence, since it would help differentiate, in point of fact, between two separate lines of conduct: one that led to the active offence and, the other, refraining from mitigating harm that has befallen another.

When it comes to the nature of withholding conduct, the further question arises as to whether a person's duty to intervene would involve only the deployment of suitable means, regardless of success at removing the source of harm, or whether it would also

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<sup>22</sup> See Article 74 of the Palestinian Traffic Law No. 5 of 2000.



entail a duty to take all necessary steps to remove the source of harm. In the French model, and its subsequent reception in Arab legislations, it is clear that material success of one's efforts is not required (Sharef, 2013, p. 85; Abdali, 2017, p. 43). The law only sanctions the withholding of assistance as such, and it is not concerned with its practical success: the duty to provide assistance is an obligation of means (Rouas, 2014). On this basis, any person who is able to rescue or help another in the event of danger and does not do so would fall foul of the criminal provisions on withholding assistance, even if someone else provided assistance in their place that ultimately removed the danger.

Last, but not least, the crime of omission can take two possible forms. In the first form (*omission without event*), a criminally relevant omission materialises by the mere withholding of action that is due, without it being relevant that the omission lead to a certain undesirable event. The second form (*omission with event*) demands the presence of an omission *and* of an event in the outside world that is connected to it, which the legal system seeks to prevent – with the consequence that, if the event contemplated by the norm was not present, then the omission would not become criminally relevant (Zaghloul, 2016, pp. 21-24; Sharef, 2013, pp. 53 ff.; Abdul Ghafoor, 2012, p. 211). This is the case of omission of assistance to one in danger, in which the omission becomes relevant so long as it is accompanied by an offending event, which can occur either as actual damage or just in terms of further exposing the victim to a source of harm.

This understanding has remained unchanged after the enactment of the new *Code pénal* superseding the *Code pénal de 1810*, by which change the withholding of assistance was moved from the General Part (Book I) to the section of the Special Part (Book II) dealing with endangering other persons (Nasr, 2013, p. 462).

To summarise: the omission of assistance is fulfilled when a person's inaction leads to a change in the outside world, either in terms of causing actual damage or merely in terms of increasing the victim's exposure to danger. In either case, a causal link between the omission and the undesirable event (injury or exposure to danger) will need to be proven (Al-Zindani, 1997, p. 28).<sup>23</sup> However, a person is not required to intervene so as to remove the danger, and would be acquitted for supplying suitable means to help, even if those did not meet with success.

### **2.1.2. Moral Element.**

The French legal system at Article 223/6 of the *Code pénal* requires that the withholding of assistance be deliberate, meaning that a person could not be held accountable if his/her failure to assist were simply due to negligence or error (Levasseur, 1968-69). This means that one must know that the victim was in a state of danger, and that his/her conduct manifests an intention to refrain from providing relief. It is enough to prove the perpetrator's general intent, consisting of knowledge

<sup>23</sup> *Contra* see Sharef (2013, p. 88), who suggests that a causal link only needs to be proven between the omission and actual damage (but not between the omission and exposure to danger).

and will, without also needing to establish a particular motive underpinning the omission of assistance, since this is not contemplated in the norm.<sup>24</sup>

This, of course, raises the further question of how to prove the defendant's knowledge of another person's state of danger. If it is obvious from the circumstances that the defendant came into direct contact with the dangerous situation, then knowledge of the threat it posed to the victim could be presumed. In this case, the only way to disclaim liability would be by establishing that the defendant did not reach a proper assessment of the situation he/she encountered. The matter becomes more complicated when it is not obvious whether or not the defendant came into direct contact with the victim's state of danger. A case in point would be that of a doctor receiving a call, from a third party, about a person in need of help. In this case, the doctor could disclaim knowledge of the situation because of not having witnessed the state of danger first hand. In the jurisprudence of French courts, this distinction has sometimes led to the exclusion of the moral element for doctors in such situations, although the prevailing opinion is now that it is no longer acceptable for a doctor to claim ignorance of the health situation of a person in need of help, when he/she is being informed on the situation by the victim him-/herself on the telephone, or by a third person (Nasr, 2013, pp. 490-1).

## **2.2. The duty to provide assistance**

Article 223/6 of the French Penal Code also specifies the nature of the duty to provide assistance by setting out three conditions that must be fulfilled for a sanctionable omission to obtain. These conditions, which will be examined in turn in the following subsections, are the following: an imminent danger threatening the victim, the possibility of providing assistance, and the absence of risk in doing so for the person charged with the omission.

