

## The Scope Compatibility between International Law and Islamic vision for Preserving the Environment

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### ملخص

هذه الدراسة في بعض المعايير البيئية المعترف بها، والمتفق على مضمونها، في القانون الدولي العام كقواعد عامة يمكن تطبيقها من قبل الدول الأطراف في الاتفاقيات المنظمة لها، ثم البحث في مدى توافق تلك المبادئ مع الشريعة الإسلامية. وتتنبق الحاجة للبحث في هذا الموضوع من أن وجود مثل تلك المعايير، وإن بدا للوهلة الأولى صناعة ليبرالية، إنما له جذور في الفقه الإسلامي إلى الحد الذي يمكن القول معه أن للفقه الإسلامي بُعد عالمي يمكن الاستفادة منه مباشرة، في تطبيقات معينة لحماية البيئة، في العالم الإسلامي وبقيّة جموع العالم على حد سواء. ومناطق هذا النتاج هو أنه ليس هناك عوائق ذات مرجعية دينية أو عقيدة في الإسلام لتحول دون قبول المبادئ الدولية المتفق عليها، أو الأعراف الدولية، الخاصة بحماية البيئة.

### Abstract

This study aims to discussing the validity of international law norms that are known to international law scholars within the Islamic law. The vitality of a comprehensive study in the topic stems from the need to signal the readiness of the Middle Eastern countries to absorb these international norms. Specifically, the question whether there are any religious or cultural impediments to the implementation of these international norms is ought to be contemplated. The hypothesis is that these norms are in fact part of the Islamic legal tradition, and therefore, religion and the law must be seen as complimentary mechanisms for protecting the environment.

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#### Introduction:

Historically, there has been a “deep and abiding interaction between international law and religion.”<sup>(1)</sup> Therefore, religious and cultural input can in fact play an important role in the implementation of international law rules. Most obvious in this connection are the theological elements of natural law<sup>(2)</sup>. At present, religious undertones are still evident within international law. For example, the Declaration of Human Rights is believed to have a parentage

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in modern religion<sup>(7)</sup>. Likewise, James Nafziger has asserted that: "International environmental law is rooted in basic Judeo-Christian values, as is the concept of a 'common heritage of mankind' which has at times influenced international environmental law...."<sup>(8)</sup> Religious influence, although much less significant in modern Western settings, remains a force through the power of both religious institutions and religiously motivated people who continue to influence both international politics and international law. For example, the 1994 International Conference on population and Development was careful to point out that its Action Plan was to be implemented "with full respect for the various religious values..." of the countries at the Conference<sup>(9)</sup>. However, it should be noted that the religious influence upon domestic law is more evident than it is on international law. Indeed, the politicisation of theology is not an uncommon phenomenon. In these situations there may be little separation between politics (and subsequently law) and religion<sup>(10)</sup>. This can be seen with some Islamic societies<sup>(11)</sup> and even some Western societies such as the United States<sup>(12)</sup>. In these settings it can be suggested that religious ideas are still an active part of domestic cultural life, and also continue to exercise an influence in international law.

The Middle East, as a region, constitutes one important part of the Islamic countries that is correspondingly susceptible to the effects of any environmental degradation. This region is distinctive in its temperament in that it includes various states with many specific similarities such as a common language, culture and religion. These states are, in general, facing common environmental problems such as marine pollution by oil, scarcity of water, deforestation, and wars leading to intentional

destruction of the environment. Yet, in common with many other countries of the world, many Middle Eastern and Islamic countries do not seem to have realised the importance emphasising sustainability within their programmes of economic development. Various factors can be presented for this laxity which are all too commonly seen in regions of similar disposition. In turn, this poor appreciation of environmental matters has been reflected in the scarcity of procedures for the protection of the environment in the region as a whole.

The Muslim world in general, and the Middle East countries in particular, are also considered homes to nations which have undertaken broad development programs characterised by extensive urban growth and a rapid modernisation of industry and agriculture. Without careful incorporation of environmental considerations, all of this development will hasten the degradation of the areas' scarce natural resources and impact adversely on the very growth and quality of life these states seek to promote. Yet, while principles of sustainable development and co-operation have become familiar concepts in developed countries, they are new and even remarkable in the Middle East. Issues of domestic or regional environmental protection, while gaining popular support, have never been specifically on the agenda of any Middle Eastern nation. Most governments, preoccupied by other immediate and pressing priorities, have dismissed environmental concerns as having little or no political relevance.

This situation, however, is changing. In 1992, the United Nations Conference on Environment and Development emphasised the global need for political and legal co-operation on environmental issues. This brought about increased international attention focused on environment and natural resources. One

important consequence of this Conference for the Middle East was that countries in this Islamic region, not previously involved with environmental protection were now embracing the subject. For example, it is becoming an accepted part of Middle Eastern political dialogue that no single country alone should have to deal with the threat of oil spills in the Gulf of Aqaba or water pollution in the Jordan River. Indeed, this change was highlighted on October 30, 1991, when many countries – including Egypt, Jordan, Lebanon, Saudi Arabia, Syria, and the Authority of Palestine – met with the occupying so-called state of Israel in Madrid in order to establish the framework of the Middle East peace negotiations. In the invitation to the parties it was stated clearly that the peace negotiations would be aimed at building confidence between the parties by concentrating on common issues, in particular: water, arms control, refugees, economic development, and the environment. As a result of this and other such negotiations, several positive developments on the region's environmental agenda have taken place based on aspects drawn from the international ideals for protecting the environment. Thus, the first vital question which this study poses is: To what extent have environmental problems been dealt with in the Middle East region in the light of the progress made recently in international environmental law?

To answer this question in full would normally require a detailed analysis of the extent of environmental protection afforded within each legal system of each Middle Eastern country, and additionally a description of all their national laws that contribute, directly or indirectly, to the protection of their environment. However, the scope of such a study cannot be contained within a single study such as this. Consequently, this study

focuses only on just one philosophical issue that relates the problems at hand, i.e. to whether there is a solid ground for the Islamic countries of the Middle East to absorb the international norms for preserving the environment from an ideological point of view.

It is therefore significant that this study presents the Islamic perspective on environmental protection. However, before reaching any conclusion as to whether international environmental principles have in reality been implemented via the application of the Islamic rules, the question as to whether those international principles are in any way accommodated in the Islamic rules will be addressed. Subsequently, there follows a discussion as to the presence of any barriers to environmental protection within Islamic teachings. One significant result of this discussion is to consider whether international environmental laws are universal in their application or whether they should be reformed to reflect the beliefs which prevail in Muslim countries.

## **Chapter One**

### **The International Legal Framework for Preserving the Environment**

Although still in early stages of construction, legal environmental protection has strong roots and encroaches upon social, economic and political issues. Particularly in the *social* context, there is a widespread belief, at a national and international level, that protecting the environment is considered to be one of the basic human rights<sup>(4)</sup>. Worldwide cultures and religions call for fair environmental protection for everyone. This is why some authors call environmental law 'the law of consolidation'<sup>(1)</sup>. This became more obvious at the time of the Stockholm Conference where it was agreed that progress on environmental protection is linked, especially for developing states, with

cause of environmental destruction is poverty, which is linked to issues such as population growth, international debt, trade and economic growth<sup>(17)</sup>. Other factors causing environmental destruction should be adequately handled via international law other than those of the environmental law principles. For example, the international law of armed conflicts is one important mean of administering the intentional destruction of the environment during warfare.

The question of the relationship between the protection of the environment and the need for economic development is an important factor underpinning the evolution of environmental law. In order to industrialize, states have to face the problem that to do so in an environmentally safe way is initially very expensive and the resources that can be devoted to this are extremely limited.

Yet, the different priorities of southern hemisphere less-developed countries and their demands for 'special consideration' is one of the most apparent forces, requiring some modifications to be made in applying the above rules and principles, despite the evident consensus which exists on many of the main issues. Developing countries for instance are now keener that the conservation measures, that they are being asked to undertake locally, are paid for by developed nations<sup>(14)</sup>.

There is no doubt that incentives to encourage developing countries' participation in global environmental treaties are justified as a matter of fundamental international equity. To give just one example, in 1989 it was surveyed that North America, Europe and Japan alone have accounted for more than 80% of the total consumption of substances subject to control under the Montreal Protocol<sup>(12)</sup>. Hence, it is not surprising that developing countries should insist on some sort of compensation in exchange for supporting the creation of international

regulatory restrictions.

One possible innovation for reducing the North-South economic dilemma regarding the environment, is to link the economic underdevelopment and protection of the environment via the 'debt for nature swaps' arrangements, whereby debts owed abroad may be converted into an obligation upon the debtor state to spend the amount of the debt on local environmental projects<sup>(17)</sup>.

### 1.1 International Law Principles Applicable to the Environmental Protection:

In this section, the main rules of international law concerning the protection of the environment to be considered in brief. The question whether a distinct regime has evolved in the realm of customary law binding upon all states will require special attention. The extent to which these rules are universally applicable to all states, or whether in fact special arrangements were made for the developing countries, will be deciphered. The importance of clarifying the application of these laws will be considered subsequently, with regard to the scope of their binding quality upon developing states, especially the Muslim world.

Although it is true, as will be made clear, that most of the environmental law rules are not yet binding upon states, or at least have not been fully realised by the Middle East countries, the reason for identifying these rules in this distinct section is twofold: first, to clarify the extent of compliance or non-compliance to these rules by the Muslim world as described above, and secondly, to allow the drawing of specific recommendations to the countries of this region in respect of their environmental protection. The suggestion here is that a brief analysis of the various rules and principles of international environmental law would be a basic ingredient for any enquiry

made into the environmental protection on an international, regional or even national levels.

International law, 'by which here is meant 'public' international law as opposed to 'private' or 'conflict of laws'<sup>(18)</sup>, has been described as "the system governing the relations between states covering every aspect of inter-state relations such as jurisdiction, claims to territory, use of the sea and state responsibility to name but a few"<sup>(19)</sup>, and an "indispensable body of rules regulating ... the relation between states without which it could be virtually impossible for them to have steady and frequent intercourse"<sup>(20)</sup>.

Environmental problems by nature are international in their scope and raise more than purely national issues. Pollution generated from within a particular state often has a serious impact upon other countries. Consequently, a sharp escalation in international concern over the state of the global environment has arisen in the last few decades. This has inevitably given rise to a parallel growth in the development of a body of international legal rules designed to maintain essential ecological processes and life-support systems, preserve genetic diversity and ensure the sustainable utilisation of species and ecosystems<sup>(21)</sup>.

It could be argued that international environmental law seriously began to manifest in the second half of the 1960s. Notable at this time was the earliest proclamation of general principles concerning water conservation<sup>(22)</sup> and air pollution control<sup>(23)</sup> in Europe, and the decision of the UN General Assembly to organise a worldwide conference on the protection of human environment<sup>(24)</sup>. The result was the well-known 1972 Stockholm Conference<sup>(25)</sup>, which can be perceived as the bedrock of subsequent international environmental legal principles. Since then there has been a plethora



of developments and several conventions have emerged which take on a universal scope, such as the protection of wildlife<sup>(r<sup>e</sup>)</sup> and controlling ocean pollution<sup>(r<sup>v</sup>)</sup>.

Thus, it seems that the source of international environmental law is, in the main, found in the form of treaties, and there also exists a substantial corpus of customary international legal principles<sup>(r<sup>v</sup>)</sup> which interact in various ways with norms derived from treaty provisions, endorsing, reflecting or supplementing them and in some cases generalising their application. These two sources, in addition to other sources of international law, derive their authority from Article 38(1) of the Statute of the International Court of Justice<sup>(r<sup>Λ</sup>)</sup>. It should be noted that, in particular, the importance of customary international law is that it “results from a general and consistent practice of states [and is] followed by them from a sense of legal obligation”<sup>(r<sup>Λ</sup>)</sup>, and in this sense is binding upon *all* states whether or not they have given a formal consent, unless, as is widely accepted, a state persistently objects to the rule while it is being formed<sup>(r<sup>Λ</sup>)</sup>.

However, the suggestion here, as will be made clear in the following sections, is that none of the above sources are fully adequate as a basis for international environmental law. However, it will also be made clear that international treaties are more important than customary international law for the development of international environmental law<sup>(r<sup>v</sup>)</sup>. Treaties work as a sign of existing customary rules and give some practical content to them. In other words, states’ obligations will be clarified once developed through treaty provisions. The 1972 London Dumping Convention is one example “where the convention provisions have in effect become internationally agreed standards for the conduct of states in preventing marine

pollution”<sup>(r<sup>v</sup>)</sup>. Thus, treaty based law is likely to be the main source for future developments in this area<sup>(r<sup>v</sup>)</sup>.

It should be noted here that, to a limited extent, there have been some customary rules developed by international and regional instruments concerned with environmental protection. For instance, customary international rules have been reflected in the work of the International Law Commission (ILC)<sup>(r<sup>ε</sup>)</sup>, the International Law Association (ILA)<sup>(r<sup>ε</sup>)</sup>, the World Commission on Environment and Development (WCED)<sup>(r<sup>v</sup>)</sup>, and in UNCED’s 1992 Rio Declaration on Environment and Development. In this respect, one should bear in mind that it is this interplay between the treaty law and customary obligations that has proved to be the central feature of the advancement of a more sophisticated system of international environmental regulation<sup>(r<sup>v</sup>)</sup>. In one recent Judgement by the ICJ<sup>(r<sup>Λ</sup>)</sup>, the International Court of Justice held that newly developed norms of environmental law were relevant for the implementation of a 1977 treaty between the disputing parties, and that the parties could by agreement incorporate them through the application of the treaty articles.

In general terms, however, it is possible to focus on a few principles that have broad, if not universal, support and are frequently endorsed in practice. Amongst these principles, as will be made evident below, there is at this time only one customary law principle which could be said to have the capability of establishing the basis of an international cause of action; that is, the capability to establish an international customary legal obligation, the violation of which would give another state or states access to a legal remedy<sup>(r<sup>Λ</sup>)</sup>. This principle is known as the principle of good neighbourliness<sup>(ε<sup>Λ</sup>)</sup> or Principle 21 as it was

originally drawn up<sup>(٤١)</sup>. Nonetheless, pursuing this method and reliance on the state responsibility rules has proved to be an inadequate framework for dealing with environmental issues for a variety of reasons, as discussed below. Consequently, it is now apparent that states are giving more weight to asserting the necessity of an attitude of co-operation between the polluting and the polluted states rather than merely relying on individual claims for resolving environmental problems.

### 1.1.1 The Duty to Control and Prevent Sources of Environmental Harm

The main principle in public international law that has traditionally undermined the development of environmental law is the principle of state sovereignty rights over its natural resources<sup>(٤٢)</sup>, and that states have the right to carry on their activities and to use their resources for their own benefit<sup>(٤٣)</sup>. Indeed, under international law, states are sovereign and have equal rights and duties as members of the international community, notwithstanding differences of an economic, social, political or other nature<sup>(٤٤)</sup>. This means, in principle, that they alone have the competence to develop policies and laws in respect of their natural resources and the environment of their territory<sup>(٤٥)</sup>, which would comprise the land, internal waters<sup>(٤٦)</sup>, territorial sea<sup>(٤٧)</sup>, and airspace above them<sup>(٤٨)</sup>.

There is, however, another rule in customary international law that requires states to act with reasonable regard for the rights of others and to co-operate in the equitable and reasonable utilisation of shared resources, such as international rivers, and to prevent serious transboundary injuries to their neighbours<sup>(٤٩)</sup>. In this regard, Kiss and Shelton refer to this principle as the 'fundamental principle' of

international law concerning transfrontier pollution<sup>(٥٠)</sup>.

