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When Environmental Obligations Collide with State Sovereignty: An International and Sharia Law Perspective

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Our planet is struggling with cross-border environmental crises: climate change, over-exploitation of natural resources, deforestation, water pollution, and biodiversity loss, only to name a few. As imposed by the nature of our modern globalized world, environmental degradation is no longer considered a local issue and transcends the political borders of States. As a result, the international community is urged to tackle the current environmental issues through international co-operative frameworks. Despite the need for such collective transnational frameworks, international law, notwithstanding its gradual progress over the past few decades, is still operating in the “State-oriented” structure. State sovereignty is the cornerstone of international relations, and international rules and principles revolve around it. In the face of looming threat of environmental issues on the one hand, and the lack of structural support by international law on the other, neutral platforms should be created to bring together science, politics, private actors, religious leaders, and in a nutshell, the entire international community in order to mobilize for creating a “human-oriented” structure,³ to say the least, in addressing environmental challenges faced by the Earth. Such a new structure entails developing new rules for unregulated areas and adopting progressive reading of the existing rules and principles in international law. In light of the preceding, international law must be revisited concerning State sovereignty and erga omnes obligations. Islamic approaches also approve of this development in that they have such legal institutions as Al-Anfal that can be employed in favor of environmental sustainability goals.

State Sovereignty in International Law

Relying on “Westphalian State sovereignty” in earlier times, States assumed ‘full’ and ‘absolute’ sovereignty by alluding to certain rules and principles of international law including the sovereign equality of States, the principle of freedom of action which was recognized as lotus principle⁴ in international jurisprudence, and the principle of non-intervention in the domestic affairs of other States.⁵

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³ Manuel Manonell, ed. *Report of the Hearings with the International Community & Civil Society regarding the United Nations*, (Barcelona: Foundation for a Culture of Peace 2006) 10, Accessed June 25, 2020. https://www.unaoc.org/repository/hearings_report.pdf

⁴ The Lotus principle refers to an extreme positivist approach in international law, according to which sovereign States should be free to act in any way they wish so long as they do not contravene an explicit prohibition. It is named after the landmark judgment of the Permanent Court of International Justice (PCIJ) in the Lotus case in 1927 concerning the legal jurisdiction of States. See *The Case of the S.S. "Lotus."* 1927. (Permanent Court of International Justice, Series A. No. 10).

⁵ Cf Daniel Philpott. "Westphalia, Authority, and International Society." *Political Studies* 566-589, (1999): doi:10.1111/1467-9248.00217.

Nevertheless, by the remarkable developments in international human rights law as well as recent mobilizations of international environmental law, territorial sovereignty is no longer an unlimited concept enabling a State to do whatever it pleases. The scope of sovereign discretion of States is restricted by such principles as No Harm Principle, Precautionary Principle, Good Neighborliness, Equitable Utilization and Apportionment, and Principle of Prior Notification, all developed by environmental treaties and case law over the past few decades.

But perhaps the most significant feature of State sovereignty while interacting with international environmental law is the principle of Permanent Sovereignty of Peoples and Nations over their Natural Resources. This principle is envisaged in the United Nations General Assembly resolution 1803 in 1962:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.⁶

The principle was advocated in a nationalization context by developing countries in an effort to secure the benefits arising from territorial natural resources for those nations still living under colonial rule.⁷ Therefore, legal interpretations of the principle have long given weight to the dimension of the “permanent sovereignty” of this principle, rather than the “sustainable use of natural resources” as the counterpart of such sovereignty.

Efforts to regulate States’ discretion to exploit their natural resources resulted in the adoption of the Stockholm Declaration in 1972 which embodies 26 significant principles related to environmental law.⁸ The Stockholm Declaration generally maintains that sovereignty over natural resources must be exercised in an environmentally responsible way and for the benefit of both the present and future generations. Principle 21 of the Stockholm Declaration addresses Permanent Sovereignty over Natural Resources as well as State responsibility for transboundary environmental damage. Furthermore, the second phrase of Principle 21 builds on the well-known findings of the ad hoc Tribunal in the *Trail Smelter* case (1938 and 1941) and of the International Court of Justice in the *Corfu Channel* case (1948) and includes such international law principles as good neighborliness and due diligence and care.⁹ The problem with Principle 21, however, is that while this principle calls for the prevention of extraterritorial effects causing environmental damage in other countries or in areas outside national jurisdiction, it does not, in fact, impose specific obligations that could be invoked by other States concerning national management of resources.¹⁰

⁶ UN General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources, Accessed June 25, 2020. <https://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf>.

⁷ Nicolaas Jan Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties in An Interdependent World*. (Groningen: University of Groningen 1995), 3. Accessed June 25, 2020. <https://www.rug.nl/research/portal/files/3265518/dissertatie.pdf>.

⁸ UN General Assembly, "United Nations Conference on the Human Environment 1995", Accessed June 25, 2020. https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1.