### **2.2.1 The Nature of the Danger.**

Article 223/6 of the *Code pénal* does not come with a definition of 'danger', thereby leaving the matter open for judicial assessment. French jurisprudence has come to a consensus around some of the features that constitute a 'danger', for the purpose of a crime of omission. For instance, a danger must involve a real risk, whereas a purely theoretical scenario has not been considered sufficient to activate criminal sanctions for withholding assistance (Nasr, 2013, p. 470). Moreover, the danger must be current or imminent, and serious, and it must also call for immediate relief.<sup>25</sup> If the danger disappears or is removed, then any omission would not be criminally relevant for failure of the offending event (endangering another) to

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<sup>24</sup> Cass Crim, 29 June 1967, JCP 1968, II, 15377 note Pradel, taken from <https://juricaf.org/arret/FRANCE-COURDECASSATION-19670629-6790711>

<sup>25</sup> Cass Crim, 26 April 1988, Bull crim, 178, p. 459. See also *Refus d'Assistance* (2009).

materialise.<sup>26</sup> That, unless the withholding of assistance took place before the danger had passed.<sup>27</sup> On this point, the *Cour de Cassation* has ruled that no withholding of assistance materialises after a person (who was in need of assistance up to that point) dies, since the risk, by virtue of having been realised, is no longer imminent.<sup>28</sup>

Moreover, the state of danger must be unexpected and unpredictable, so that depriving a child under the age of fifteen of long-term care would not amount to withholding assistance, but would come under scrutiny under a different norm, such as the ill-treatment of children in accordance with Articles 227/15, 227/16 and 227/17 of the *Code pénal*.<sup>29</sup>

The source of danger could be another person, a natural event, an animal, or it might even arise from the victim endangering him-/herself, as with one threatening to commit suicide – in which case the withholding of assistance would obtain provided there was something the accused could have done to prevent the suicide.<sup>30</sup>

The danger should pose a threat to the life or physical integrity of a living person. In connection to this, the *Cour de Cassation* deemed that a foetus during the process of childbirth could already be treated as a living person, susceptible of being endangered by a doctor, who was late in practicing a caesarean section without a show of sufficient cause, after he had been warned by a nurse of an urgent situation – with the outcome of birth deficiencies suffered by the newborn.<sup>31</sup> Still, the court has also suggested that it would be more coherent to consider the doctor's withholding of assistance as being directed against the mother at childbirth, since childbirth straightforwardly constitutes a state of danger, instead of pinning the danger purely on the foetus coming into the world (Nasr, 2013, p. 468).

According to a view in the French jurisprudence reported by Larguier, if a mother who needed a caesarean section died and the caesarean section could have helped save the foetus, provided his/her chances of survival were strong, and if the husband had denied permission to perform the section, then both the doctor and the husband would be liable for the crime of withholding assistance (Larguier, 1953, pp. 154ff.).

### **2.2.2. Possibility of Providing Assistance.**

Criminal liability for withholding assistance requires that the person accused of omission be in a position to assist, and this is because the policy goal that underpins the criminalisation of withholding assistance is to foster social solidarity. On this view,

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<sup>26</sup> See above section 2.1.1.

<sup>27</sup> Cass Crim, 10 March 1993, Dr pén 1993, 151 note Véron.

<sup>28</sup> Cass Crim, 1 February 1955, D 1955, 384 note Vouin.

<sup>29</sup> Cass Crim, 2 April 1992, GP 24 October 1992, 608; Cass Crim, 23 March 1953, Bull Crim, 104.

<sup>30</sup> Cass Crim, 31 May 1949, JCP 1949, II, 4945 note Magnol.

<sup>31</sup> Cass Crim, 2 April 1992, GP 24 October 1992, 608. See also Deprest (2013-14, p. 26).

every individual in society is under an obligation to undertake steps to help another in pressing need, relative to his/her position. In this respect, the Cour de Cassation has held, in the words of one commentator, 'that one is bound to provide the assistance imposed by the duty of humanity, even if such assistance is ineffective'.<sup>32</sup>

In assessing the possibility of material assistance being delivered, one must take into consideration the concrete circumstances and any special skills of the individual, as well as his/her professional activity. For example, rescuing a person from drowning requires proficiency in swimming, or prevention of a crime in sudden situations may require a modicum of strength, or access to a weapon. In this respect, it would not be enough for a doctor merely to ask for help, insofar as his/her professional competence was needed in the situation.<sup>33</sup> On this matter, French jurisprudence has found a doctor guilty of withholding assistance when he failed to provide treatment in person, but only limited his intervention to some tips and guidance, when his material intervention was actually necessary.<sup>34</sup>

In addition to this, a physician may not deny emergency assistance by virtue of not being a specialist in the injury to which he/she is asked to attend. In the French legal system, this duty to intervene regardless of specialism has its source in Article 70 of the French Code of Medical Ethics, which states that 'every doctor, as a matter of principle, is deemed suitable to perform all activities connected to diagnosis, prevention and treatment [of illness]' (Ordre National des Medecins, 2017). In contrast, a misdiagnosis that aggravates a person's state of danger does not substantiate a withholding of assistance.<sup>35</sup>

In sum, the assessment of whether assistance was possible – at the time the omission took place – is a matter for the judge's appreciation on the facts of each case. So, for example, the French *Cour de Cassation* ruled that the crime of withholding assistance would not obtain when the defendant had failed to help a person who had lost consciousness and had died, even when medical opinion affirmed that early intervention could have saved the victim. This outcome was reached on the back of a concrete assessment of the envioning circumstances: since the victim was an alcohol addict, whose behaviour often involved drunkenness and prolonged sleep, the defendant was not held responsible for thinking that the victim was sleeping as usual.<sup>36</sup>

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<sup>32</sup> Cass Crim, 23 March 1953, Rev sc crim 1953, 496 obs Huguency.