This principle is stated in Principle 21 of the Stockholm Declaration, providing a statement regarding the relationship between the permanent sovereignty over a state's natural resources and its responsibility for the environment. Principle 21 provides that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or the areas beyond the limits of national jurisdiction"<sup>(٥١)</sup>.

Principle 21 has its historical roots in the Roman maxim *sic utero tuo ut alienum non laedas*<sup>(٥٢)</sup>. This maxim was later expanded in the well known *Trail Smelter Arbitration*<sup>(٥٣)</sup>, which gave credit to the prevention of harm principle. This case was concerned with the issue of fumes from a Canadian smelter that were adversely affecting property across the border in the US State of Washington. The Tribunal stated that: "Under the Principles of international law, ... no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and injury is established by clear and convincing evidence"<sup>(٥٤)</sup>.

While the *Trail Smelter* aided the development of international environmental law, it is "actually a rather modest contribution to the jurisprudence"<sup>(٥٥)</sup> because of its limited application. First of all, the case is unusual since Canada admitted its responsibility, the two states having agreed to the use of a

tribunal to determine the question of damage and future operation of the smelter<sup>(٤٦)</sup>. Hence, the tribunal was only concerned with affording compensation to the USA as a result of a property damage caused by the Smelter and placed “no value on wider environmental interests such as wildlife, aesthetic considerations, or the unity of ecosystem”<sup>(٤٧)</sup>. Also, as set out in the above quotation, the incident had to be of ‘serious consequences’, and the injury had to be ‘established by a clear and convincing evidence’. Most of all, under the *Trail Smelter*, “the victim has to wait for the harm to be done before he can take action”<sup>(٤٨)</sup>. It might be argued that these represent shortcomings in the context of environmental protection since they have the effect of burdening the victim states with the requirement of proving that a ‘serious’ damage has actually taken place rather than taking precautionary measures.

However, while the shortcomings of *Trail Smelter* can be criticised for its limited scope of application, it did provide a precedent for international environmental law through the use of an international tribunal to deal with harm from transboundary pollution<sup>(٤٩)</sup>. It has highlighted the fact that as scientific knowledge advances as to the nature of ‘damage’ that pollution wreaks, and as technology advances to permit greater industrial production with a lesser amount of pollution, the decision of the *Trail Smelter* becomes stronger<sup>(٥٠)</sup>. Still, such knowledge cannot resolve the problem of unwillingness to pay for higher standards of environmental protection, and certainly, without the acceptance of such responsibility by industrialised states, the developing world will similarly disregard such a duty<sup>(٥١)</sup>.

There also exists other case law related to and supportive of the principle of environmental harm prevention. In the *Corfu Channel case*,

the International Court of Justice held Albania responsible for damage caused to British ships in its territorial waters, because Albania failed to warn the ships of the presence of mines<sup>(٥٢)</sup>. Specifically, the Court’s emphasis was that it is “every state’s obligation not to allow *knowingly* its territory to be used for acts contrary to the rights of other states”<sup>(٥٣)</sup>, thus establishing a “... *prima facie* liability for the harmful effects of conditions created even by trespassers of which the territorial sovereign has knowledge or means of knowledge”<sup>(٥٤)</sup>. However, while the ‘right of other states’ could be identified in this context as the right of innocent passage, the specific rights are not as clear where the harm may be to common resources<sup>(٥٥)</sup>.

Furthermore, in the *Lac Lanoux Arbitration*<sup>(٥٦)</sup>, Spain claimed that France was illegally diverting waters from reaching Spain, without the consent of the Spanish government. The tribunal held that if France had impaired the waters through pollution, Spain would have had a valid claim. It was pointed out that “while it is admitted there is a principle prohibiting the upper riparian state from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian state, such a principle has no application to the present case, since it was admitted by the Tribunal ... that the French project will not alter the waters of the Carol”<sup>(٥٧)</sup>.

As stated earlier, these cases have led to the development of the ‘fundamental principle’ concerning transfrontier pollution, formulated in Principle 21 of the Stockholm Declaration on the Human Environment, adopted at the 1972 United Nations Conference on the Human Environment<sup>(٥٨)</sup>.

The principle has also been supported by declarations adopted by the General Assembly,



including the Charter of Economic Rights and Duties of states, in which article 30 reiterates the responsibility of states laid down in Principle 21<sup>(vi)</sup>; the 1978 UNEP Draft Principles<sup>(vii)</sup>; and the International Law Commission's focus on prevention in its work on the liability topic<sup>(viii)</sup>. In addition, the 1979 Geneva Convention on Long Range Transboundary Air Pollution (LRTP)<sup>(ix)</sup>, the 1982 UN Convention on the Law of the Sea<sup>(x)</sup>, the Vienna Convention for the Protection of Ozone Layer<sup>(xi)</sup>, the Framework Convention on Climate Change<sup>(xii)</sup> and other agreements also reiterate or otherwise give support to Principle 21<sup>(xiii)</sup>.

It is of note, however, that Principle 21 has been rephrased in Principle 2 of the Rio Declaration on Environment and Development to read: "States have ... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies". The equation here between environmental and 'developmental' policies means that the state's responsibility in the exploitation of their resources is no longer subject solely to its 'environmental policies', but also to its 'developmental policies' as well<sup>(xiv)</sup>. This inclusion, which was criticised by some scholars as a step backwards<sup>(xv)</sup>, was insisted upon by the G-77 group of developing states. This was due to the "perception [of the G-77] that developed country rhetoric was shifting dangerously in the direction of globalizing certain selected environmental resources..."<sup>(xvi)</sup> Naturally, this shows that the issue of development is critical in environmental policies and signals that it should not be taken lightly in lawmaking. Indeed, the issue of development has been articulated in both the ozone layer depletion and climate change regimes, and would certainly help in shaping the expectations of states with regard to future

regulations and the concept of 'sustainable development'.

It could be concluded from the above that a general duty of prevention of harm to the environment exists. Birnie and Boyle point out that recent conventions, discussed above, indicate an international acceptance that states are now required to prevent transboundary harm<sup>(xvii)</sup>. Nonetheless, the enforcement of this duty is not as easy as the theory. Traditionally, the enforcement of such a duty, where an interstate complaint is concerned, takes place *vis-à-vis* the application of the principles of state responsibility, and the employment of the various forms of dispute settlement instrumentation contemplated in article 33 of the UN Charter. But as discussed earlier, the court's main concern in such cases was only to afford reparation or some other remedy as a response to violations of international law, as in the *Trail Smelter* arbitration<sup>(xviii)</sup>. In other cases the court's concern was mainly in the allocation of property rights over resources as in the *Behring Sea Fur Seals* arbitration<sup>(xix)</sup>. Hence, such a system of enforcement is basically bilateral and confrontational. Only 'injured states' are capable of seeking a remedy and compliance with the international legal standard.

Furthermore, any attempt to effectively implement such customary rules was often dependent on negotiations between the states concerned. Such negotiations have, in some cases, been facilitated by more formal institutional arrangements as seen in fisheries commissions or river commissions, such as the International Joint Council established under the 1909 US-Canadian Boundary Waters Treaty<sup>(xx)</sup>. However, rather than favouring preventative or precautionary principles, the emphasis in these commissions was on the maximum utilisation of an exploitable resource shared by two or more states.

Moreover, the above rules seem to be very general and in many respects deficient in terms of the clarity and precision one would ideally expect in a legal regime. Questions regarding the precise meaning and scope of environmental damage, the standard of care applicable to the obligation (strict or fault)<sup>(A4)</sup>, and the consequences of a violation (including appropriate reparation) are yet to be resolved.

In recognition of this point, principle 22 of the 1972 Stockholm Declaration provides that: "States shall *co-operate* to develop further the international law regarding liability and compensation for the victims of pollution ... caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction." Twenty years later, however, by the time of the Rio Earth Summit, it was not possible to detect much progress in that regard. All that had been achieved was the conclusion of principle 13 of the Rio Declaration on Environment and Development<sup>(A5)</sup> that only called for this co-operation to be pursued in 'an expeditious and more determinate manner'.

Consequently, these rules were unable to confront the increasingly complex environmental problems such as climate change, desertification or the loss of rare species and ecosystems. Debate continues as to how to utilise them in particular instances of environmental disruption, both in terms of formulation and application. Nuclear incidents are another example<sup>(A6)</sup>.

In addition to the duty to prevent and control sources of environmental harm, there is now a strong conviction that an in-advance co-operation to mitigate the environmental risks would certainly be of a great benefit for alleviating the environmental risks. Accordingly, a new duty to co-operate in mitigating environmental emergencies evolved in international law and practice. Other principles have also developed with a varying degrees of

influence and committing power such as the precautionary principle, the 'polluter pays' principle, and the principle of equal access and non-discrimination.

These principles, if included in a specific agreement between states, and if completely adhered to, would have the benefit of alleviating complete resource or dependence on Principle 21 for the environmental protection. The following is some analysis into the adequacy of these principles to deal with the environmental problems. Here, it should be born in mind that these principles are best resorted to altogether although each would fit a given situation and is approached differently from the others. In other words, the issue here is not a question of preference of which would be more adequate in a given situation but about the mutuality of these principles to mitigate the environmental degradation. While these principles can not be fully considered as part of the customary law rules, the adherence to them by all the states concerned, including the Middle East countries, by way of including them in a detailed bilateral or multilateral treaty regimes, can prove a step forward in the environmental protection.

### 1.1.2 The Precautionary Principle:

In addition to the above-discussed principle (The Preventative Principle), the Precautionary Principle is yet another known principle in international law, and is a relatively new concept when compared to the preventative principle<sup>(A7)</sup>, and has begun to appear frequently in various declarations and international agreements, attracting the interest of legal scholars in the process<sup>(A8)</sup>. It has been adopted explicitly by the United Nations Environment Program (UNEP) Governing Council<sup>(A9)</sup>, reaffirmed by the North Sea Conference<sup>(A10)</sup>, and referred to in the preamble of the Montreal Protocol<sup>(A11)</sup>. Recently, it has been reflected in

Principle 15 of the Rio Declaration, which provides that: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

This obligation relates to and addresses the highly threatening environmental issues such as ozone depletion and climate change, specifically where scientific certainty is not firmly concluded. Thus, the application of this principle is attached to the sufficient evidence that an activity is likely to cause unacceptable harm to the environment with a consequent requirement that responsible public or private powerholders prevent or terminate the activity<sup>(97)</sup>.

International law also requires the fulfilment of this duty even in the absence of clear scientifically proven environmental harm. Instead, only an evidence of a significant risk will suffice there of<sup>(98)</sup>. In this respect, the greater the risk, the lower the evidentiary burden of proving causal linkage with the transboundary injuries<sup>(99)</sup>. Unlike preventive measures, the precautionary principle is understood to involve some shift in the burden of proof, towards those who would pollute, to demonstrate that pollution is not serious or likely to cause irreversible harm. In other words, it is upon the state that intends to carry out an activity to prove that this activity will not harm the environment and that no neighbouring state will be effected therefrom. This is normally done by way of formulating an environmental impact assessment of the intended project. This assessment is normally made subject to the approval of the states that would potentially be affected if that activity is carried out.

In this regard we can derive an example from the 1990 Ministerial Declaration adopted at the Bergen Conference on Sustainable Development in the ECE Region which

emphasised that: “where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”<sup>(100)</sup>. Also, in the Final Declaration of the Third International Conference on the Protection of the North Sea, the parties committed themselves to apply the precautionary principle by taking “preventative action... even when there is no scientific evidence to prove a causal link between emissions and effects.” This shows that this principle is emerging strongly as a new principle of law backed by a political will amongst states<sup>(101)</sup>. Signatory parties of the North Sea Declaration, for instance, have, to a varying extent, interpreted and incorporated this principle into their respective national legislation<sup>(102)</sup>. In Germany for example, the *Vorsorgeprinzip*, which literally translates ‘precautionary principle’, allows a preventative approach instead of a reactive one to environmental problems<sup>(103)</sup>.

It should be noted, however, that the precautionary principle is not yet a fully accepted principle of international law<sup>(104)</sup>. This is perhaps due to the fact that the ‘precautionary principle’ is a term that engenders certain ambiguity and entails some definitional problems<sup>(105)</sup>. In fact there is no definitive commonly agreed definition. It remains unclear as to the exact extent of the threshold ‘irreversible damage’ as envisaged in the related declarations. Further, where there is a violation and international responsibility is incurred, whether strict liability or fault is required in order to give rise to a legal action necessitates further clarification. Finally, the exact action that is required by states to fulfil this duty is unclear. For instance, whether or not there is a duty of due diligence<sup>(106)</sup> that may require a state to abstain from carrying out an activity that beholds a significant risk

of harm to other states<sup>(1.7)</sup>. In other words, the level of risk, the level of precaution and the economic factors to be considered are not clear<sup>(1.7)</sup>.

### 1.1.3 The Duty to Cooperate in Mitigating Environmental Emergencies:

Since the UN 1972 Stockholm Conference, the international community's general policies, which have been reflected in the subsequent treaty instruments, seems to have shifted from merely requiring states to prevent environmental harm to the observance of a number of procedures before permitting the conduct of activities which may cause such harm. The essence of these policies is based upon a co-operative attitude to avoid further environmental degradation. This duty is known as the duty to cooperate in mitigating transfrontier environmental harm, and is mostly apparent in Principle 24 of the Stockholm Declaration and Principle 27 of the Rio Declaration. Both maintain, in rather general terms, that states *shall* co-operate in good faith in achieving the objectives of the declarations provided especially in the further development of international environmental law. Practically, co-operation in environmental matters has been affirmed in all international environmental agreements whether bilateral and regional applications, or even global instruments<sup>(1.8)</sup>. Thus, the extent to which this duty is accepted as an obligation within international law is not a controversial matter. As Birnie and Boyle put it: "... the basic principle that states must co-operate in avoiding adverse effects on their neighbours through a system of impact assessment, notification, consultation, and negotiation appears generally to be endorsed by the relevant jurisprudence, the declarations of international bodies, and the work of the ILC....[and] some support in state practice"<sup>(1.9)</sup>.

Along with the principle of prevention of harm to the environment, this principle is specifically important in the context of global environmental change. The procedural duties most often mentioned in regard to this obligation include the duty to conduct environmental impact assessment, notify potentially affected states of proposed activities which may entail environmental damage, exchange of information on the effects of such activities, consulting other states where necessary<sup>(1.10)</sup>. In general, these procedural duties are designed to come into play at an early stage before the expected harm is generated. In that sense, they are procedural or instrumental aiming to oblige states to ensure that the "substantive decisions reached take into account anticipated environmental harm and the interests of those states likely to be affected"<sup>(1.11)</sup>.

However, attempts to weigh up these procedural obligations in terms of their strength or their legal significance outside the treaty regime shows that despite the general acceptance of the duty to co-operate, very little explicit attention has been paid to its procedural duties<sup>(1.12)</sup>. For instance, while the general obligation to co-operate is reflected in one recent international tribunal award concerning the dispute between Slovakia and Hungary<sup>(1.13)</sup>, little attention was paid to the procedural rules in as far as the questions of how to comply with these procedural duties and what are the legal consequences of non-compliance. Hence, the degree to which these duties have gone beyond generalities to specifics remains unclear<sup>(1.14)</sup>. Therefore, and in order to give a meaningful value to the general duty to co-operate, these various procedural duties are best included in the environmental treaty regimes between the states concerned.