⁹ Nicolaas Jan Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties in An Interdependent World*, 119.

¹⁰ Ibid.

Nevertheless, in subsequent years, a significant development took place. While previous UN Resolutions were primarily concerned with the extraterritorial impact of environmentally harmful activities, later resolutions have indicated that the environmental impact of irrational and wasteful exploitation of natural resources may amount to a threat to the exercise of permanent sovereignty over natural resources by other countries, especially developing States. Moreover, ever since the Stockholm Conference, UN resolutions have gradually elaborated guidelines for nature management, conservation, and utilization of natural resources within States, while recognizing permanent sovereignty over natural resources.¹¹ This paragraph of UN General Assembly Resolution 35/7 of 1980 is affirmative of this trend:

Solemnly invites Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.¹²

The Stockholm Declaration also paved the way for later environmental instruments and frameworks such as Rio Declaration, the UN Framework Convention on Climate Change, and the Convention on Biological Diversity which all, more or less, maintain the objectives of the Stockholm Declaration with regard to sustainable development and the permanent sovereignty over natural resources.

Meanwhile, it should be borne in mind that most of these instruments do not have a binding force or an effective enforcement mechanism. That can be a significant impediment upon the progress of international environmental law. I will address this problem in the second part of my presentation called *erga omnes* and State Responsibility.

Erga Omnes Obligations and States Responsibility

According to the latest statistics available, today, there are more than 3700 inter-governmental Environmental Agreements.¹³ Despite the massive number of agreements, environmental problems are more prevalent than ever in the history of our planet. That is mainly because, apart from the complicated nature of environmental issues, the liability regimes envisaged in these treaties narrowly define areas or activities in question and do not provide a complete or satisfactory system of protection for severe environmental harm. Therefore, effective judicial means are needed to respond to the currently ongoing ecological damages. This explains the significance of *erga omnes* obligations and the state responsibility regime in coping with environmental issues.

The term *erga omnes* obligation was introduced by the International Court of Justice in momentous dictum in the *Barcelona Traction* case (Belgium v. Spain) in 1970:

¹¹ Ibid, p. 120.

¹² UN General Assembly Resolution 35/7 of 30 October 1980. Accessed June 25, 2020. <https://undocs.org/en/A/RES/35/7>.

¹³ IEA Database Project, "Summary Statistics for Environmental Agreements." Accessed June 25, 2020. <https://iea.uoregon.edu>.

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.¹⁴

The Court then continues to enumerate the instances of erga omnes obligations by maintaining that these obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹⁵ What can be inferred from the Court's holding in this part is that the erga omnes character should be attached to the most important international obligations, including those that can significantly affect human beings, and to which the entire international community owes a shared responsibility.

The primary rules and obligations that hold an erga omnes status are not only prioritized over ordinary commitments, but are also accompanied by a stronger enforcement mechanism, and therefore, a more severe responsibility regime. In other words, the erga omnes status implies that for certain obligations, the right of enforcement belongs to all States. Therefore, any State can invoke the responsibility of a State which is in breach of an erga omnes obligation before an international tribunal without having any legal pitfalls as regards to locus standi. This has been embodied in article 48 of International Law Commission (ILC) Articles on States Responsibility which maintains that "any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole",¹⁶ i.e. obligations erga omnes.

The function of erga omnes obligations is to protect the collective interest of the international community. Environmental issues, including climate change, ozone layer depletion, transboundary pollutions, and biodiversity loss, are common concerns of all humanity that are shared by peoples and nations across the globe.

Nevertheless, to date, there has been no express recognition of environmental obligations as erga omnes by international fora. In fact, given the scarcity of the jurisprudence on erga omnes obligations in general, ecological obligations have not been particularly acknowledged under the rubric of erga omnes.

That being said, ever since the ICJ rendered its landmark judgment about erga omnes obligations in 1970, there have been positive developments that cannot be overlooked, namely the ILC has identified environmental pollution as an example of possible collective interest protected by erga omnes character,¹⁷ Institut de Droit International has declared obligations relating to the environment of common spaces to be reflective of fundamental values,¹⁸ and

¹⁴ *Barcelona Traction, Light and Power Company, Limited*. 1970. (International Court of Justice), para. 33

¹⁵ *Ibid.* para. 34.

¹⁶ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," 2001, art. 48.1(b).

¹⁷ *Ibid.*, p. 127, para. 10.

¹⁸ Institut De Droit International, "Fifth Commission, Resolution on Obligations and Rights erga omnes in International Law", 2005.

the Convention on Biological Diversity identifies the conservation of biological diversity as 'a common concern of humankind'.¹⁹

In sum, while environmental obligations have not been formally acknowledged as *erga omnes* by States or international tribunals particularly in respect to greenhouse gas emissions and climate change, the dearth of legal jurisprudence in this area can be considered an opportunity for regulatory measures to be adopted by the actors of the international community.