<sup>33</sup> Cass Crim, 9 December 1959, Bull Crim, 541; Cass Crim, 2 July 1975, Bull Crim, 173; Cass Crim, 27 March 1991, Dr pén 1997, 125 note Véron.

<sup>34</sup> Cass Crim, 15 March 1961, Bull Crim, 162, p. 314; Cass Crim, 26 March 1997, Bull Crim, 123, p. 408, taken from <https://www.legifrance.gouv.fr/affichJurijudi.do?idTexte=JURITEXT000007067485>.

<sup>35</sup> CA Paris, 18 February 2000, Juris Data 106315.

<sup>36</sup> Cass Crim, 22 June 2016, Bull Crim, 197, taken from <https://www.legifrance.gouv.fr/affichJurijudi.do?idTexte=JURITEXT000032774071>.

It is not necessary for the person lending assistance that he/she successfully manage to remove the danger; it is enough to take steps to aid the person in need, regardless of outcome.<sup>37</sup> If assistance is not practicable because of some impediment or material impossibility, then the person faced with another's state of danger will not be held liable for the crime of omission; an example being that of a doctor whose car broke down on the road so that he could not reach the victim in time.<sup>38</sup>

Assistance need not be provided directly, unless in the case of doctors faced with a medical emergency. However, even if one were unable to assist directly, one would still be bound to discharge his/her duty to help by informing the public authorities or procuring further assistance from others (Levasseur, 1968-69).

### **2.2.3. The Absence of Risk in Providing Assistance.**

Liability for the crime of omission is conditional on absence of danger for the person charged with assisting: the law does not require heroic efforts of people. Therefore, one would be justified for refraining to help when doing so would expose the helper to disproportionate risks. The assessment of proportionality is another matter for judicial assessment on a case-by-case basis.<sup>39</sup>

The gravity of personal danger for the person charged with assistance will need to be assessed according to both an objective and a personal criterion. The judge must examine the personal circumstances of the defendant in order to decide if he or she is responsible or not. Obviously, personal capabilities vary among people in terms of courage, fear, ability to face events, the extent of control of the person on his or her nerves, and the speed of his or her reactions. These personal aspects undoubtedly place a heavy burden on the judge in ascribing responsibility or not. For example, a driver was acquitted of the crime of withholding assistance to a passenger whose clothes had caught fire (Nasr, 2013, p. 493), on grounds that he had focused instead on extinguishing the fire in his car, fearing that it would explode and kill the rest of the passengers (Rouas, 2014). Instead, it will not be acceptable to motivate the withholding of assistance with fear of conviction, as in the case of a driver injuring a passer-by and then fleeing the scene without lending any help (Rouas, 2014).

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<sup>37</sup> See above sect 2.1.1, clarifying that the duty to assist a person in need is an obligation of means.

<sup>38</sup> Cass Crim, 3 January 1972, D 1972, 220.

<sup>39</sup> Cass Crim, 4 February 1998, unreported, taken from <https://www.legifrance.gouv.fr/affichJurijudi.do?oldAction=rechJurijudi&idTexte=JURITEXT000007573550&fastReqId=864028456&fastPos=1>.

### **3. The crime of withholding assistance: the English model of a closed list and its implementation in the Palestinian Criminal Code 1936**

The Palestinian Criminal Code 1936 was issued by the British Mandate Government in Palestine and is still in force in the Gaza Strip at the time of writing. Due to its historical origin, it can be considered a transplant from the English system, containing many norms sourced from English law. Article 4 explicitly states that the Criminal Code is to be interpreted on the basis of the principles used for the interpretation of laws in England, and any terminology used therein is to be understood according to the meaning that belongs to it in English law, and must be construed on the basis of those laws and of the context of each sentence, save for any express exceptions.<sup>40</sup>

In contrast to the other Arab legislations that follow the French model, the Palestinian Criminal Code 1936 does not adopt a general clause that applies to every instance of withheld assistance. In so doing, it follows English law, which does not impose a general obligation to rescue others in the event of danger, even if doing so would not endanger them personally (Al-Qahtani, 2005, p. 91).

This approach is premised on concerns around the suitability of a general clause for narrowing down a workable definition of omission, and on preference for judicial assessment of omission in individual instances. Still, it has been criticised for privileging the interest of individual autonomy over the preservation of human life and bodily integrity (Hughes, 1958, p. 634).

This approach has been transplanted into the Palestinian Criminal Code 1936 by leaving out a general clause that would have embraced all potential instances of withholding assistance. Instead, an alternative route has been taken, which is to name only specific instances of omission that will be susceptible of criminal sanction. According to Article 142 of the Palestinian Criminal Code 1942, liability for omission only obtains in the presence of inaction in the face of a duty to act mandated by law: the following sections explore individual instances in which that is the case.