While the above duties are the general type

of obligations in international environmental law that include few specific duties and which dates back to the 1972 Stockholm Conference and before, one can also speak of few other recent and detailed duties that have emerged in the 1990s. As discussed before, the Stockholm Conference of 1972 is considered to be the starting point from which international institutions launched their facilitation of the prevention of environmental harm and the conservation and sustained development of natural resources and ecosystems. Since that time, the protection of the natural environment has become one of the central objectives of the international legal system as a whole<sup>(111)</sup>. In this sense international institutions, including UNEP, IUCN, and IMO, have played an increasingly important role in bringing about more detailed and specific rules of environmental law<sup>(112)</sup>. This meant that by 1990 there was a discrete area called international environmental law that made preparation for the United Nations Conference for Environment and Development (UNCED)<sup>(113)</sup> more attainable. Besides the previously discussed precautionary principle, this era has produced new concepts such as the sustainable development, the 'polluter-pays' principle, and non-discrimination and equal access.

#### 1.1.4 The Principle of Sustainable Development:

The concept 'sustainable development' has been used extensively since the Report of the World Commission on Environment and Development (WCED) 1987<sup>(114)</sup>, known as the Brundtland Report. This report defines the concept as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"<sup>(115)</sup>, and the concept has since become an elementary part of a range of

intellectual developments<sup>(116)</sup>. It has been supported by a number of decisions of the United Nations and other international organisations<sup>(117)</sup>.

Sustainable development is related to the protection of the environment from an anthropocentric-economic<sup>(118)</sup> perspective. It reflects a commitment to promote development, albeit with a special qualitative nature<sup>(119)</sup>. The right to development asserted in the definition entails objective limitation inasmuch as it can not be asserted at the expense of the community or even at the expense of neighbouring states whose prospects may be jeopardised. This concept, however, poses a substantial definitional problem despite its increasingly frequent affirmation as a cardinal principle of international environmental law. For example, the 1990 Bergen Ministerial Declaration and the Interparliamentary Conference on the Global Environment refer to this term generally and rather abstractly. In general, this concept means living off nature's income rather than wasting its capital<sup>(120)</sup>, and hence could impose a clear encroachment upon state sovereignty since it involves directing states on how to exploit their resources.

For Sands<sup>(121)</sup>, this concept comprises four legal elements as reflected in international agreements. First, the intergenerational equity, i.e., the care for future generations by preserving present natural resources. Second, the sustainable use principle, i.e., a rational use and exploitation of natural resources. Third, the intragenerational equity, i.e., taking account of the less developed states. And fourth, the principle of integration, i.e., considering the environmental impacts in all economic and developmental plans. It is in this sense that Lothar Gundling put his argument that "without equity within the present generation, we will not be able to achieve equity among



generations”<sup>(122)</sup>.

From this outset, it could be deduced that this concept reflects a special priority arrangement and differentiated responsibilities for the developing countries. The needs of the present generation in the Southern Hemisphere are ultimately different from the Western Hemisphere. This is evident in the above definition where development is essentially subjected to meet the *needs* of the present generation. In this respect the WCED has concluded a similar vein in submitting that sustainable development contains “the concept of ‘needs’, in particular the essential needs of the world’s poor, to which the overriding priority should be given”<sup>(123)</sup>. Principle 3 of the Rio Declaration invokes the ‘right to development’ as a means of ‘equitably’ meeting the developmental and environmental needs of *present* and future generations. Similarly, subsequent Conventions to the UNCED have asserted the basis of ‘equity’ to achieve their objectives<sup>(124)</sup>.

The most recent example for the differentiated responsibility accorded to developing states, and a reflection of the 1992 Climate Change Convention requiring an equitable allocation of emission rights, was seen at the Kyoto Conference in Japan where it was concluded that China’s emissions of Carbon Dioxide would be put under no further restrictions as compared to a reduction in emissions by 8% in Europe and 7% in The United States of America.

### 1.1.5 The Polluter-Pays Principle:

This is another newly emerging principle in international environmental law. However it is essentially a principle of economic policy. The first international instrument to command such a principle was the 1974 OECD Council Recommendation on the Implementation of the Polluter-Pays Principle which came to

reaffirm an earlier recommendation<sup>(125)</sup> that the principle constituted a ‘fundamental principle’ for uniform observance among member states<sup>(126)</sup>. Under EC Law, this principle was adopted in the first programme of action on the environment in 1973<sup>(127)</sup>, and afterwards was adopted as a legally binding obligation in the 1986 Single European Act<sup>(128)</sup>. As such it has a legal force which the OECD recommendations lack. Furthermore, this principle can be found in various documents, including the 1990 Convention on Oil Preparedness, Response and Co-operation<sup>(129)</sup>, the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe (CSCE)<sup>(130)</sup>, Principle 16 of the Rio Declaration<sup>(131)</sup>, and a UNEP Governing Council Decision<sup>(132)</sup>.

This principle means that the costs for pollution should be borne by the person responsible for causing the pollution and additionally all consequential costs as a result of measures taken by him. In so doing, “the cost of these measures could be reflected in the costs of goods and services which cause pollution in production or in consumption”<sup>(133)</sup>. Such measures must not be accompanied by subsidies causing significant distortions in international trade and investment. This has been implemented by a number of European States, using a variety of tax measures, charges, and liability provisions of national law<sup>(134)</sup>. In the United States, the polluter pays principle has been adopted in the 1990 US Oil Pollution Act (OPA), stating that liability is unlimited and requiring compensation in full in circumstances involving gross negligence, wilful misconduct and violations of federal regulations<sup>(135)</sup>.

However, within the developing countries, there is less evidence of general support for the adoption of this principle. For them the

principle is understood to encompass financial support that should flow as a result of the international responsibility born to developed countries in view of the distinct pressure they place on the global environment<sup>(133)</sup>.

#### 1.1.6 Equal Access and Non-Discrimination Principle:

These two basic principles are interrelated in considering the role of national law in providing a right to a decent environment. In this sense they may represent one possible approach to resolving transboundary environmental conflicts via individual rights. Again, these principles were created and are available in Western Europe and North America<sup>(134)</sup> but, regionally, have not left that ambit as yet. OECD is the only international organisation to have detailed the content of these principles in detail. As defined by this organisation<sup>(135)</sup>, the principles entail the availability of information and easy access to it by the public, the ability to resource that information and to use it in administrative and judicial procedures, including emergency procedures.

However, while equal access is primarily concerned with making national remedies available to transboundary complaints, non-discrimination goes even further in demanding that states should treat both domestic and transboundary effects of polluting activities on an equal basis. In so doing, non-discrimination requires that polluters causing transfrontier pollution should be subject to legal standards no less severe than would apply to pollution with domestic effects only.

The difficulty with this principle is easy to appreciate. Since transfrontier pollution should not, under this principle, exceed levels that would be considered acceptable within the *exporting state*, the principle can be perceived as entailing a potential bias in favour of polluting

states with lower standards of regulations. A state with higher environmental standards will be forbidden from exporting pollution to a state with lower standards, under whose laws the levels of pollution involved may not be unlawful.

Consequently, the better standard in this respect is to fix the level of pollution to the standards adopted in the *receiving state* not the *exporting state*. This has been followed by some European states, such as in France and Germany, where a failure to take account of the extraterritorial effects of polluting activities may lead to judicial review before their national courts. In general, however, should this not be followed by the rest of the world, the general duty to control sources of environmental harm, with all its criticisms discussed earlier, will come into play.

Meanwhile, this principle should also be considered in the context of transboundary access to civil and administrative proceedings for private individuals as found in the 1974 Nordic Convention for the Protection of the Environment<sup>(136)</sup>. Article 3 of this convention affords individuals full procedural rights before the courts or administrative authorities of any of the parties to the same extent and on the same terms as a legal entity of the state in which the activities are being carried out. Some national laws also grant transboundary claimants an equal access to their civil courts as in France, the Netherlands, and Switzerland, but this does not necessarily mean that it is available throughout Europe or elsewhere<sup>(137)</sup>.

Of course, if this principle emerges as a binding rule, it will mean that more litigation on transboundary environmental disputes will be resolved through normal civil liability schemes, hence avoiding the more problematic rules of state responsibility which will be discussed below. As yet, however, this principle

has not emerged as a customary international law since as we have seen above, neither state practice nor international policy statements arrive at this conclusion.

## 1.2 Mass Destruction of the Environment in International Law:

Intentional destruction in this section refers to destruction that occurs during or as a result of an armed conflict. Because the principal nature of war is to destroy life and property, it is perhaps the most destructive among man's activities that threaten the environment. Consequently, the application of the above-discussed principles of international law of environmental protection (LEP) is rendered highly susceptible to hindrance during warfare, if not wiped out altogether.

However, the international law of armed conflicts (LOAC), in regulating state actions during armed conflicts, has proved to hold some environmentally protective ethics within its system. While LOAC predates LEP and has been developing for many years, it has recently developed aspects with an effect similar to LEP. Specifically, the modern law of armed conflicts sets forth norms and expectations expressly restricting the ways and means of destruction during war by requiring that the aggressors should consider the environmental impact of their activities.

As an example, the environmental protection aspect of both LEP and LOAC in the course of armed conflicts can be analysed through the eyes of the Iraqi scene. The 1991 War waged by the United Nations allied coalition headed by the USA forces against Iraq was an episode that reflected the regulatory reciprocation between the law of environmental protection and the law of armed conflict. In fact however, throughout history, the environment has repeatedly been a victim of military strategy,

mainly designed to cause widespread damage to an enemy or to frustrate advancing troops, in order to force the opposition into submission<sup>(١٤١)</sup>.

There is a long list of wars where leaders and officers have attempted to destroy the enemy by attacking the environment<sup>(١٤٢)</sup>, the effect of which has had indiscriminate and long lasting residual effects<sup>(١٤٣)</sup>. An example of this residual effect was seen in May 1943 when the British troops demolished two major dams in the Ruhr Valley during World War II, destroying 125 factories, twenty-five bridges, and a power station; flooding coal mines; and killing 1,294 Germans<sup>(١٤٤)</sup>. Even more extensive in its destruction is the series of actions conducted by the United States during the Second Indochina War of 1961 to 1975 (Vietnam Conflict) which involved massive rural bombing, chemical and mechanical deforestation, large scale crop destruction, and intentional disruption of natural human ecologies<sup>(١٤٥)</sup>.

Environmental warfare was said to have been instigated by Iraqi troops during the Gulf War. It was repeatedly pressed that on August 2, 1990, Iraqi armed forces crossed the southern border of Iraq and entered Kuwait as a result of border, oil, and debt disputes<sup>(١٤٦)</sup>; that during the course of war, Saddam Hussein threatened, and then on several occasions, utilised deliberate environmental destruction as a tool of war; that on January 26, 1991, the the Iraqi troops' deliberate release of huge amounts of crude oil from Kuwait's Sea Island Oil Terminal into the Persian Gulf with the calculated effect of endangering wild life, water desalination plants, and industrial facilities in the adjacent Gulf countries<sup>(١٤٧)</sup>. Even more disruptive were the Iraqi troops' actions in burning more than 500 of Kuwait's oil wells by the time the coalition troops could cross the border to retake Kuwait<sup>(١٤٨)</sup>.

Scientists stated that the result would be an episode of pollution that is unprecedented in history<sup>(١٤٩)</sup>. The question prompted by these examples of destruction is what can international law offer to subdue such environmentally harmful activities.

There are of course some treaties within the LEP that are linked to the LOAC and which are applicable to the Gulf situation and certainly other situations. Principles 2, 7, 21, 22, and 24 of the 1972 Stockholm Declaration are but a few examples. Therefore, discharging toxic materials into the marine life and inflicting serious, if not irreversible damage, affects all states sovereign rights within the region. Furthermore, the 1972 Convention for the Protection of the World Heritage<sup>(١٥٠)</sup> states that: "Each state party ... undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage ... situated on the territory of other states' parties to the Convention"<sup>(١٥١)</sup>.

However, this and other provisions are hampered when strictly applied in the context of armed conflicts<sup>(١٥٢)</sup>, and if they do apply in this respect, some provisions from the same set of rules seem rather confusing if adhered to. For instance, Principle 23 of the 1972 Stockholm Declaration provides that "...it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of applicability of standards ...which may be inappropriate and unwarranted social cost for the developing countries." In this context, Iraq may argue that its resorting to widespread pollution as a weapon was due to its national or religious norms, or that there were no other cheaper means to defend itself<sup>(١٥٣)</sup>.

Under international custom and law of armed conflicts, intentional attack on the environment is illegal. There are a number of

international and regional treaties that provide some insight into what the legal remedies might be for Iraq's intentional activities. Foremost amongst these is the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention of 1907)<sup>(١٥٤)</sup>. Article 23 of this convention dictates that "... it is especially forbidden...(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering", including flagrant distortion of cultural and historical properties<sup>(١٥٥)</sup>.

It is of significance that these rules are binding upon states as customary international law and hence, Iraq was subject to them disregarding the fact that its government had neither adopted nor signed the Convention. The 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War<sup>(١٥٦)</sup>, the 1922/1923 Hague rules of Air Warfare<sup>(١٥٧)</sup>, the 1949 Geneva Convention (IV)<sup>(١٥٨)</sup>, and the 1954 Hague Cultural Convention<sup>(١٥٩)</sup> explicitly provide for the protection of cultural and historical objects. This has been manifested in the trials of war criminals conducted after World War II. The Nuremberg Tribunal considered that the actions of plundering public or private property, wantonly destroying cities, towns or villages, or performing devastation not justified by military necessity, amounts to war crime<sup>(١٦٠)</sup>. In so doing, the tribunal held that the LOAC principles had the force of customary law binding all states, and that ratification of the pertinent instruments is not strictly relevant for enforcing its norms<sup>(١٦١)</sup>.

In order to assume the state's wrongfulness however, it only remains to prove that the conduct of its army troops was strictly unnecessary to achieve military goals. In the Iraqi scene, It is hypothesised that the main reasons for the intentional pumping of oil into the sea and the subsequent burning of the wells was of

military tactical value, since the oil slicks would present problems to Coalition troops should they attempt to land on the Kuwaiti coast, and would obstruct Saudi desalination plants which served as the main supply of fresh water for the allied troops<sup>(167)</sup>. Additionally, the smoke emanating from the burning wells would serve to obstruct the vision of the allied Air Force<sup>(168)</sup>. In the end, however, neither of these actions achieved the desired effect. What was produced, however, was unprecedented environmental devastation throughout the Gulf Region, including acid rain causing groundwater pollution and affecting vegetation, smoke and soot which had a negative impact on the human population, possible climate changes, and the endangerment of wild life and fish stock in the Gulf Sea<sup>(169)</sup>.

Obviously, in the legal sense, requiring the above condition is an inappropriate loophole in the LOAC system. Iraq, irrespective of how heinous its action may be, can always claim military necessity to escape responsibility. It should be mentioned here that the law of armed conflicts also contains provisions regarding the various methods of environmental warfare that Iraq could have put to use. Iraq has threatened to resort to using chemical weapons, as it did during 1984 and 1985 against Iranian forces. Traditional international law, however, has evolved to forbid the use of chemical and biological weapons where consideration was given to the protection of the property of non-combatants<sup>(170)</sup>.

As for chemical weapons, the Hague Convention of 1907 specifically forbids the employment of poison or poisoned weapons<sup>(171)</sup>. Similarly, the 1899 Hague Declaration Concerning Asphyxiating Gases calls upon state parties to abstain from using projectiles containing asphyxiating or deleterious gases<sup>(172)</sup>. However,

these two instruments did not stop the use of chemical weapons in World War I, and consequently the 1925 Geneva Gas Protocol was adopted, almost universally, to achieve the same ends<sup>(173)</sup>. As a result of this wide adherence, some scholars contend that there is a customary international LOAC against the use of chemical weapons<sup>(174)</sup>.

In rather a similar fashion, the use of Biological weapons is also forbidden. The 1925 Geneva Gas Convention extends the prohibition on the use of chemical weapons to 'the use of bacteriological methods of warfare'. A ban on the possession of such weapons in addition to the use of them is found in the 1972 Bacteriological Convention, however, this is not, as yet, a binding customary international law due to the lack of states' practice in this respect<sup>(175)</sup>.

Another LOAC applicable to the environmental warfare situations is the 1977 Protocol Additional to the Geneva Convention of 1949<sup>(176)</sup>. While mainly concerned with protecting civilians in times of war, it specifically provides for the protection of the environment during such times. Article 35 provides that "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause *widespread, long-term and severe* damage to the natural environment." Articles 48 and 54 limit 'attacks' only to military targets rather than to objects indispensable for the survival of the civilian population such as foodstuffs, drinking water installations and supplies. Indeed, Iraq could have embraced these very articles against the allied force air attacks on Baghdad. However, neither Iraq nor the United States has ratified this treaty, and since there is no widely accepted view that it reflects customary law, there may be a problem using it as a source of liability<sup>(177)</sup>.



In this respect, the most relevant treaty provisions that can be enforced directly against Iraq are the ones contained in the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution of which Iraq is a signature. However, this convention is directed solely to the protection of the marine environment in the region<sup>(١٧٢)</sup>.

In sum, there are many treaties applicable to the use of environmental warfare. However, there are criticisms as to the vagueness of many of the standards they set, their non-applicability to non-party states, or that they were never intended to protect the environment as such. For example, treaties and customs limiting the use of poisons in war were established to avoid the unnecessary suffering of combatants, and not out of concern for the residual effects of these poisons on the surrounding ecosystem. However, one should mention that until today, the most stringent obligation under the law of armed conflicts has come not from treaties but from a decision of the UN Security Council. For instance, the invasion of Kuwait by Iraq in August 1990 and the consequential burn of oil wells has led the Security Council to consider, for the first time, the responsibility of states for the adverse impact of their unlawful military acts on the environmental. As a result, Security Council Resolution 687 was produced reaffirming that Iraq was liable under international law for, *inter alia*, 'environmental damage and the depletion of natural resources' resulting from the unlawful occupation of Kuwait<sup>(١٧٣)</sup>. In effect, the Iraqi invasion of Kuwait and the resultant Security Council Resolution 'has led to further consideration of the environmental effects of war and armed conflict, including an examination of the adequacy of the existing and rather limited treaty rules'<sup>(١٧٤)</sup>. Consequently, one obvious solution would be a comprehensive

and definitive treaty, signed and ratified by the United Nations, prohibiting the utilisation of the environment as a wartime weapon in all types of armed conflicts and setting standards for methods of assessing environmental damage. The goal of such a treaty would be the avoidance of ecological destruction at a national, regional, and international level.

## Chapter Two

### The Islamic Framework for Preserving the Environment

It has been indicated that the Middle East region is mainly inhabited by Muslims. This is an international religion with its own ideology and rules. Proponents of Islam insist that its teachings must be encapsulated as a way of every day life<sup>(١٧٥)</sup>. Since religion is about worship of God and relationships with other human beings, it assumes a morally responsible attitude towards God's creation. Consequently, the shared legal system in the Middle East has long been attentive, and responsive, to the environmental issues. This is reflected in a few principles, as will be discussed below, which characterised Islamic law (the *Shari'a*).

Islamic environmental ethics, like all other forms of ethics in Islam, is based on clear-cut legal foundations which Muslims hold to be formulated by God. Thus, in Islam, an acceptance of what is legal and what is ethical has not involved the same processes as in cultures which base their laws on humanistic philosophies.

Muslim scholars have found it difficult to accept the term "Islamic Law", since "law" implies a rigidity and dryness alien to Islam. They prefer the Arabic word *Shari'ah* {Shariah} which literally means the "source of water"<sup>(١٧٦)</sup>. The Shariah is the source of life in that it contains both legal rules and ethical principles. This is indicated by the division of the Shariah relevant to human action into the

categories of: obligatory actions (*wajib*), those which a Muslim is required to perform; devotional and ethical virtues (*mandoob*), those actions a Muslim is encouraged to perform, the non-observance of which, however, incurs no liability; permissible actions (*mubah*), those in which a Muslim is given complete freedom of choice; abominable actions (*makrooh*), those which are morally but not legally wrong; and prohibited actions (*haram*), all those practices forbidden by Islam. A complete separation into the two elements, law and ethics, is thus unnecessary in Islam. For a Muslim is obliged to obey whatever God has ordered, his philosophical questions having been answered before he became a follower of the faith.

## 2.1 The Islamic Teachings for preserving the Environment:

At the outset, it should be noted that terminology such as 'environment', 'development' and 'pollution' are not explicitly used in the different Holy Books of the world, yet their implications are diffused within the verses and texts of these Books. To extract them requires an attempt to establish a modern understanding of the religious script. Such an attempt will render these scripts closer to the spirit and concept of modern times, while the essence of religion and its essential teachings and worships must remain unviolated. Consequently, for any discussion about topics within Islamic law, a reference should always be made to the Qura'nic verses and the holy prophetic traditions (*hadiths*) as being the main two sources of Islamic law. This is in addition to the most significant Islamic practices in this field. This relates equally to laws relating to environmental protection.

In this regard, consideration should be first made of the general Islamic attitude towards the earth's resources and mankind's relation to it: First, God is the creator of this universe

with all its contents. In this respect it is stated in the Holy Qura'n that "*For to God belongeth the domination of the heaven and the earth and all that is between. He createth what He pleaseth*"<sup>(١٧٨)</sup>.

Secondly, God has made mankind his vicegerents on this earth, and has provided them with all that assures the performance of their duties in order to carry out such vicegerency through the development of this earth and realisation of complete servitude to God therein. In this connection it is stated in the Holy Qura'n that "*It is He who hath made you (His) agents and inheritors on the earth*"<sup>(١٧٩)</sup>. This vicegerency bestowed by God on man in this earth, however, is not absolute. Its principles and rules have been prescribed by the Islamic law (*Shari'a*). Foremost amongst these is the mankind duty to correctly worship God by being the best of agents and proxies in preserving His property<sup>(١٨٠)</sup>, otherwise they have not fulfilled the conditions of vicegerency<sup>(١٨١)</sup>.

Thirdly, God has opened an unequivocal invitation to man to do his utmost in scientific research and discoveries in all fields<sup>(١٨٢)</sup>. This includes using all means available to mankind in order to enhance their surrounding environment. In this respect there are many Qura'nic verses explicitly stating that the earth with all its resources is made ready for human beings<sup>(١٨٣)</sup>.

There are a large number of Qura'nic verses that either relate to the earth in general or to each of its constituents in particular. In particular, an extensive reference has been made to agriculture<sup>(١٨٤)</sup>, mineral resources<sup>(١٨٥)</sup>, animal resources<sup>(١٨٦)</sup>, sea, rivers and springs<sup>(١٨٧)</sup>, land<sup>(١٨٨)</sup>, and air or atmosphere<sup>(١٨٩)</sup>. In effect, these verses require mankind to respect God's creation and declare their obedience to Him by utilising them in the manner He wishes and according to heavenly set principles and rules.

These principles and rules are too numerous for this study to examine in detail. However, it can be said that first and foremost among these is land development and utilisation of this as a resource. Also important is the provision of every human effort to extract the hidden potentials of the earth and its benefits in a manner conducive to human prosperity. In the exhortation to revive the desolate land by cultivation and building, the Prophet said: "Whoever reclaims a barren land shall be its owner", and "Anyone who reclaims an uncultivated land shall have a reward therefore"<sup>(١٩٠)</sup>, and "Every Muslim who plants a crop or a tree from which an animal, a bird or a human being eats will have it as a charity recorded for him"<sup>(١٩١)</sup>.

In this context, Al-Jassas stated in his commentary on Sura 11 verse 61 of the Holy Qura'n that God has settled mankind in the earth and commanded them to develop it in order to satisfy their needs in a suitable manner<sup>(١٩٢)</sup>. Such development, or any kind of development, must not cause any harm to mankind; for the rule is to safeguard human life and security against any possible threat and to ban anything that may cause harm to men and lead to their destruction. In this connection the Holy Qura'nic verses state that: "*And Make not your own hands contribute to (your) destruction*"<sup>(١٩٣)</sup>. And "*Nor kill (or destroy) yourselves*"<sup>(١٩٤)</sup>. Also, "*And those who annoy believing men and women undeservedly, bear (on themselves) a calumny and a glaring sin*"<sup>(١٩٥)</sup>. Obviously this includes mass destruction and embarking on mass disastrous operations such as those related to chemical plants and nuclear reactors where leakage of poisonous gases and nuclear radiation have caused wide scale destruction.

The prophetic statement which says that

"Islam does not allow harm or inconvenience"<sup>(١٩٦)</sup>

is an Islamic golden rule which stands out as a clear regulator in this context. This is affiliated with the fact that restrictions focused on the protection of the environment in Islam are aimed at public welfare, for the primary aim is to prohibit causing harm to others. Al-Ghazali says: "Justice means that one should not hurt others. The general governing rule is that one should not love for others except that which one loves for oneself. In this case anything that will prove to be harmful or difficult if done to one entity, must not be done to other entities by the first one"<sup>(١٩٧)</sup>. Also, no matter how much a specific activity might be of national interest, such interests should be suspended when associated with bringing harm since warding off harm should be given priority over further interests. In modern terminology, this amounts to the principle of sustainable development, that is, allowing development which will only benefit present and future generations equally, by combating excessive damage to the environment or by gaining any excessive benefit therefrom.

Moreover, Islamic law (*Shari'a*) exhorts caring for and cleanliness of the environment so that it is always ready for utilisation and comfortable use by man without suffering any harm. This is evidenced by a number of prophetic statements (*Hadiths*). Foremost amongst these is the statement of the prophet - peace be upon him-: "Keep your courtyards clean....; for Almighty God is good and loves goodness; clean and loves cleanliness..."<sup>(١٩٨)</sup>

Also his statement: "He who removes anything causing harm from the Muslim's road will be counted by God as a benefaction for him..."<sup>(١٩٩)</sup>

One important element of safeguarding the constituents of a beautiful environment in Islam is the prohibition of animal killing for

any other reason than food<sup>(٢٠٠)</sup>, and paying due attention to forests and green cover. This is explicit in Caliph Abu Baker's instructions to Yazid Ibn Sufian, commander of the Muslim army in Syria, asking him to observe specific things while in a state of war, stating that:

I [council] you to carefully observe the following commandments: Do not kill a woman, a child or an aging person. Do not cut off any fruit tree, or ruin a well developed and thriving place, or kill a sheep or a camel except for food, cut off or burn down any palm tree, or be false to your trust<sup>(٢٠١)</sup>.

This statement is the Islamic outlook on environmental preservation that has to be considered during armed conflicts. Thus, the environment must not be used as a target for achieving strategic military ends. Muslim Jurists are of the opinion that these instructions are absolute or applicable to all circumstances when they say: "Muslims are not allowed to cause any damage or ruin in the enemy territory in war times because this amounts to doing mischief and God does not love mischief"<sup>(٢٠٢)</sup> For example, Muslim Jurists agreed that enemy water resources should not be poisoned during the war nor should mass killing weapons be used against the enemies whether they are members of the fighting forces or not<sup>(٢٠٣)</sup>.

Further, in relation to water, Islam urges that water resources receive due attention. The general principles of Islamic law not only confirm that sea waters are freely permitted to all, but also imply a prohibition to pollute or otherwise abuse such communal public assets. Prophet Muhammad -peace be upon him- explicitly banned any sort of harmful discharges into water resources by giving an example of prohibiting mere urinating or defecating in water resources<sup>(٢٠٤)</sup>.

Moreover, there are rules in Islam provided for banning over-exploitation of available resources. For instance, as regards the water resources one of the most significant duties upon individuals towards water is not to use it extravagantly. The prophet Mohammed -peace be upon him- said in this regard: "Do not be extravagant in using water even if you were on a flowing river"<sup>(٢٠٥)</sup>. This is first implied in the idea that this universe is based on very exact calculations in that everything therein is duly balanced and based on interconnection and integration between all mediums. The Holy Qura'nic verses state that: "*It is He who created all things and ordered them in due proportion*"<sup>(٢٠٦)</sup>, and "*Verily, all things have We created in proportion and measure*"<sup>(٢٠٧)</sup>, and "*There is not a thing but its (sources and) treasures (inexhaustible) are with Us; but We only send down thereof in due ascertainable measures*"<sup>(٢٠٨)</sup>. This exact measurement applies to all the environment's mediums individually as well as to it as a whole<sup>(٢٠٩)</sup>. However, although God has created this for the benefit of mankind, the duty lies upon mankind not to misuse this gift. In this regard the Holy Qura'n states that: "*Eat of the good things We have provided for your sustenance, but commit no excess therein*" and "*Eat and drink: but waste not by excess, for God loveth not the wasters*"<sup>(٢١٠)</sup>, and "*...But squander not your wealth in the manner of a spendthrift, Verily spendthrifts are brothers of the Evil Ones*"<sup>(٢١١)</sup>.

Other sources of traditional Islamic law also come to the same conclusion that man must use water economically and protect it from pollution. An example of this is the judicial view of the Ayatollah S. R. Khomeini of Iran which states that to use water supply for domestic or other uses beyond what is reasonably necessary is an abuse of public right and

engages liability<sup>(٢١٢)</sup>. In other words, people are entitled under Islamic law to use water only to such extent that the right of other persons to use water is not obstructed. To state the obvious, such a prohibition applies equally to all natural and legal persons whether in public or private sector. By the same criterion, when it comes to the exercise of any natural or communal rights, a person cannot exercise his authority or entitlement in such a way which results in loss to others.

Islam even includes within its principles the rule of equitable utilisation of environmental resources. While this principle is most known in relation to international rivers and seas, Islamic law extends it even further to include pasture and energy resources. The authentic prophetic directive by the prophet Muhammad –peace be upon him- stating that: “People are partners in three: Water, pasture and fire (energy)”<sup>(٢١٣)</sup>. In fact, these three resources include most of the earth’s resources referred to in the World Resources Institute 1988/89<sup>(٢١٤)</sup>. Water includes fresh water, seas and lakes; pasture covers grazing lands and wild habitats; and fire comprises energy and the sources thereof such as forests, oil, gas, coal, oil shale and the like. The rule prescribed here concerns public property of these resources which shall then secure the right of all mankind in utilising them equally, and therefore are all held accountable for securing their preservation from depleting or pollution. This idea is clearly revealed in a booklet entitled: *A Basic Study on Environment Protection in Islam* in which the International Association for Environment and Natural Resources Conservation took part. Published in three languages, it states that:

All the resources created by God are ours. Therefore their utilisation is regarded as a right for all. Consequently those people who have a share and interest in them have to be

taken into account. Moreover, such property and utilisation rights should not be viewed as exclusively restricted to one particular generation but as belonging to all generations each of which benefits from them in accordance with its needs without encroachment upon the interests of future generations such as abusing, distorting or ruining these resources; because each generation enjoys only the right of utilisation and no absolute ownership<sup>(٢١٥)</sup>.

In recent times when the economic and industrial development of the Muslim countries made them aware of the need for developing new legal standards to protect the marine environment, some, notably Saudi Arabia, invoked these religious norms in support of introducing environmental measures. A Saudi Arabian official, in a paper on ‘Islamic Law and Environment’ delivered at the International Union for Conservation of Nature and Natural Resources (1981), expressed the view that, water being a communal property in Islam, all people must share the right to use it in all the lawfully prescribed manner. To support his view, he quoted a statement of the Prophet Mohammed -peace be upon him- narrated by al-Bukhari which states that there are “three [persons] who will be disregarded on the Day of Judgement, for whom there will be no attestation and who shall be sorely punished: he who has water by the roadside and refuses it to a wayfarer...”.