#### **3.1. Crimes of Omission in the Palestinian Criminal Code 1936**

##### **3.1.1. Withholding Assistance in Preventing a Crime.**

Article 33 of the Palestinian Criminal Code 1936 stipulates that a person that is aware of another's intention to commit a felony, and who does not use all reasonable means to prevent it, will be held liable for committing a misdemeanour. The named article

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<sup>40</sup> In this respect, one commentator has noted that the laws enacted in British colonies do not reflect exclusively the conceptual apparatus and interpretive custom prevalent in the English system. For instance, the Palestinian Criminal Code 1936 also reflects transplants from French and Ottoman laws (Abrams, 1972).

uses the expression 'reasonable means', thereby allowing the judge a modicum of discretion in assessing each case separately, according to the circumstances. Moreover, Article 135 sanctions the withholding of assistance when requested by any public official, police officer or any other person seeking to prevent a crime or perform a rescue or an arrest. It is interesting to note that this case contemplates the withholding of assistance when requested by (i) a public official, (ii) a police officer or (iii) any other person. The third case, however, does not amount to a general duty to assist persons in need, but is limited to omission of help in preventing a crime, while it does not apply to danger due, say, to a natural cause. Further, the article in question again admits the judge's discretionary assessment of one's ability to assist ('according to his ability'),<sup>41</sup> taking into account personal and subjective circumstances. Related to Article 135 is Article 381, which sanctions the withholding of assistance that has been solicited by a public official in the presence of a live crime or public disasters such as shipwrecks, fires, floods, or earthquakes. Despite the expansive formulation, it is submitted that even Article 381 fails to introduce a general clause on omission of assistance, comparable to the French model, because the omission only obtains in the event of a prior request from a public official.

### **3.1.2 Precautionary Clauses.**

Included in the Palestinian Criminal Code 1936 are precautionary clauses to ensure that unnamed behaviours that might lead to an offence are not exempted, just because they have not been listed explicitly elsewhere. A case in point would be Article 244, which sanctions any harm-causing act or omission not covered by the named instances listed in the article that immediately precedes it (Article 243), which enumerates various forms of reckless or negligent endangerment of human life (e.g. whilst driving, during navigation, when handling fire).

In like fashion, Article 382 introduces another precautionary formulation, by introducing a penalty for all offences contemplated in any law, for which no penalty is expressly stated. In such case, Article 382 specifies that the penalty will be seven days' imprisonment or a five-pound fine. The above could, theoretically, also apply to any duties of assistance contemplated elsewhere in the legal system. Here, again, despite the general formulation, what the norm does is not establish a general crime of omission of assistance, but merely provide a penalty for all duties to intervene (which are explicitly named elsewhere in the legal system), for which no penalty is indicated. Hence, liability for omission still remains confined to particular cases named by law.

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<sup>41</sup>Article 135 of the Palestinian Criminal Code 1936.

### **3.1.3. Withholding Action Due Under Maintenance Obligations.**

A number of provisions in the Palestinian Criminal Code 1936 provide criminal protection to minors against injuries that may hamper their life or bodily integrity, specifically Articles 184, 185, 186, 229 and 230 (Kamel, 2014, p. 89). While they describe different scenarios, they are underpinned by the same unifying idea to sanction the withholding of support towards a minor, which withholding would endanger his/her life. Article 184 (abandoning a child under the age of two) captures the withholding demeanour that is implicit in all such offences through the verb 'abandon', since abandonment entails precisely an omission of some required action (Taha, 1999, p. 70).

Beyond outright abandonment of an infant, the other provisions in this grouping sanction the withholding of basic necessities (Article 185), the desertion of a pre-teen (Article 186), the withholding of parental maintenance support (Article 229) or neglect of a master's duty to provide for his/her apprentices under the age of sixteen (Article 230).<sup>42</sup>

Other persons that, like minors, lack capacity due to their age, to illness, disability or similar causes are equally protected by provisions sanctioning the omission of care (Articles 228 and 242). This means that caregivers who withhold support in such circumstances would incur liability, in case their inaction led to an injury to the life or health of the person placed under their care.

### **3.1.4. Withholding Medical Assistance.**

Article 231 of the Palestinian Criminal Code 1936 demands that a doctor who administers treatment not withhold efforts constituting 'reasonable care', otherwise he/she would be held liable for failing to undertake them, in case of subsequent injuries to another's life or health.

In the face of such provision, one doctrinal current argues that the doctor remains free to accept or reject a request for treatment (al-Qablawi, 2011, p. 730). In contrast, more recent laws and regulations governing the practice of medicine have restricted a physician's freedom of choice, since they sanction a doctor who refuses to provide necessary medical treatment (al-Qablawi, 2011, p. 730).

## **3.2. Withholding Assistance in Complementary Criminal Legislation**

The approach of sanctioning omission of assistance only in named circumstances entails that individual duties to act, on penalty of criminal sanctions, have also been

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<sup>42</sup> In a similar spirit to protecting minors' maintenance rights, the Palestinian Criminal Code sanctions other omissions that endanger those placed under the care or protection of another, such as the master's withholding of adequate board, lodging or clothing from his/her apprentices (Article 187).



introduced in a number of complementary criminal provisions located outside of the Palestinian Criminal Code 1936.<sup>43</sup>

### **3.2.1 Withholding Assistance in the Palestinian Traffic Law.**

For example, the Palestinian Traffic Law No. 5 of 2000 contemplates two types of omission of assistance. The first, which can be found in Article 74, concerns assistance withheld, by the driver of a vehicle who caused an accident, towards those that were injured in it. The second, described in Article 75, addresses any driver passing the scene of an accident (even if he/she did not cause the accident), and requests him/her to provide any injured person(s) with available assistance or to transfer them to the nearest hospital. Still, this is short of a general clause enacting a crime of omission of assistance, since the duty applies specifically to drivers, leaving out others present at the scene. The penalties established in the Palestinian Traffic Law for withholding assistance in the case contemplated by Article 74 (omission of assistance by driver at fault) include withdrawal of one's license (Article 105) and imprisonment and/or a fine (Article 113). In case of assistance withheld by drivers who merely pass by an accident scene, without having themselves been involved in it, they are subject to the pecuniary penalties set out in Article 117 of the Palestinian Traffic Law.

### **3.2.2. Withholding Action Required Under the Palestinian Forestry Law.**

Another criminal provision sanctioning the withholding of action is Article 9 of the Palestinian Forestry Law No. 5 of 1926, which requires those persons holding rights in a forest or living within a five-kilometre radius of it to lend assistance to extinguish any fires to the said forest, on penalty of fourteen days' imprisonment pursuant to Article 17/3 of the same law.

### **3.2.3 Withholding Assistance Under the Palestinian Child Law.**

Article 54 of the Palestinian Child Law No. 7 of 2004 requires – on penalty of a fine – that every adult lend assistance to a child asking for help, by informing the child protection officer of the condition of the child or of any siblings of his/hers, or of

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<sup>43</sup> The restriction of criminal liability to named instances of omission means that some cases do not attract liability, for lack of a complete provision establishing criminal liability and an attendant penalty. For instance, the Palestinian Law on Disabled Persons' Rights establishes certain obligations on the part of the state to cater for disabled persons, the failure of which will issue in civil liability. While omission of duties of care that the state has towards disabled persons could still be deemed a criminal offence according to Article 32 of the Palestinian Constitutional Law (which qualifies as crimes any attacks on personal freedom and the sanctity of private life), this text does not attach a punishment, which makes the criminalisation of the omission of state duties towards disabled persons incomplete—and therefore inoperative. Similarly, Article 48 of the Palestinian Criminal Procedure Law allows to enter another person's home without a warrant in cases of fire, drowning, of *flagrante delicto* and in case of a request coming from a person inside. At the same time, this norm merely *allows* such entrance without warrant, but does not create an obligation to enter another's home in the named cases: this is left to the person's choice. Therefore, this is one of the cases that, lacking a general clause for crimes of omission, would plainly not fall within the scope of criminal law.

any other child they come to know of, in case the children in question are without family support, show signs of neglect or of lack of care, are otherwise subject to ill-treatment, sexual or economic exploitation, are being forced to beg or take part in criminal activities, appear to be fleeing or absent from the family home, or if they are being deprived of education without reason.<sup>44</sup>

#### **3.2.4. Withholding Assistance in the Palestinian Labour Law.**

The Palestinian Labour Law No. 7 of 2000 stipulates – at Article 117/1 – that an employer must provide first aid to an injured worker and transfer him/her to the nearest treatment centre. Any person who withholds such assistance is punished with a fine, as set out in Article 136 of the same law (Mohamed, 2017, p. 99).

#### **3.2.5. Withholding Court Witness.**

Witnesses play a pivotal role in the different stages of criminal proceedings, and proof by testimony is considered to be the most important type of evidence in criminal procedure (Mohammed, 2011, p. 24).

To safeguard this principle, the Palestinian legal system imposes an obligation upon witnesses to testify. To withhold one's testimony amounts to omission of a service to the administration of justice and carries with it the seed of withholding assistance to persons in a state of necessity, especially if one's witness would actually help them receive justice. For this reason, the Palestinian Code of Criminal Procedure sets out a crime of withholding court witness both at the stage of preliminary investigations (Article 88) and at the trial stage (Article 233).

### **4. Civil liability for omission**

While criminal offences will always activate civil liability, not all instances of civil liability will amount to a crime. In those legal systems that adopt the French general clause model, injured persons will be able to claim damages from anyone guilty of omitting assistance under the general clause on criminal omission. Instead, those systems that follow the English model will directly attach civil liability only to those cases explicitly contemplated in criminal legislation. However, there might foreseeably arise cases of non-criminally relevant omissions that give rise to harm. For these, it will be necessary to examine – in order to ascertain the legitimacy of a civil claim for damages – the extent to which the withholding conduct of the defendant constitutes a deviation from the conduct of an average bystander, in application of the customary test for civil liability claims.

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<sup>44</sup> On this topic, see Al-Jabri (2014, pp. 92 ff.).

Faced with omissions, neither the French Civil Code (*'Code civil'*) nor the Palestinian Civil Law No. 4 of 2012 explicitly contemplate a tort of withholding assistance. Instead, both introduce only a general clause for civil liability to provide compensation. The *Code civil* does so at Article 1382, which states that 'any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.'<sup>45</sup> The Palestinian Civil Law No. 4 of 2012 contemplates liability for harmful acts at Article 179, which reads as follows: 'Anyone who, through a harmful act, has caused damage to others shall be liable for compensation.'