Therefore, there must be equity in distribution whatever that distribution may be. This is declared by the Holy Qura’n as to emanate only from the achievement of justice: “*Be just! that is next to piety*”<sup>(٢١٦)</sup>. It is this fair distribution that will maintain economic balance whether among individuals at the level of each individual state or at interstate level<sup>(٢١٧)</sup>.

To conclude, Islam has no basic objections to the general environmental principles found



in international law. In reality, it includes within its divine law most of these principles. Muslim countries are therefore not only obliged by the principles and rules which are supposedly a Western product, but also with their religion which offers a foundation for the same objectives. In fact, the Islamic law (*Shari'a*), which has operated before the twentieth century as the common law of all Middle East countries, has introduced many rules that relate to the environmental protection in the region long before the western influence has taken place. For instance, as regards water law, there have been some essential traits which were consolidated in the Ottoman Majalla (The Civil Code)<sup>(٢١٨)</sup> and in the Ottoman land laws of 1858<sup>(٢١٩)</sup>. This influence was later combined with French and British colonisation and the reception of their laws in several countries. For example, the concentration of water law in the Majalla was repeated in consolidated legislation known as 'Code des Eaux'<sup>(٢٢٠)</sup>.

## 2.2 The Right to a Clean Environment in Islam:

While it has been resolved in the above section that Islamic teachings are supportive of the general principles of international environmental law, putting environmental protection within a human rights perspective is a complicated matter and needs further analysis. Secular countries and Islamic countries may have fundamental differences in their approach to environmental law as regards their respective legal systems<sup>(٢٢١)</sup>. Nonetheless, many environmentalists seem to ignore these differences by assuming that, first, there is, in general, a "universal consensus on the ethical basis of nature conservation, and secondly, that human rights standards are or at least should be universally applicable throughout the world"<sup>(٢٢٢)</sup>. On these bases, their hypothesis is that there

are no differences between rights-based approaches to a clean environment in secular and Islamic countries. This argument is based on the assumption that all major world religions incorporate general ethical principles advocating compassion for the living environment and imposing a duty to protect this environment<sup>(٢٢٣)</sup>.

While Islamic environmental ethics appear to support this argument, in that there are about 500 verses of the Qura'n which refer to the relationship between man and the environment<sup>(٢٢٤)</sup>, the Qura'n, at first sight, seems to be silent on human rights to a clean environment, and instead stresses the duty of the individual Muslim to care for the natural environment<sup>(٢٢٥)</sup>. This duty is rooted to the belief that the earth in its totality is a creation of God, and that both the individual and the state are enjoined to take responsibility of God's creation as part of their religious, and therefore ethical, duties<sup>(٢٢٦)</sup>.

In this context, it could rightly be argued that duty-based environmental ethics are substantially different from a rights-based approach to environmental protection even though they are normally activated for protecting the environment on an equal footing. However, this difference is frequently ignored in attempts to prove the existence of a universal consensus on the human rights to a clean environment. An example of bringing together both religious ethics and human rights under the same category can be seen in the tendency to support general statements on human rights to a clean environment with quotes from a variety of religious texts<sup>(٢٢٧)</sup>. Nevertheless, this view is not taken in all aspects of human rights. In fact, this approach is completely at odds with more critical assessments of the fate of international human rights under Islamic law. Islamic countries such as Iran, Saudi Arabia, and Pakistan have been frequently accused of

flagrant human rights abuses perpetrated in the name of an officially endorsed version of Islam law<sup>(٢٢٨)</sup>. It comes therefore as a surprise that in the area of environmental law no conflict appears to exist. Furthermore, there are a number of Islamic countries openly refusing to incorporate internationally recognised human rights standards into their domestic legal systems<sup>(٢٢٩)</sup>, and many Islamic countries have even countered 'Western' international human rights conventions with their own Islamic formulations of human rights charters and to some degree restricted the internationally recognised human rights<sup>(٢٣٠)</sup>.

On the national level, the co-existence of Islamic and secular constitutional provisions in many Muslim States has produced a rich body of case law exploring the interaction and the relationship between these two sources of law<sup>(٢٣١)</sup>. The debate here centres around whether the secular fundamental rights must be made subject to the limits prescribed by Islamic law or subjecting the Islamic human rights ethics to those agreed on an international level.

However, it could be argued that taking such a restricted approach of subjecting either model to the other might look fatuous. An alternative possibility is to use Islamic law as an additional source of rights to expand the provisions of western statements of fundamental human rights. An allegiance to the ideal of an Islamic state would not necessarily result in a denial of the very idea of human rights, although any formulation of human rights would have to take place within an Islamic frame of reference.

Examples of this above-mentioned possibility can be derived from the Islamic Republic of Pakistan's experience in this regard. In two cases the Supreme Court of Pakistan has held that the constitutionally guaranteed right to life<sup>(٢٣٢)</sup> includes the right to live in a clean

environment<sup>(٢٣٣)</sup>. Both judgements arise from so-called 'public interest litigation', i.e. legal action for the enforcement of constitutionally guaranteed rights involving questions pertaining to public interest<sup>(٢٣٤)</sup>. Public interest litigation in this context can be regarded as a conscious attempt to combine and harmonise Islamic law and secular fundamental rights. A power is given to the Supreme Court to pass any appropriate order in the nature of a prerogative writ for the enforcement of Fundamental Rights<sup>(٢٣٥)</sup>. The willingness of Pakistan's judiciary to allow for a relaxation of the procedural requirements of this writ jurisdiction was first expressed in the case of *Benazir Bhutto v. The Federal Republic of Pakistan*<sup>(٢٣٦)</sup>. In rejecting the traditional rules of standing and the definition of an aggrieved person, Chief Justice Muhammad Halim (as he then was) asserted that the writ jurisdiction of the Supreme Court was to be marked by an interpretative approach inspired by both the secular and the Islamic elements of the constitution. The ultimate goal behind the enforcement of fundamental rights is, according to Halim, the achievement of democracy, equality, and social justice according to Islam<sup>(٢٣٧)</sup>. The jurisprudential basis of public interest litigation in Pakistan consists of three elements: secular human rights guaranteed in the chapter on fundamental rights, the directive principles of state policy, and ethics of an Islamic precepts. In order to avoid conflict, the potential Islamic precepts were however avoided by reducing the contribution of Islamic law in this triad of sources to just one element: justice. According to Chief Justice Zullah (as he then was), the Islamic concept of justice is the "paramount Human Right which is inviolable and inalienable"<sup>(٢٣٨)</sup>. To the same effect, the Supreme Court of Pakistan held:

So much so that although it is not enshrined

in the Constitution as a Fundamental Right, in the entire constitutional set-up mentioned above, the right to obtain justice as is ordained by Islam, has become and inviolable right of citizens of Pakistan<sup>(٢٣٩)</sup>.

This very notion of Islamic justice, which is a wide concept that may encompass any set of legal adjudication, has been used in a number of cases related to the environment protection. The installation of a grid station in a suburb of Islamabad was held to be unconstitutional<sup>(٢٤٠)</sup>, as was the dumping of nuclear waste in Baluchistan<sup>(٢٤١)</sup> or health hazards created by a sewage-treatment plant in Karachi<sup>(٢٤٢)</sup>.

In sum, it could be argued that the incorporation of Islamic law as an additional source of fundamental rights has enabled judges to overcome the conceptual tensions inherent in Pakistan's legal system, i.e., the co-existence of Islamic law with its reluctance to recognise individual human rights, and secular human rights which used to be perceived as being curtailed by any reference to Islamic law. The recognition of a basic human rights law has repercussions in the field of Pakistan's environmental law. General ethical principles on conservation and environmental protection can be interpreted both in the light of the secular fundamental right to life and the Islamic right to justice. The concept of Islamic justice enables the aggrieved party to approach the court, whereas the right to life empowers the court to give relief. As a result, it could be argued that Pakistan's judiciary has successfully refuted the widely accepted argument that Islamic law and individual rights are irreconcilable.

Furthermore, in the realm of environmental protection, it could also be argued that the duty-based ethics as well as right-based image were both made relevant and specifically pertinent in the 1990 Cairo Declaration on Human Rights in Islam. Article 17 (a) States

that "Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is incumbent upon the state and society in general to afford that right"<sup>(٢٤٣)</sup>. In so providing, this could be taken as the general attitude of the various Muslim countries at least in relation to environment protection.

However, despite the many Islamic divine laws against environmental deterioration, the contemporary Muslim world is in general very little concerned with environmental preservation. Like other parts of the third world, the Muslim-populated countries do not treat pollution as an issue of great concern and set greater store upon economic development and growth. The problem of the increasing environmental degradation becomes a matter of concern only when pollution has itself become a threat to development.

## Conclusion:

This study aimed at discussing the validity of international law norms that are known to international law scholars within the Islamic law. The vitality of a study in the topic stems from the need to signal the readiness of the Middle Eastern countries to absorb these international norms, and specifically the question whether there are any religious or cultural impediments to the implementation of these international norms is ought to be contemplated. The hypothesis was that these norms are in fact part of the Islamic legal tradition, and therefore, religion and the law must be seen as complimentary mechanisms for protecting the environment.

If law, whether national or international, is a system of enforceable rules governing social relations and legislated by a political system, it might seem obvious that law is connected to

an ideology, or a variety of ideologies that were the reason of its creation. Ideology refers, in a general sense, to a system of political ideas, and law and politics seem inextricably intertwined. Just as ideologies are dotted across the political spectrum, so too are legal systems. Thus, we speak of both legal systems and ideologies as Islamic, liberal, fascist, communist, and so on, and most people probably assume that a law is the legal expression of a political ideology.

One would expect the practice and activity of law to be shaped by people's political beliefs, so law might seem to emanate from ideology in a straightforward and uncontroversial way. However, the connection between law and ideology is both complex and contentious. This is because of the diversity of definitions of ideology as a concept and the various ways in which ideology might be related to law. Also, due to the mere existence of plethora of ideologies worldwide, and that by embracing one and neglecting the others may cause to constitute a clash of civilizations, and therefore a disrespect for the legal outcome shaped as laws or agreements. As technology and industry develop and populations expand, environmental issues, such as pollution, over-exploitation of natural resources, and extinction of plant and animal species, have become increasingly serious concerns throughout the world. With environmental challenges mounting, some activists and scholars have looked to religious values as a source of support for increased protection of the environment. Religions have traditionally provided frameworks for fairness and justice and have had major effects on the development of political, economic, and social systems around the world. More recently, theologians from many religions have sought to synthesize fundamental religious values into environmental ethics and rules. One such religion

is Islam, where religious scholars have begun to rediscover and reapply environmental precepts of Islamic law (shariah) developed centuries ago.

The purpose of this paper was also to examine the principles of Islamic law that govern man's relationship with the natural environment, to show how Muslim governments may use these and other legal principles to address environmental problems. The general international environmental principles were deciphered. An illustration was then put forward on how Islam contains many principles that relates to the protection of plants and animals, the conservation of natural resources, and the prevention of pollution, which are clearly contained within the main sources of Islamic law, and can work as a solid ground for absorbing the international legal rules.

At issue is an understanding of the degree of compatibility between Islam as an ideology, and as a source for law creation in most of the Muslim world countries, with the current international legal rules for protecting the environment. In fact, the presence of some ideological conceptions in these countries, if reflected in law, might help to a great deal in their law's integrity, and surly be advantages to the comprehension of an international form of environmental protection.

In Islam, the legal and ethical reasons for protecting the environment can be summarized as follows: First, the environment is God's creation and to protect it is to preserve its values as a sign of the Creator. To assume that the environment's benefits to human beings are the sole reason for its protection may lead to environmental misuse or destruction.

Second, the component parts of nature are entities in continuous praise to their Creator. Humans may not be able to understand the form or nature of this praise, but the fact that

the Qur'an describes it is an additional reason for environmental preservation: *"The seven heavens and the earth and all that is therein praise Him, and there is not such a thing but hymneth his praise; but ye understand not their praise. Lo! He is ever Clement, Forgiving"* (Surah 17:44).

Third, all the laws of nature are laws made by the Creator and based on the concept of the absolute continuity of existence. Although God may sometimes wish otherwise, what happens, happens according to the natural law of God (*sunnah*), and human beings must accept this as the will of the Creator. Attempts to break the law of God must be prevented.

Fourth, the Qur'an's acknowledgment that human-kind is not the only community to live in this world - *"There is not an animal in the earth, nor a flying creature flying on two wings, but they are peoples like unto you"* (Surah 6:38) - means that while humans may currently have the upper hand over other "peoples," these other creatures are beings and, like us, are worthy of respect and protection.

Fifth, the balance of the universe created by God must also be preserved. Islamic environmental ethics is based on the concept that all human relationships are established on justice (*'adl*) and equity (*ihsan*): *"Lo! Allah enjoineeth justice and kindness"* (Surah 16:90). Sixth, the environment is not in the service of the present generation alone. Rather, it is the gift of God to all ages, past, present and future. Finally, no other creature is able to perform the task of protecting the environment. God entrusted humans with the duty of viceregency, a duty so onerous and burdensome that no other creature would accept it: *"Lo! We offered the trust unto the heavens and the earth and the hills, but they shrank from bearing it and were afraid of it. And man assumed it"* (Surah 33:72).

Accordingly, Islam can easily be used as the basis for justice, mercy, and cooperation between all humankind. Yet, there is a necessity for a call for an increase in scientific and technological assistance from the North to help conserve natural and human resources, combat pollution and support sustainable development projects. It is also imperative to acknowledge that the new morality required to conserve the environment which the World Conservation Strategy emphasizes, needs to be based on a more solid foundation. It is not only necessary to involve the public in conservation policy but also to improve its morals and alter its attitudes. In Muslim countries such changes should be brought about by identifying environmental policies with Islamic teachings. To do this, the public education system will have to supplement the scientific approach to environmental education with serious attention to Islamic belief and environmental awareness.

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  4. **1974** International Convention for the Prevention of Pollution from Land-Based Sources, (Paris), 13 International Legal Materials, 1974.
  5. **1974** Nordic Convention on the Protection of the Environment (Stockholm) 19 February 1974, 13 International Legal Materials, 1974.
  6. **1975** United Nations Charter of Economic Rights and Duties of States, UN Resolution A/Res./3281, 15 January 1975, 14 International Legal Materials, No. 1, 1975.
  7. **1978** UNEP Draft Principles, 17 International Legal Materials, 1978.
  8. **1979** Geneva Convention on the Long-Range Transboundary Air Pollution (LARTAP), 19 International Legal Materials, No. 6 (1979).
  9. **1979** London Dumping Convention, 18 International Legal Materials, 1979.
  10. **1980** Memorandum of Intent between the US and Canada, 20 International Legal Materials, 1981.
  11. **1982** United Nations Convention on the Law of the Sea, 21 International Legal Materials, 1982.
  12. **1982** UN Resolution on a World Charter for Nature, UNGA Res. 37/3; UN Doc. A/37/51 (1982).
  13. **1983** World Charter for Nature, 22 International Legal Materials, 1983
  14. **1986** WCED Draft Convention on Environment Protection and Sustainable Development, in Munro and Lammers, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, (London, 1986).
  15. **1987** Vienna Convention on the Protection of the Ozone Layer, 26 International Legal Materials, 1987.
  16. **1992** Climate Change Convention, 31 International Legal Materials, 1992.
  17. **1992** Biodiversity Convention, 31 International Legal Materials, 1992.
  18. **1992** Declaration of Principles on Air Pollution Control, in Harold Hohmann, ed., *Basic Documents of International Law*, (Graham & Trotman Nijhoff, 1992), Vol. 1.
  19. **1992** Rio Declaration; 31 International Legal Materials, 1992.
- Reports:**
1. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.
  2. The ILA Montreal Rules on Water Pollution, 1982, *Report of the 60<sup>th</sup> Conference*.
  3. The ILA Montreal Rules on Transfrontier Pollution, 1982, *Report of the 60<sup>th</sup> Conference*.
  4. WCED, *Our Common Future*, (Oxford, 1987).
  5. Montreal Protocol on Substances that Deplete the Ozone Layer, September 16, 1987, 26 International Legal Materials, 1987.
  6. ILC Draft Articles on State Responsibility, *Report of the ILC to the United Nations General Assembly*, UN doc. A/44/10,

- 1989.
7. Montreal Protocol, Final Report, Second Session of the First Meeting, Nairobi, 28 August - 5 September 1989, UN Doc. UNEP/OzL.Pro.WG.1(2)4, 26 (1989).
8. Barboza, Fifth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc. A/CN.4/43. 22-23 (1989).
9. ILC, Sixth Report on International Liability for Injuries Consequences of Acts Not Prohibited by International Law, UN Doc./A/CN.4/428 (1990)
10. ILC Draft Articles on the Non- Navigational Use of International Watercourses, *Reports of the ILC to the General Assembly*, UN GAOR, 45<sup>th</sup> Session, A/45/10 (1990).
11. *Report of the International Conference on population and Development* A/CONF 171/13, 18 October 1994.
12. Doha Declaration, *Priorities for Progressive Development of International Law in the UN Decade of International Law to Meet the Challenges of the 21<sup>st</sup> Century*, 24(5) Environmental Pollution & Law, 1994.
13. ILA Helsinki Rules on International Rivers, 1966, *Report of the 52<sup>nd</sup> Conference*.

### **Case Materials:**

1. *Bering Sea Fur Seals Fisheries Arbitration* (Great Britain v. United States), 1 Moore's International Arbitration Awards, 1893
2. The River Oder. International Commission of the River Oder (1929) PCIJ Ser. A. No. 23.
3. *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 Rewards of International Arbitral Awards, 1941.
4. *Corfu Channel case*, ICJ Reports (1949).
5. *Lac Lanoux Arbitration* (France v. Spain), 24 International Law Reports, 1957.

6. *Kuwait v. American Independent Oil Co*, 21 International Law Materials, 1982.
7. Case concerning Gabčíkovo Nagymaros Project (Hungary/Slovakia), 27 International Legal Materials, 1998. See 'Modern Environmental Law Applicable to 1977 Treaty', International Law Reports, October 31<sup>st</sup> 1997.

### **Footnotes:**

- (1) J. A. R. Nafziger, *The Function of Religion in the International Legal System*, in M. W. Janis, *The Influence of Religion on the Development of international Law*, (Nijhoff, Netherlands, 1991), p. 152.
- (2) J. E. Noyes, *Christianity and Late Nineteenth Century British Theories of International Law*, in Janis, *ibid.*, p. 85.
- (3) M. H. Arsanjaki, *Religion and International Law*, 195 American Bar Association Journal of International Law, 1989, pp. 206-8.
- (4) J. A. R. Nafziger, *supra* note 1, at p. 157.
- (5) Preamble, Chapter II. *Report of the International Conference on population and Development* A/CONF 171/13, 18 October 1994.
- (6) R. Robertson, *Modern Religion and Globalization*, in T. Robins, *Cults, Culture and the Law: Perspectives on New Religious Movements*, (Scholars Press, California, 1985), p. 39; M. H. A. Reisman, *Islamic Fundamentalism and Its Impact on International Law and Politics*, in M. W. Janis, *supra* note 1, at p. 107.
- (7) M. Reisman, *ibid.*
- (8) R. Roberts, *Law, Morality and Religion in a Christian Society*, 20 Religious Studies, 1984, p.79.
- (9) There is an abundance of literature relating to whether human rights are universally applicable or whether they are just a western creation that only suits their culture. Despite this, none has provided this argument in relation to the right of a decent environment. For this topic see generally E. Mayer, *Islam and Human Rights: Tradition and Politics*, (Westview, 1995), and A. An-Na'Im, *Human Rights in Cross-cultural*



- Perspective*, (University of Pennsylvania Press, 1991).
- (10) J. Morand-Deville, *Le droit de l'Environnement*, P.U.F. Que Sais - je No 2334, 1sted., (Paris, 1987), p. 5.
- (11) It was perceived at the Stockholm Conference that progress on environmental protection was inextricably linked, for developing states, with progress in economic development. See I. Badran, *Development and the Environment: Where to?* (Arabic), Majallet Albeea'h, Almarkiz Alarabi Lili'lam Albee'i, Vol. 15 1987; M. Eid, *The Environment and the Economies* (Arabic), Alahram 16 July 1991.
- (12) WCED, *Our Common Future*, (Oxford, 1987), at p. 43.
- (13) See UNICEF, *State of the World's Children*, (Oxford University Press, 1993), pp. 23-39; R. Attfield, *Development and Environmentalism*, in R. Attfield, ed., *International Justice and the Third World*, (Routledge, 1991), pp. 154-61; and F. Castro, *Tomorrow is Too Late: Development and the Environmental Crisis in the Third World*, (Ocean Press, 1993), p. 14.
- (14) Consider for instance article 4(1) of the 1992 Climate Change Convention where it stated that all parties are committed to take certain measures taking into account their common but *differentiated* responsibilities and priorities, objectives and circumstances; 31 International Legal Materials, 1992, p. 849. For a practical employment of this principle consider the discussion of the principle of sustainable development, *infra*.
- (15) Working Group of the Parties to the Montreal Protocol, Final Report, Second Session of the First Meeting, Nairobi, 28 August - 5 September 1989, UN Doc. UNEP/OzL.Pro.WG.1(2)4, 26 (1989).
- (16) F. G. Minujin, *Debt-for-Nature Swaps: A Financial Mechanism to Reduce Debt and Preserve the Environment*, 21 Environmental Policy and Law, 1991, p. 146 and S. George, *The Debt Boomerang*, (Pluto, 1992), pp. 30-31.
- (17) D. Hughes, *Environmental Law*, 2nd ed., (Butterworths, 1992), at p. 82.
- (18) S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wild Life*, (Grotius, 1985), p. 3.
- (19) J. G. Starke, *Introduction to International Law*, 10thed., (Butterworths, 1989), p. 15.
- (20) These objectives are embodied in the World Charter for Nature adopted by the UN General Assembly in 1982: UNGA Res. 37/3; UN Doc. A/37/51 (1982). 1, p. 64; and 22 International Legal Materials, No. 2, (1983).
- (21) Proclaimed by the Council of Europe on 6 May 1968.
- (22) Declaration of Principles on Air Pollution Control, adopted by the Committee of Ministers of the Council of Europe, Harold Hohmann, ed., *Basic Documents of International Law*, (Graham & Trotman Nijhoff, 1992), Vol. 1, p.502.
- (23) A. Kiss, *The International Protection of the Environment*, in R. St. J. Macdonald and D. M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, (Martinus Nijhoff Publishers, 1986), p. 1070.
- (24) Stockholm Declaration of the United Nations Conference on the Human Environment, 11 International Legal Material, 1972, pp. 1416-1469.
- (25) Such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, 993 UNTS 243 (1973 CITES), reprinted in Harold Hohmann, ed., *Basic Documents of International Law*, (Graham & Trotman Nijhoff, 1992), p. 1346.
- (26) For Example: Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft, (Oslo) 15 February 1972, in force 7 April 1974, 932 UNTS 3; International Convention for the Prevention of Pollution from Land-Based Sources, (Paris) 4 June 1974, in force 6 May 1978; 13 International Legal Materials, 1974, p. 352.
- (27) Customary international law, which is applicable to all nations, is a general and consistent practice of nations that is followed over a period of time out of a sense of legal obligation. The practice need not be universal, but must be followed by a significant number

- of states involved in the activity in question. See I. Brownlie, *Principles of Public International Law*, (Oxford, 1990), pp. 4-10.
- (28) Article (38) of the Statute of the International Court of Justice enumerates the sources of international law as custom, general principles recognised by civilised, decisions of international arbitrate and judicial bodies, the view of international public lawyers of high renown, and most importantly, treaties, both general and particular, establishing rules accepted by states. See, Ian Brownlie, *Basic Documents in Public International Law*, 4th ed., (Oxford, Clarendon Press, 1995), p. 448. The International Law Commission has also proposed a list of sources other than those reflected in Article 38(1) which include the binding decisions of international organisations, and judgement of international courts and tribunals. ILC Draft Articles on State Responsibility, Part 2, Art. 5(1), *Report of the ILC to the United Nations General Assembly*, UN doc. A/44/10, 1989, p. 218. It is to all these sources that the ICJ would look in determining whether a particular legally binding principle or rule of international environmental law existed.
- (29) American Law Institute, *Restatement (Revised) Foreign Relations Law of the United States* (St. Paul, MN: American Institute Publishers, 1987), Section 102 (2), p. 24.
- (30) Beyond the above sources of 'hard law', which establishes legally binding obligations, this study will point out few rules which are not binding *per se* but which in the field of international environmental law have played and important role in reflecting the rules of customary law, or at least pointing to the likely future direction of formally binding obligations. These are normally called 'soft law' rules and are considered by states as acceptable norms of behaviour.
- (31) A. Boyle, *Saving the world? Implementation and Enforcement of International Environmental Law Through International Institutions*, 3 *Journal of Environmental Law*, p. 229-233.
- (32) P. Birnie and A. Boyle, *International Law and the Environment*, (Oxford, 1992), p. 251.
- (33) See, P. Birnie and A. Boyle, *ibid.*, chap. 1.
- (34) Such as in the ILC, Sixth Report on International Liability for Injuries Consequences of Acts Not Prohibited by International Law, UN Doc./A/CN.4/428 (1990), Articles 1-33; and the ILC Draft Articles on the Non-Navigational Use of International Watercourses, *Reports of the ILC to the General Assembly*, UN GAOR, 45th Session, A/45/10 (1990), p. 137, reprinted in Harold Hohmann, *supra note*.
- (35) Such as in the ILC Helsinki Rules on International Rivers, 1966, *Report of the 52nd Conference*, p. 484; the ILC Montreal Rules on Water Pollution, 1982, *Report of the 60th Conference*, p. 531; and the ILC Montreal Rules on Transfrontier Pollution, 1982, *Report of the 60th Conference*, p. 1, H. Hohmann, *supra note* 25.
- (36) Such as in the WCED Draft Convention on Environment Protection and Sustainable Development, in Munro and Lammers, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, (London, 1986).
- (37) See analysis by Hahn and Richards, *The Internationalisation of Environmental Regulation*, 30 *Harvard International Law Journal* (1989), p. 421; and Gehring, *International Environmental Regimes*, 1 *Yearbook of International Environmental Law*, 1990, p. 35.
- (38) Case concerning Gabčíkovo Nagymaros Project (Hungary/Slovakia), 27 *International Legal Materials*, 1998. See 'Modern Environmental Law Applicable to 1977 Treaty', *International Law Reports*, October 31<sup>st</sup> 1997.
- (39) P. Sands, *Principles of International Environmental Law*, (Manchester University Press, 1995), Vol. 1, p.184.
- (40) P. Birnie and A. Boyle, *supra note* 32, p. 89.
- (41) The status and effect of the others remains inconclusive, although they may bind as treaty obligations or, in limited circumstances, as customary obligations. In particular, it is questionable 'whether they give rise to actionable obligations of a general nature'. In Sands, *supra note* 39, at p. 184.
- (42) In *Kuwait v. American Independent Oil Co*, 21 *International Law Materials*, 1982, p. 976.

- (43) This fundamental principle underlies the first part of Principle 21 of the 1972 Stockholm Declaration, *supra note* 8, and subsequently the first part of Principle 2 of the 1992 Rio Declaration; 31 International Legal Materials, 1992, p. 874.
- (44) Declaration on principles on International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter for the United Nations, UNGA. Res. 2625 (XXV) (1970).
- (45) UNGA Res. 626(VII) (1952); Res. 837(IX) (1954); Res. 1314(XIII) (1958; Res. 1515(XV) (1960). See also the preamble to the 1992 Climate Change Convention, 31 International Legal Materials, 1992, p. 848; and Article 15 of the 1992 Biodiversity Convention, 31 International Legal Materials, 1992, p. 818.
- (46) Art. (8) of the 1982 United Nations Convention on the Law of the Sea, 21 International Legal Materials, 1982, p. 1261.
- (47) *Ibid.*, articles (2) and (48).
- (48) Oppenheim, *International Law*, Vol. 1, (Longmans, London, 1937), pp. 650-61.
- (49) The United Nations Charter of Economic Rights and Duties of States reiterates that sovereign rights should only be used 'without causing damage to the legitimate rights of others', UN Resolution A/Res./3281, 15 January 1975, 14 International Legal Materials, No. 1, 1975, pp. 251-65.
- (50) A. Kiss and D. Shelton, *International Environmental Law*, (Transnational Publishers, Inc., 1991), p. 107.
- (51) Stockholm Declaration of the United Nations Conference on the Human Environment, *supra note* 24, pp. 1416-14469.
- (52) Meaning "You should not use your property in such a way so as to harm others." An expansion of the *sic utere* principle can be found in the concept of "good neighbourliness", which was recognised in the International Commission of the River Oder. International Commission of the River Oder (1929) PCIJ Ser. A. No. 23, Judgement 16, pp. 4-46. See also, L.F.E. Goldie, *Special Regimes and Pre-emptive Activities in International Law*, 11 International Comparative Law Quarterly, Part 3 (July, 1962), p. 689, where he refers to good neighbourliness as a broad standard of recognition and respect. The rule against abuse of rights also finds its origins in *sic utere* and essentially maintains that "... no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international laws contemplates the power will be used". See G. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 British Yearbook of International Law (1972-73), p. 352. However, there is disagreement as to the theoretical descriptions of this concept and whether it is in actuality a principle of international law. See, for example, A. Lester, *River Pollution in International Law*, 57 American Journal of International Law, No. 4 (October, 1963), pp. 833-34.
- (53) *Trail Smelter Arbitration* (United States v. Canada) 16 April 1938, 11 March 1941; 3 Rewards of International Arbitral Awards, 1941; see 33 American Journal of International Law, No. 1 (January, 1939), pp. 182-212; and Vol. 35, No. 4 (October, 1941), pp. 684-736.
- (54) *Ibid.*, p. 716.
- (55) Ian Brownlie, *A survey of International Customary Rules of Environmental Protection*, 13 Natural Resources Journal, No. 2 (April 1973), p. 180.
- (56) Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 Oregon Law Review, No. 3, Part I (Spring 1971), pp. 259-82.
- (57) P. Birnie and A. Boyle, *supra note* 32, p.100.
- (58) P. Birnie, *The Development of International Environmental Law*, 3 British Journal of International Studies, No. 2 (July, 1977), p. 176.
- (59) Lynton Keith Caldwell, *International Environmental Policy*, 2nded., (Duke University Press), p. 123.
- (60) *Trail Smelter Case*, *Supra note* 53, pp. 281.
- (61) *Ibid.*, pp. 281-82.
- (62) *Corfu Channel case*, ICJ Reports (1949), pp. 4-38.
- (63) *Ibid.*, p. 22.
- (64) Ian Brownlie, *supra note* 32, p. 180.
- (65) P. Birnie, *supra note* 58, p. 176.
- (66) *Lac Lanoux Arbitration* (France v. Spain), 24 International Law Reports, 1957, pp. 101-42.