The absence of an explicit mention of omission leaves the question open as to whether the mere withholding of assistance would activate civil liability, or whether the latter would only come into play in the case of positive conduct.

Amongst all Arab legislations contemplated in this article, the greatest clarity on the matter is found in the Sudanese legal system, which deals explicitly with the question of withholding assistance in connection with civil liability. Specifically, Article 140 of the Sudanese Civil Transactions Act of 1984 states that 'It is considered a harmful act, which is subject to liability, to refrain from providing help to others to protect them from suffering an injury to their physical health, their honour and their property, provided one is able to provide such help without risk'.

This text makes it clear that the Sudanese legal system acknowledges two types of conduct for the purpose of civil liability: the first being positive conduct and the second – pursuant to Article 140 of the Civil Transactions Act – the withholding of assistance (negative conduct), whenever it causes damage unto others. Hence, refraining from the duty to assist others, who might be in danger of suffering an injury to their physical health, honour or property, will oblige the person who withheld assistance to indemnify the victim(s), as long as he/she would not have exposed him-/herself to danger by stepping in.

The approach embodied by the Sudanese legal system has its roots in Islamic jurisprudence, which recognises that harm might be caused either by a positive conduct, such as burning, dumping, or destruction of property, or by a negative one, such as refraining from providing food to a person in urgent need of it, or to a prisoner, until he/she dies (al-Zuhaili, 2008, p. 667).

Much can be said in favour of this position, which fosters social solidarity among individuals and therefore embodies a humanitarian concern. Conversely, the lack of one such provision would give rise to manifestly unreasonable outcomes, such as letting go free of liability a person who comes across one drowning at sea and does not rescue him/her despite being able to do so without personal risk. Yet another example of manifest incoherence would be that of someone who encounters an

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<sup>45</sup> The English-language translation of the *Code civil* used in this article is that by G. Rouhette and A. Rouhette-Berton, taken from the Legifrance website: [https://www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code\\_22.pdf](https://www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code_22.pdf)

ill person in need of treatment and refuses to help, despite his/her ability to do so without incurring any danger. Finally, let us consider the case of one being unaccountable for withholding help in extinguishing a fire that attacks a neighbour's house, despite being in a position to help.

Jurists in Arabic-speaking doctrine have avoided developing a comprehensive definition of omission; they have veered instead on a casuistic approach that singles out individual instances of inaction and seeks to devise situation-specific standards to ascertain whether one failing to act in that particular situation ought to be held accountable (Salim, 2003, p. 31). However, some have attempted to provide a comprehensive definition of omission as follows:

A person refraining from undertaking legally-mandated work that he/she is required to perform, either by virtue of legislation or by agreement or to avoid violation of habitual conduct that is in accordance with custom, with the principles of Islamic law and with the principles of justice, provided such abstention can be proved in court. (Salim, 2003, p. 53)

It is immediately worthy of notice that this definition only contemplates one of two possible types of omission relevant to civil liability, which are examined in the next sub-section.

#### **4.1 Possible types of omission in civil liability**

Arabic-speaking doctrine traditionally makes a distinction between two types of omission (Zaki, 1978, pp. 489 ff.; Mansour, 2001, pp. 302-4). One form is easily identifiable as refraining from positive conduct mandated by the law, examples of which could be: a driver not taking steps to slow his/her car down in a traffic jam; a railway company's failure to install appropriate protective equipment to safeguard people; an employer's inaction in putting into place precautionary protocols to protect third parties; a property owner's non-undertaking of maintenance on his/her property; a bank's omission of controls over the signature of a check, resulting in wrongful payment (Al-Din Al-Dinasuri & Al-Shawarbi, 1988, pp. 68-9). All such instances of omission activate liability upon the party guilty of omission, whenever the omission has injured another, on grounds of an easily identifiable withholding demeanour vis-à-vis harm-limiting conduct that would have been imposed by the law (al-Auji, 1996, p. 250). For instance, the driver's withholding of steps to slow his/her car down can be regarded as a form of avoidance, in this case of precautionary measures needed when driving a vehicle. The same reasoning applies to every other case in which an omission stands out as the avoidance of a clearly identifiable act. This form presupposes a legal obligation to comply with a given (harm-limiting) standard of conduct, so that if a person refrains from doing so, he/she will be considered at fault. Moreover, the source of this obligation may also be found in a contractual agreement, or in the duties imposed by the defendant's profession.

In this last respect, for example, the harmful withholding of important details concerning a person's involvement in a particular event, on which a journalist is producing a report, will constitute an omission, in the face of the professional obligation for journalists to provide reports that do not omit available facts (El-Din Al-Ahwani, 1997-98, p. 109).<sup>46</sup>

There is widespread consensus that this withholding of harm-limiting conduct mandated by law, contract or professional standards will always fall within the scope of civil liability. Whenever an obligation exists for a person to perform certain identifiable steps – whether the obligation have its source in law, contract, or professional standards – and he/she fails to take those steps, then he/she will have to face a claim for compensation by the injured party.<sup>47</sup> Jurisprudential applications of such principle include: the liability of a property owner vis-à-vis an injured pedestrian, for failure to place grit on an ice-covered sidewalk in the presence of a municipal notice mandating this;<sup>48</sup> the liability of an employer for failure to fence a workshop, so as to prevent children's entry and play in it;<sup>49</sup> the liability of a property owner who failed to undertake repairs to a property at risk of collapse.<sup>50</sup>