- (67) Yearbook of the ILC, Volume. II, Part II (1974), p. 197.
- (68) Note that Principle 21 is more advantageous than the earlier case law in many ways, for instance Principle 21 does not qualify 'damage' by the term 'serious' and includes damage caused by persons under the state's control, wherever they may act. See, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harvard International Law Journal, No. 1 (Winter 1973), p. 344.
- (69) The United Nations Charter of Economic Rights and Duties of States reiterates that sovereign rights should only be used 'without causing damage to the legitimate rights of others', UN Resolution A/Res./3281, 15 January 1975, 14 International Legal Materials, No. 1, 1975, pp. 251-65.
- (70) Principle 1 of the UNEP Draft Principles, 17 International Legal Materials, 1978, p. 1097.
- (71) See Barboza, Fifth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc. A/CN.4/43. 22-23, paragraphs 64-68 (1989). Note Draft Article 8 as proposed by the Commission's special rapporteur.
- (72) Geneva Convention on the Long-Range Transboundary Air Pollution (LARTAP), 19 International Legal Materials, No. 6 (1979), pp. 1442-55, where Principle 21 expressed verbatim in the introduction.
- (73) The 1982 United Nations Convention on the Law of the Sea, 21 International Legal Materials, 1982, p. 1261, pp. 1245-1345. Article 194(2) states that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."
- (74) Vienna Convention on the Protection of the Ozone Layer, 26 International Legal Materials, No. 6 (1987), pp. 15160-40.
- (75) See the preamble to the 1992 Climate Change Convention, 31 International Legal Materials, 1992, p. 84, where Principle 21 is repeated in the Convention's Preamble.
- (76) See, in addition, the 1980 Memorandum of Intent between the US and Canada, 20 International Legal Materials No. 3 (1981), pp. 690-95; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (London Dumping Convention), 18 International Legal Materials No. 2 (1979), pp. 499-529; and the 1982 UN Resolution on a World Charter for Nature, adopted by the UN General Assembly in 1982: UNGA Res. 37/3; UN Doc. A/37/L51 (1982), pp. 455-60; and 22 International Legal Materials, No. 2, (1983).
- (77) Marc Pallemmaerts, *International Environmental Law From Stockholm to Rio: Back to the Future*, in Philippe Sands, ed., *Greening International Law*, (Earthscan, 1993), p. 6.
- (78) *Ibid.*, p. 5.
- (79) Ileana Porras, *The Rio Declaration: A New Basis for International Co-operation*, in Philippe Sand, *ibid.*, p. 31.
- (80) P. Birnie and A. Boyle, *supra note 32*, p. 91.
- (81) Canada duly made reparation to the United States as a result of fumes emanated from a Canadian factory.
- (82) *Bering Sea Fur Seals Fisheries Arbitration* (Great Britain v. United States), 1 Moore's International Arbitration Awards, 1893, p. 755.
- (83) For fisheries commissions, see Koers, *International Regulation of Marine Fisheries: A Study or Regional Fisheries Organisations*, (London, 1973).
- (84) See *infra*.
- (85) UN Doc. A/CONF. 151/5/Rev. 1.
- (86) P. Sands, *Chernobyl: Law and Communication*, (Grotios, 1988), p.13.
- (87) The reason behind including it in this section is its close connection to the Preventative Principle.
- (88) See, for example, Lothar Gundling, *The Status in International Law of the Principle of Precautionary Action*, in D. Freestone and T. Ijlstre ed., *The North Sea: Perspective on Regional Environmental Co-operation*, (Dordrecht: Martinus Nijhoff, 1990), pp. 23-30; Ellen Hey, *The Precautionary Concept in Environmental*



- Policy and Law: Institutionalising Caution*, 4 Georgetown International Environmental Law Review, No. 2 (1992), pp. 303-318; David Freestone, *The Precautionary Principle*, in R. Churchill and D. Freestone ed., *International Law and Global Climate Change*, (London: Graham & Trotman, 1991), p. 30.
- (89) UNEP Governing Council Decision 15/27, *Precautionary Approach to Marine Pollution, Including Waste-Dumping at Sea*.
- (90) Final Declaration of the Third International Conference on the Protection of the North Sea, 4 (1990).
- (91) Montreal Protocol on Substances that Deplete the Ozone Layer, September 16, 1987, 26 International Legal Materials, 1987, at p. 1550.
- (92) J. Cameron and J. Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 Boston College International and Comparative Law Review, 1992, p. 1.
- (93) Some writers used this argument to annul United States argument of 'scientific uncertainty' against Canada claims that the United States should take specific remedial actions regarding the North American acid rain problem. Handle, *Acid Rain in United States-Canada Relations: The Politics of Procrastination and International Law*, (1978), p. 131.
- (94) However, there has been a clear and repeated reluctance by the US government to commit itself to a reduction of greenhouse gases on the grounds that scientific evidence warranting such action was not conclusive enough. See, *US to Negotiate Steps on Warming*, N.Y. Times, February 15, 1991.
- (95) Ministerial Declaration on Sustainable Development in the ECE Region, United Nations Economic Commission for Europe Conference on Action for a Common Future, Bergen, Norway, 15 May 1990, UN Doc. A/CONF.151/PC.10. Text is also in 1 Yearbook of International Environmental Law, 1990.
- (96) Note however, the strong opposition to this principle by the United States as demonstrated at the Bergen Conference and again at the Second World Climate Conference. N.Y. Times, November 11, 1990, at a5, col. 1.
- (97) J. Cameron and J. Abouchar, *supra note 92*.
- (98) For example, Article 5 of the Federal Emission Control Act and Article 7 of the Nuclear Energy Act.
- (99) Birnie and Boyle, *supra note 32*, p. 98.
- (100) Gundling, *supra note 88*.
- (101) Handle, *National Use of Transboundary Air Resources: The International Entitlement Reconsidered*, 26 National Resources Journal, p. 405, at 429-30.
- (102) G. Handle, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 American Journal of International Law, 1975, p. 50.
- (103) See Daniel Bodansky, *New Developments in International Law: Remarks by Daniel Bodansky*, American Society of International Law: Proceedings of the 85th Annual Meeting, by the American Society of International Law, Washington, DC (1991), pp. 413-17.
- (104) For Example, Article 5 of the 1992 Biodiversity Convention, *supra note 45*.
- (105) *Supra note 32*, at p. 188.
- (106) This is reflected in principle 7 of the 1978 UNEP Draft Principles, *supra note 70*.
- (107) P. N. Okowa, *Procedural Obligations in International Environmental Agreements*, The British Yearbook of International Law, 1996, p. 275. Okowa lists a few underlying policy objectives of the procedural duties: First, these duties may serve as a vehicle for the resolution of conflicts between states. Secondly, states contemplating the conduct of activities can be properly advised on an international level as to the environmental effects of their actions. Thirdly, the procedural duties 'encompass a broad notion of fairness' by giving other states and individuals the opportunity to participate in the decision-making process. p. 278.
- (108) For a comprehensive study on this see P. Okowa, *ibid*.
- (109) In a claim over the Gabčíkovo Nagymaros Project and the proposed diversion of the Danube River, Hungary argued that Slovakia (which was then Czechoslovakia) was in violation of its obligation to co-operate in good faith in the implementation of principles



- affecting transboundary resources. The claim included Slovakia's failure to negotiate to prevent disputes, to provide timely notification of future plans which may entail significant environmental risk, and to engage in consultations to arrive at an equitable resolution of the situation. Hungary's application, 22 October 1992, at paras. 27, 29 and 30, *supra* note 38.
- (110) The suggestion here is that, with the exception of notification in emergency situations and only in their specific application to international watercourses, none of the procedural obligations have passed into the corpus of customary international law, and hence it can be said that they do not, as yet, have a general binding quality upon states.
- (111) See generally on this point the Doha Declaration, *Priorities for Progressive Development of International Law in the UN Decade of International Law to Meet the Challenges of the 21st Century*, adopted at the Qatar International Conference, March 22-25, 1994, 24(5) *Environmental Pollution & Law*, 1994, p. 291.
- (112) A large number of multilateral law making treaties have been accomplished. See for example the 1973 MARPOL Convention, 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats, 1979 Geneva Convention on Long Range Transboundary Air Pollution, 1985 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes, 1991 Protocol to the Antarctic Treaty on Environmental Protection.
- (113) UNGA Res. 44/228 (1989). For an account of the negotiating history and an interpretative guide of the Rio Declaration, see Ileana Porras, *The Rio Declaration: A New Basis for International Co-operation*, Review of European Community and International Environmental Law Journal, 1992, p. 245.
- (114) WCED, *Our Common Future*, (Oxford University Press, 1987).
- (115) *Ibid.*, p. 43.
- (116) Such as international environmental law, human rights and international economics and trade. See generally D. Reid, *Sustainable Development: An Introductory Guide*, (Earthscan, 1996); J. Holmberg, S. Bass and L. Timberlake, *Defending the Future: A Guide to Sustainable Development*, (Earthscan, 1991).
- (117) For Example, Recommendation 1130 (1990) (1) of the Parliamentary Assembly of the Council of Europe on the Formulation of a European charter and a European convention of environmental protection and sustainable development. Also, the Bergen Ministerial Declaration on Sustainable Development in the ECE Region, text in the 1990 Yearbook of International Environmental Law.
- (118) It is an anthropocentric concept inasmuch as the measures of its value are the needs and aspirations of present and future humans detached from the need to preserve the environment as such.
- (119) Of the same meaning is a statement by the UNEP Governing Council on Sustainable Development, Doc. UNEP/GC 15/L.37, Annex II (1989).
- (120) Cited in G. Handle, *Environmental Security and Global Change: The Challenge to International Law*, 1 Yearbook of International Environmental Law, 1990, p. 26.
- (121) P. Sands, *supra* note 39, pp. 199-208.
- (122) L. Gundling, *supra* note 88.
- (123) WCED, *supra* note 114, at p. 43.
- (124) Arts. 3(1) and 4 (2) (a) of the 1992 Climate Change Convention, and Arts. 1 and 15 (7) of the 1992 Biodiversity Convention, *supra* notes.
- (125) OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies C(72)128 (1972), 14 International Legal Materials, 1975, p. 236.
- (126) OECD Council Recommendation C(74)223 (1974), paras. I(1), II(3) and II(1), *ibid.*, p. 234.
- (127) OJ C 112, 20.12.1973, at p. 1.

- (128) Art. 130R(2), 25 International Legal Materials, No. 3 (1986), pp. 506-518, see also Art. 130S(5) of the EEC Treaty as amended by the 1992 Maastricht Treaty, which allows temporary derogation without prejudice to the principle that the polluter should pay.
- (129) 30 International Legal Materials, 1991, p. 735.
- (130) See Birnie and Boyle, *supra note 32*, at pp. 110-111.
- (131) Principle 16 states that: "National authorities should *endeavour* to promote the internalisation of environmental costs and the use of economic instruments...that the polluter should...bear the costs of pollution...." *Supra note 85*. However, this text falls short of the more specific language of the EC and OECD instruments, since it includes words that limit the extent of obligation upon states.
- (132) SS. II/4/B/, 3 August 1990.
- (133) Birnie and Boyle, *supra note 32*, p. 109, citing OECD definition.
- (134) OECD, *Economic Instruments for Environmental Protection*, (Paris, 1989). In England, for example, the government imposed pollution charges for watercourse discharges and pesticides and higher taxes for leaded petrol. See for example the 1989 Pesticides (Fees and Enforcement) Act.
- (135) Birnie and Boyle, *supra note 32*, p. 296.
- (136) As concluded in Principle 7 of the Rio Declaration and followed by the Montreal Protocol to the Vienna Ozone Convention whereby financial aid is offered to developing states for environmental protection.
- (137) P. Birnie and A. Boyle, *supra note 32*, p. 198. It is to be noted here that the Council of Europe has adopted the 1993 Lugano Convention on Civil Liability for damage Resulting from Activities Dangerous to the Environment; 32 International Legal Materials, 1993, p. 1228. This established a general standard for indemnification of those injured by hazardous activities and products and eases the burden of proof on persons seeking reparations. Within contracting States this Convention applies to all persons, companies and all agencies exercising control over dangerous activities. The place of the harm is irrelevant for liability if the activity or event takes place on the territory of a contracting State. This Convention is the first civil liability instrument to include provisions on access to information.
- (138) OECD Council Recommendation C(74) 224; C(76) 55; C(77) 28.
- (139) Nordic Convention on the Protection of the Environment (Stockholm) 19 February 1974, in force 5 October 1976; 13 International Legal Materials, 1974, p. 511.
- (140) Munro and Lammers, *Environmental Protection and Sustainable Development*, (Dordrecht, 1986), pp. 121-2.
- (141) A good history review of the use of the environment as a weapon in A. Ross, *Environmental warfare and the Persian Gulf War: Possible Remedies to Combat International Destruction of the Environment*, 10 Dickinson Journal of International Law, 1992, p. 516.
- (142) Stockholm International Peace Research Institute, *Warfare in a Fragile World: Military Impact on the Human Environment*, (1980), pp. 15-19, and *Ecological Consequences of the Second Indochina war*, (1976). [hereinafter SIPRI].
- (143) See generally J. Robinson, *The Effects of Weapons on Ecosystems*, (Pergamon, Oxford, 1979). Example of this residual effect is England's test in 1942 of the military potential of *bacillus anthracis* (the agent that causes anthrax) at Gruinard Island. The effect was devastating and to this day the island is uninhabitable since the produced micro-organism has become part of the ecosystem. Westing, *Environmental Warfare*, 15 Environmental Law, 1985, at p. 656.
- (144) See Westing, *ibid.*, at pp. 644, 652.
- (145) SIPRI, *supra note 142*, at p. 22.
- (146) *Invading Iraqis Seize Kuwait and it's Oil*, N.Y. Times, August. 3, 1990, at A1, col. 6.
- (147) R. W. Apple, *US Says Iraq Pumps Kuwait Oil into Gulf; Vast Damage is Feared Growing Slick*, N.Y. Times, Jan 26, 1991, at A1.
- (148) *Oil as a Weapon of Combat*, Gannett News Service (Jan. 22, 1991) (LEXIS, Nexis Library, Int' file).

- (149) *War Scars Gulf's Fragile Environment*, Gannett News Service (Feb. 27, 1991) (LEXIS, Nexis library, Int' file).
- (150) Signed in December 17, 1975, 11 International Legal Materials, 1972, p. 1358.
- (151) Article 6.
- (152) On this topic see generally Kass and Gerrard, *The Gulf War*, 4 New York Law Journal (July 26, 1991).
- (153) C. Joyner and T. Kirkhope, *The Persian Gulf War Oil Spills: Reassessing the Law of Environmental Protection and the Law of Armed Conflict*, 24 Case Western Reserve Journal of International Law, 1992, at p. 36.
- (154) The International Convention Concerning the Laws and Customs of war on Land (Hague IV), Oct. 18, 1907, in D. Schindler & J. Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Document*, (1981), p. 63.
- (155) *Ibid.*, article 27.
- (156) *Ibid.*, at p. 723.
- (157) *Ibid.*, at p. 147.
- (158) Article 53 of the Convention for the Protection of War Victims Concerning the Protection of Civilian Persons in Time of War, Aug. 12, 1949, *ibid.*, at p. 427.
- (159) Article 4.1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954; *ibid.*, at p. 661.
- (160) Principle VI(B) of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, adopted by the ILC in 1950; *ibid.*, at p. 835.
- (161) See comments on this in S. Mallison & W. Mallison, *Armed Conflict in Lebanon*, (American Education Trust, 1985).
- (162) *War in Gulf; US Says Iraq Pumps Kuwaiti Oil into Gulf*, N.Y. Times, Jan. 26, 1991, at A1, col. 6.
- (163) *Oil as a Weapon of Combat*, Gannett News Service (Jan. 22, 1991) (LEXIS, Nexis Library, Int' file).
- (164) M. Weiskopf, *Oil Fire Pollution Assessed*, Wash. Post, Apr. 4, 1991, at A1, and Philip Shenon, *Oil Company Ecologist Fears Slick Will Leave a 'Dead Gulf'*, N.Y. Times, Feb. 9, 1991, at A7.
- (165) B. Schafer, *The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Re-evaluate What Types of Conduct are Permissible During Hostilities*, 19 California Western International Law Review, 1989, at p. 308.
- (166) The International Convention Concerning the Laws and Customs of war on Land (Hague IV), Oct. 18, 1907, in D. Schindler & J. Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Document*, (1981), p. 63., Article 23.
- (167) The Declaration Prohibiting the Use of Asphyxiating Gases (Hague Declaration II), July 29, 1899, *ibid.*, at p. 100.
- (168) Protocol for the Protection of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacterial Methods of Warfare, June 17, 1925, *ibid.*, at p.109.
- (169) See for example Mallison, *The Law of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 George Washington Law Review, 1967.
- (170) See Mallison, *ibid.*, at p. 328.
- (171) Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.
- (172) Kass and Gerrard, *supra note* 152, at p. 9. For similar and other reasons, the 1977 Convention on the Prohibition of Military or Any Other Hostile Uses of Environmental Modifications Techniques (ENMOD), which provide for a similar provision in article 1, may entail some problems in holding Iraq accountable for its activities in the Gulf War. See generally A. Westing ed., *Environmental Warfare: A Technical, Legal and Policy Appraisal*, 1984, at p. 70.
- (173) Articles V, VI and XIII are of a relevant importance in this regard.
- (174) Security Council Resolution 687/1991, 30 International Legal Materials, 1991, p. 847.
- (175) P. Sands, *supra note* 39, p. 236. The most important outcome of the Security Council Resolution was the establishment of the UN

- Compensation Commission in 1991 to provide reparation for the consequences of Iraq's unlawful invasion of Kuwait. In deciding upon the methods for assessing environmental damage that Iraq must pay for, the Governing Council of this Commission provided that payments would be available for direct environmental damage and the depletion of natural resources, including losses or expenses resulting from:
- a) abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
  - b) reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
  - c) reasonable monitoring and assessment of the environmental damage for the purpose of evaluating and abating the harm and restoring the environment;
  - d) reasonable monitoring of public health and performing medical screening for the purpose of investigating and combating increased health risks as a result of the environmental damage; and
  - e) depletion of or damage to natural resources.
- See, Governing Council, UN Compensation Commission, Decision 7, para. 34, 31 International Legal Materials, 1992, p. 1051.
- (176) Christianity and Judaism are international religions which are also followed and practised in the region. For a comprehensive discussion of the different outlooks of the religions in the Middle East region see *Religion and the Use of the Earth's Resources*, organised jointly by The Pontifical Council for Interreligious Dialogue (Vatican City) and The Royal Academy for Islamic Civilisation Research / Al Albait Foundation (Amman-Jordan), Rome (Italy), 17-20 April 1996.
- (177) In fact, before it simply meant law, the Arabic word for Islamic law, *Shari'a*, denoted the law of water. Ibn Manzur, the famous Arab lexicographer, mentions in his dictionary *Lisan al-Arab* under the root "sh r" that "*shari'a*" is the place from which one descends to water...and *Shari'a* in the acceptance of Arabs is the law of water (*shur'at al-ma'*). Ibn Manzur, *Lisan al-'Arab*, (Beirut, 1959), Vol. 3, p. 175; A later classical dictionary is more general, beside the same meaning already mentioned, Zubaydi also defines "*Shari'a*" as what God has decreed or legislated for the people in terms of prayer, fasting, pilgrimage, marriage.... Al-Zubaydi, *Taj al-'Arus*, (N.D., Benghazi), Vol. 5, p. 394ff.
- (178) Sura 5, verse 17.
- (179) Sura 6, verse 165. Also see Sura 2, verse 30; Sura 57, verse 7; and Sura 41, verse 10.
- (180) On the property right in Islam see A. al-Abbadi, *Ownership in Islam*(Arabic), Vol. 1, p. 401.
- (181) For the same conclusion see Al-Qurtubi commentary on the Holy Quran, *Al-Qurtubi: Tafsir*, Vol. 17, p. 238. Also see *Ruh al-Ma'ani*, Vol. 27, p. 169; *Tabari: Tafsir*, Vol. 27, p. 317, and *Ibn Kathir: Tafsir*, Vol. 4, p. 305.
- (182) See Sura 10, verse 101; Sura 7, verse 185. Also see Iqbal, *Renovation of Religious Thought in Islam*, p. 149, and Sayyid Qutub, *Islam and the Problems of Civilisation* (Arabic), p. 33.
- (183) See Sura 31, verse 20, Sura 2, verse 22, Sura 43, verse 10, Sura 67, verse 15, Sura 15, verses 19-20, Sura 7, verse 10 and Sura 7 verse 74.
- (184) See for example Sura 22, verse 5, Sura 36, verses 33-36 and Sura 6, verse 141.
- (185) See for example Sura 57, verse 25 and Sura 34, verses 11 and 13.
- (186) See for example Sura 45, verse 4, Sura 6, verse 38, Sura 16 verses 5, 8, 66, 68, 69 and 79.
- (187) See for example Sura 25, verse 53, Sura 45, verse 12, Sura 5, and Sura 16, verse 14.
- (188) See for example, Sura 5, verse 99, Sura 17, verse 70, Sura 27, verse 63, and Sura 10, verse 22.
- (189) See for example, Sura 39, verse 21, Sura 2, verse 168, Sura 7 verse 57, and Sura 2, verse 164.
- (190) Narrated and classified by Ahmad, al-Nissa' and ibn Hibban.
- (191) Narrated and classified by al-Bukhari, *The Book on Ploughed Land* in *al-Bukhari Sahih*



- (192) Al-Jassas, *Rules of Qura'n* (Arabic), Vol. 3, p. 203.
- (193) Sura 2, verse 195.
- (194) Sura 4, verse 29.
- (195) Sura 33, verse 58.
- (196) Al-Ghazzali, *Ihya' Ulum al-Din*, Vol. 2, p. 95.
- (197) *Ibid.* For the same conclusion see also Al-Gazzali, *Nihayat al-Muhtaj*, Vol. 5, p. 337.
- (198) This hadith is traced by al-Tirmidhi and regarded to be fairly authentic by Ezziddin Blaqe in *Minhaj al-Salihin*, pp. 592-3.
- (199) Tabarani, *Al-Awsat al-Kabir, Muja'mma' al-Zawaid*, Vol. 2, p. 6. See also a number of hadiths to the same meaning narrated and classified by Muslim, *Sahih Muslim*, Vol. Vol. 6, pp. 170-1
- (200) See hadiths narrated and classified by al-Bukhari and Muslim, *ibid.*
- (201) Narrated and classified by Malik, see Shawkani, *Nayle al-Awtar*, Vol. 7, p. 243. See Waheb al-Zuhaili, *Impact of war in Islamic Jurisprudence* (Arabic), p. 128.
- (202) Al-Zarqani, *Commentary and Explanation on Malik, Malik's Muwatta* (Arabic), chapter 3, p. 12.
- (203) *Islamic Civilization*, Al-Albait Foundation 1/88, (Amman, Jordan, 1995).
- (204) See Mohammed ibn Allan al-Siddiqi, *Believers Sign for the way to Paradise* (Arabic), Vol. 4, pp. 592-3. Also see Al-Nawawi, *Riad al-Salihin*, chapter entitled "A Chapter on Banning Defecation in People's Roads, Shadows and Water Resources."
- (205) In *Zadul-Ma'ad*, Vol. 1, p. 48
- (206) Sura 25, verse 2.
- (207) Sura 54, verse 49.
- (208) Sura 13, verse 8.
- (209) See the Qura'ic verses Sura 15, verse 21; Sura 41, verse 10; Sura 23, verse 18, Sura 13, verse 17; Sura 42, verse 27; and Sura 87, verse 2-3.
- (210) Sura 7, verse 31.
- (211) Sura 17, verse 27. For the same meaning is a prophetic statement specifically prohibit the over-use of water, in *Zadul-Ma'ad*, Vol. 1, p. 48. For prohibition of making mischief on the earth see the Holy Qura'n, Sura 7, verse 85 and Sura 2, verse 205.
- (212) *Ettela'at* Iranian daily newspaper, Tehran, 17 Mehr 1361/8-9-1982, p. 3.
- (213) Narrated by Abu Dawud in his *Sunan*
- (214) World Resources 88/1989: World Resources Institute, International Institute for Environment and Development Affairs. UNDP.
- (215) A. Baqadir, A. al-Sabbagh, M. al-Julaynid, M. al-Samarra'i, *A Basic Study on Environment Protection in Islam*, Department of Islamic Studies, King Abdul-Aziz University, Jeddah, (Kingdom of Saudi Arabia, Department of Meteorology and Environment Protection, International Association for Conservation of Natural Resources, 1989), p. 12.
- (216) Sura 5, verse 9.
- (217) This remark is quoted from an article by M. al-Fangari, *Development in Islam* Vol. 1, p. 209.
- (218) The Majalla is important as the codification of Islamic law in several Middle Eastern countries. It remains residual legislation for Palestine, Jordan, Lebanon, Syria, and Iraq. The Ottoman Majalla gives particular attention to water, with 92 articles dealing specifically with the subject (Arts. 1234-1326).
- (219) For summary of these core principles see Chibli Mallat, *The Quest for water Use Principles: Reflections on Shari'a and Custom in the Middle East*, in J. A. Allan and Chibli Mallat, *Water in the Middle East*, (Tauris Academic Studies, London, 1995), p.127.
- (220) In Algeria (Law 17/83 of 16 July 1983), Tunisia (Law 1975/16, 31 May 1975), Lebanon (Code des Eaux 1926/30) and Mauritania (Decree-law 1921/315). For a more comprehensive discussion on this see Chibli Mallat, *ibid.*
- (221) The distinction between 'secular' and 'Islamic' legal systems is imprecise. In this study the term 'Islamic country' refers to a legal system which is marked either by an explicit commitment to the introduction of Islam as a primary source of law, or is committed to the Islamization of the legal system. It should be stressed that not all countries with a majority Muslim population have incorporated such Islamization policies in their legal systems. Especially in the South Asian discourse a distinction is often made between Muslim



- countries, i.e., a country with a majority population, and Islamic states, i.e., a state which 'opts to conduct its affairs in accordance with the revealed guidance of Islam'. See Khurshid Ahmad, *Introduction*, in Sayyid Abul A'la Maududi, *The Islamic Law and the Constitution*, Lahore, 1955. In spite of this plurality of legal systems among Muslim and Islamic countries it is widely acknowledged that these countries share a legal tradition which sets them apart from a Western constitutional discourse, which is marked by tendency to reject religion as the basis for legitimisation of laws. See especially Abdullah Ahmed An-Na'im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 The John Marshall Law Review, 1992, pp. 267-93, at p. 268.
- (222) M. Lau, *Islam and Judicial Activism: Public Interest Litigation and Environment Protection in The Islamic Republic of Pakistan*, in A. Boyle and M. Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press Oxford, 1996), pp. 286. See Palmer, *The Encounter of Religion and Conservation*, in Engel and Engel (eds.), *Ethics of Environment and Development* (Tucson, 1990), pp. 50-63. See also Nickle, *The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification*, 18 Yale Journal of International Law, 1993, pp. 281-95.
- (223) *Ibid.*
- (224) See B. A. Al-Hafiz, *Islam and Ecology*, in Fazlun M. Khalid, *Islam and Ecology*, London, 1992, pp. 1-24, at p. 3.
- (225) For a comprehensive discussion see Mawil Y. Izzi Deen (Sanarrai), *Islamic Environmental Ethics, Law, and Society*, in Engel and Engel (eds.), *Ethics of Environment and Development*, pp. 189-97.
- (226) See Mawil Y. Izzi Dien, *Islamic Ethics and the Environment*, in Fazlun M. Khalid, *Islam and Ecology*, pp. 25-35, at p. 34. The emphasis on religious duties rather than on rights is common in the discourse of human rights in Islam, See Abdullah A. An-Na'im, *supra* note 145.
- (227) For instance, the Final Report of the United Nations' Special Rapporteur on 'Human Rights and the Environment' begins with a quote attributed to the successor of the Holy Prophet Muhammad, the first Caliph Abu Baker al Siddiq, in order to illustrate that the precepts of Islam embody a moral postulate to protect the environment. The report then proceeds to trace the further development of the right to a clean environment thereby implying that a consensus on environmental ethics must mean that there is no difference between the conceptual framework of human rights in Islamic and in secular countries. See: *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/9 (6 July, 1994), p. 8.
- (228) For a comprehensive analysis of human rights in the constitution of Iran and the basic law of Saudi Arabia see Mayer, *Islam and Human Rights*, London, 1995.
- (229) Such as Iran and Saudi Arabia.
- (230) The most recent example of this development is the 1990 Cairo Declaration on Human Rights in Islam passed by the Organisation of the Islamic Conference (OIC), which represents most of the Muslim countries of the world. See the OIC, *The Cairo Declaration on Human Rights in Islam*, Annex to Res. No. 49/19-P. A copy of the text can be found in UN General Assembly Documents A/45/421. A restriction of the scope of internationally recognised human rights is a common feature of Islamic human rights convention. This restriction is achieved by making internationally recognised human rights subject to Islamic law thereby narrowing the extent of the rights guaranteed under Islamic conventions.
- (231) For example, the potential tension within the constitutional structure between Islamic provisions and secular human rights has lead to contradictory decisions handed down by the Islamic Republic of Pakistan's judiciary. For a comprehensive discussion of this see M. Lau, *supra* note 146, pp. 285-302.

- (232) Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973, provides that “No person shall be deprived of his life or liberty save in accordance with law.”
- (233) See *Human Rights Case (Environment Pollution in Baluchistan)* PLD 1994 SC, p. 102 and *Shela Zia v. WAPDA* PLD 1994 SC, p. 693, discussed in M. Lau, *The Right to Public Participation: Public Interest Litigation and Environmental Law in Pakistan*, 4 Review of European Community and International Environmental Law, 1994, p. 49.
- (234) Pakistan’s judiciary has waived the strict procedural rules pertaining to writ petitions for this class of cases. For a brief overview of public interest litigation cases in Pakistan. See Mansoor Hassan Khan, *Public Interest Litigation in Pakistan: Growth of the Concept and its Meaning in Pakistan*, (Karachi, 1993).
- (235) This is contained in chapter 1 of part II of the Constitution is derived from Article 184(3) of the Constitution.
- (236) PLD 1988 SC, p. 416.
- (237) *Ibid.*, p. 489.
- (238) Muhammad Afzal Zullah, *Human Rights in Pakistan*, CLB (October 1992), pp. 1343-84, at p. 1343.
- (239) *Akbar Ali v. The State* 1991 SCMR. p. 2114.
- (240) *Shela Zia v. WADPA* PLD 1994 SC, p. 416.
- (241) *Human Rights Case (Environment Pollution in Baluchistan)* PLD SC, p. 102.
- (242) *Human Rights Case No. 20-K92*, reproduced in Zullah, CLB (October, 1992), pp. 1368-9.
- (243) See the Organisation of the Islamic Conference, *The Cairo Declaration on Human Rights in Islam* Annex to Res. No. 49/19-P.