*Simple omission* refers instead to inaction that is not linked to an identifiable positive conduct, the absence of which could automatically demonstrate withholding behaviour (El-Din Al-Ahwani, 1997-98, p. 108). Simple omissions involve inertia in the face of a train of events in which the defendant has no scripted 'role', such as a doctor's failure to rescue someone injured in an accident (the doctor here lets the person's injury, which he/she did not cause, follow its worsening course), a subordinate's failure to inform his/her principal or the public authorities of an attempt to murder the principal, a person's inertia to save a child, whose foot slipped into the water. The jurisprudence in Arab legal systems has held that these cases do not, as a general rule, activate the liability of the defendant due to the lack of a demonstrable causal relationship between withholding conduct and harm (Zaki, 1978, p. 491; Al-Din Al-Dinasuri & Al-Shawarbi, 1988, p. 70), since omission here takes the form of simple inertia (El-Din Al-Ahwani, 1997-98, p. 110). Moreover, such cases directly appeal to the principle of individual freedom to choose whether or not to perform an action, when the law does not stipulate that it ought to be done or refrained from (Abu Srour, 2006, p. 48).

<sup>46</sup> On the topic of omission in connection to reporting duties by journalists and media organisations, with specific reference to the law of the uae, see Jadalhaq & Alqodsi (2018).

<sup>47</sup> The French *Cour de Cassation* aptly describes this form of omission as: 'Omission that activates the liability of the defendant when the latter is obliged to complete an action he/she has refrained from, whether the source of the duty be in the law or in an agreement or in the requirements of a profession' Cass Civ(1), 27 February 1951, D 1951, 329 note Desbois. See also Shaheen (2009, p. 1349).

<sup>48</sup> Cass Civ(1), 18 April 2000, Bull Civ, I, 117, p. 78, taken from <https://juricaf.org/arret/FRANCE-COURDECASSATI-ON-20000418-9815770>. See also Shaheen (2009, p. 1350).

<sup>49</sup> Cass Civ(2), 6 January 2000, Bull Civ, II, 4, p. 3, taken from <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=URITEXT000007041487>. See also Shaheen (2009, p. 1350).

<sup>50</sup> Cass Civ (1), 28 November 2007, Juris Data 041641, taken from <https://juricaf.org/arret/FRANCE-COURDECASSATI-ON-20071128-0513153>. See also Shaheen (2009, p. 1350).

However, another opinion holds that simple omission requires a distinction to be made, based on whether there was an identifiable intent to harm the third party: if such an intention exists, the defendant would be deemed liable to the injured party, provided the other material elements of civil liability were established. If no such intention to harm can be demonstrated, e.g. when the omission is the outcome of simple inertia or timidity, then the defendant would not incur any civil liability. In applying this criterion, a court would resort to an 'average bystander' test, comparing the actual conduct of the defendant to the behaviour of the ordinary person in the same circumstances. Specifically, if an average bystander would not have remained inert, even if his/her intervention was not mandated by law but purely as a matter of courtesy or ethics, then the defendant would be held liable. On this view, a driver failing to stop at the scene of an accident to transport an injured person has been considered responsible in tort. Instead, a driver who fails to stop to help another motorist to repair his vehicle would not be found liable for damage suffered by the motorist (Zaki, 1978, pp. 391-4).

Even outside of Arab jurisdictions, the French *Cour de Cassation* has refused to hand down civil liability for this type of omission, as evidenced from such pronouncements as the refusal to hold liable two persons who witnessed a third setting fire to a haystack, without trying to prevent the latter from doing so.<sup>51</sup>

Arab jurisprudence will generally restrict civil liability for simple omission to three cases: (i) refraining from rescuing or relieving a person in danger (Zaki, 1978, p. 495); (ii) withholding treatment required by a sick or injured person;<sup>52</sup> (iii) withholding of information that could help prevent a disaster. These cases will result in liability for inertia, as long as there is an identifiable intention to harm (implicit in the deviation from the behaviour that an average bystander would adopt in the same circumstances) that can be imputed to the defendant, and that his/her intervention could have taken place without endangering him-/herself personally.

Based on the foregoing summary, it is possible to attempt a restatement of the requirements of civil liability for withholding conduct in Arab jurisdictions. To begin with, outside of the first type of omission, in which withholding demeanour emerges automatically in contrast to an explicit obligation to act, omission is otherwise to be sanctioned only in certain circumstances, as specified by the jurisprudence, such as (i) refraining from rescuing or relieving a person in danger; (ii) withholding treatment required by a sick or injured person; (iii) withholding of information that could help prevent a disaster. Additionally, intent to harm the third party ought to be implicit in the withholding demeanour, and it would not obtain whenever others

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<sup>51</sup> Cass Civ(2), 19 April 1985, GP 1985, panor, 399. See also Shaheen (2009, p. 1350).

<sup>52</sup> The view in Arab jurisprudence is that the doctor would not be obliged to lend assistance to every ill person, as long as no law or contract obliged him/her to do so, since stating otherwise would amount to an intolerable burden (Hanna, 1989, p. 229). Another possible view could be that the doctor would always be obliged to intervene because of the humanitarian duty towards society imposed by the requirements of the medical profession, as discussed by Savatier (1964, p. 401).

might also have refrained from action, such as for lack of motivation to intervene in the affairs of others or because of timidity.<sup>53</sup> To make sure that intent to harm is evident in the circumstances, an objective ‘average bystander’ test ought to be followed: if an average bystander would not have withheld intervention in the same circumstances, then the defendant would be responsible in civil liability for any harm suffered by a third party. At the same time, the defendant could only be liable if he/she would not have exposed him-/herself to danger by acting, since it would be unreasonable to require a person to take action to assist others, while endangering him-/herself. Finally, omission only obtains in the face of a risk of injury to another’s bodily integrity, honour or property.

On the back of these observations, and based on the jurisprudence of Arab jurisdictions, a possible definition of (simple) omission for purposes of civil liability could be the following:

Failure to provide assistance to a person in danger, refusal to treat a sick person or patient – as far as medical professionals are concerned – or failure to provide information that would prevent a disaster. Such instances of withholding would entail liability towards others – who suffered damage in their physical health, honour, or property – provided there was an identifiable intent to harm on the part of the defendant so that he/she ought to intervene, as an average person would, to prevent damage to others without exposing him-/herself to danger.<sup>54</sup>

## 5. Conclusion

This article has examined the treatment of omission of assistance in the legal systems of several Arab jurisdictions and, from there, it has expanded to an in-depth examination of two main models for the criminalisation of omission. On the one hand, the French model of a general clause such as Article 223/6 of the Code pénal – which has been adopted by such Arab jurisdictions as Algeria, the UAE, Qatar, Lebanon, Bahrain and Morocco – and, on the other, the Palestinian model, based in turn in English criminal law, of sanctioning omission of assistance only in named circumstances. In this case, an overview of the main instances of criminalisation of omission in the Palestinian Criminal Code 1936 and complementary criminal legislation has been undertaken.

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<sup>53</sup> Lacking such an identifiable intention to cause harm, the defendant would go free from liability, as in the case of a doctor withholding care towards a person injured in an accident, when an average bystander in his/her professional capacity would also have refrained from intervention.

<sup>54</sup> Criminal liability always activates civil liability. Therefore, if a person were guilty of a criminal omission, that same person will also be considered liable in tort to the injured person and will need to pay compensation (Obaid, 1985, p. 12). However, civil liability for omission could also arise without triggering criminal liability, since criminal convictions are subject to the principle of *nullum crimen sine lege*. Therefore, if [the person withholding action] is responsible in civil liability, and this is because the judge on civil matters has great freedom to rule on civil responsibility on the basis of the multiple sources on which it is based, ... the civil liability of the person withholding action will not necessarily entail criminal liability’ (Salim, 2003, p. 74).

The French model takes the question of intervening in the life of endangered others outside of the realm of ethics – prioritising human life and bodily integrity over individual freedom to act or not act – more than the Palestinian/English model, which still leaves a significant number of cases in the realm of ethics.

In connection to the use of a general clause, a number of interpretive points have been clarified. First of all, when a person commits an active offence that places the victim in danger, a criminal omission of assistance could still obtain by scrutinising the withholding features of the defendant's demeanour against the civil liability duty to mitigate harm inflicted upon others. This would help separate – in point of fact – the positive offence from the withholding of containment measures, which could feed into a crime of omission. In such a case, the defendant would have to respond of two separate offenses, in the presence of conduct fulfilling multiple charges, so that the criminal omission could not simply be subsumed in the active offence. In addition to that, a criminal omission requires a sudden and unpredictable risk, so that long-term mistreatment of children would not fulfil an omission of assistance, but fall under the purview of crimes dealing with the ongoing withholding of care towards children. Finally, a criminal omission only obtains as long as the judge holds that assistance would indeed have been possible taking into consideration the circumstances, any special skills possessed by the defendant, and his/her professional specialisation.

It is hoped that the considerations presented here lend credit to the policy of a general clause for criminalising omission, showing its viability and internal coherence. On these grounds, we suggest it would be viable for the Palestinian legal system to shift to such a model, on grounds of promoting broader social solidarity, so as to move beyond its current approach of sanctioning omission only in named circumstances. One step in this direction could be the amendment of Article 75 of the Palestinian Traffic Law, so as to extend the scope of the obligation to assist at the scene of an accident beyond drivers of passing vehicles, so as to include all persons passing the scene.

When it comes to civil liability for omission, instead, there usually lack comparable general clauses on withholding conduct. The only exception to this trend is the Sudanese Civil Transactions Law, which enshrines in legislation a principle derived from Islamic jurisprudence. It has been observed how, along with omissions consisting in avoidance of positive conduct mandated by legislative provisions, contract or professional customs, the jurisprudence of many Arab countries also acknowledges civil liability for omissions in which there is less of a clearly identified 'role' or script that the defendant ought to have performed (simple omissions). In such cases, the jurisprudence has allowed civil liability, albeit restricting it through a number of safeguards.



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