Islamic Approach to Sustainable Use of Natural Resources

Why is it significant to discuss environmental sustainability obligations within an Islamic context, one may ask? Firstly, the answer lies in the impacts that the environmental policies adopted by the Muslim States can have on national, regional, and international levels, especially those relating to natural wealth and resources. For instance, natural resources such as hydrocarbons, petroleum, and natural gas have shaped the Middle East more than most other regions. Therefore, the depletion of natural resources; the influence of the region's environment on its people, states, and economies over the long term; and the impact of natural resources on the processes of state formation remain tremendous subjects to be studied in this region.²⁰

Secondly, Islam is a strong religion with millions of followers, not only in the Middle East and North Africa but also throughout the whole world. One should remember that Islamic "mosques are full and on Fridays, thousands upon thousands listen to preachers discussing various issues ... and media programs dealing with Islam have a vast readership and audience."²¹ This explains why religion has and should have an important role to play in environmental studies.

Interestingly, sustainable utilization of natural resources and the need to render restrictive interpretations of State sovereignty when facing environmental obligations as explained in the above sections are aligned with Islamic views to law and governance. Some Islamic scholars such as Ayatollah Mohaghegh Damad²² believe that the origins of sustainable utilization of natural wealth and resources in Sharia can be traced back to the Islamic notion of "Al-Anfal."

Anfal which can *mutatis mutandis* be translated into "Natural Resources" for our purpose, has its origin in the following verse of Quran:

وَ رَسُولُهُ إِنَّ «بِسْمَلْتُونَكَ عَنِ الْأَنْفَالِ قُلِ الْأَنْفَالُ لِلَّهِ وَالرَّسُولِ فَاتَّقُوا اللَّهَ وَ أَصْلِحُوا ذَاتَ بَيْنِكُمْ وَ أَطِيعُوا اللَّهَ
كُنْتُمْ مُؤْمِنِينَ» (الأنفال – 1)

¹⁹ Convention on Biological Diversity of 5 June 1992. Accessed June 25, 2020. <https://www.cbd.int/doc/legal/cbd-en.pdf>.

²⁰ Center for International and Regional Studies, *Environmental Politics in the Middle East* Working Group Summary Report 2018, Georgetown University in Qatar.

²¹ Seyyed Hoessein Nasr. "Islam, the Contemporary Islamic World and Environmental Crisis," 87 In *Islam and Ecology, A Bestowed Trust*, eds Richard C. Foltz, Frederick M. Denny and Azizan Baharuddin (Massachusetts: Harvard University Press, 2003) 85-106.

²² Ayatollah Dr. Mostafa Mohaghegh Damad is an Iranian Shia Mujtahid and legal scholar. For more information about Ayatollah Mohaghegh Damad and his publications, see his website at <http://mdamad.com/Welcome.html>.

They ask you about the Anfal. Say: Anfal belongs to Allah and the Prophet. Therefore, be afraid of Allah and set things right between you. Obey Allah and His Prophet if you are believers. (Al-Anfaal – 1)

According to Ayatollah Mohaghegh Damad, the phrase “belongs to Allah and the Prophet” in this verse does not purport that *Anfal* is the personal property of the Prophet, but it indicates that it belongs to all the Islamic Ummah.

For having a clear understanding of the notion of Al-Anfal, it should first be pointed out that there are different forms of ‘ownership’ in Islamic jurisprudence, including: private ownership, public ownership, state-owned ownership, and national ownership. Each of those forms are regulated with their particular rules and features that differ from one another:

- 1- Private properties are those acquired through the legitimate procedures that belong to their owners and are always transferable. The ownership of these properties is derived from the renowned Islamic principle called ‘*Taslit*,’ which maintains, ‘*People are in control of their properties.*’²³
- 2- Public properties, also known as common properties in the Iranian Constitution, are those that can only be used by the public, including alleyways, roads, bridges, and other public places. These types of properties are managed by the States and are non-transferable.
- 3- State-owned properties are those that belong to the government as a separate legal entity. They can be transferred, purchased, or sold by the government under its applicable rules and regulations.
- 4- National properties are those properties that do not belong to the government, State, or any particular person. They belong to the nation as a whole and should be managed by the government in a manner that their origins are kept for the current and future generations. In other words, the object of those properties shall be preserved, and people may only enjoy the profits and benefits of such properties. The instances of National Properties include *Moughofeh* (endowed property), as noted in Article 55 of the Iranian Civil Code, as well as *Anfal* and Public Wealth, as enshrined in Article 45 of the Iranian Constitution.

Article 45 of the Constitution of the Islamic Republic of Iran regulates Al-Anfal and Public Wealth in this way:

Anfal and public wealth such as uncultivated or abandoned lands, mines, seas, lakes, rivers, and other public waterways, mountains, valleys, forests, marshlands, natural forests, unenclosed pastures, legacies without heirs, the property of undetermined ownership, and public property recovered from usurpers, shall be at the disposal of the Islamic government for it to utilize in accordance with the public interest. Law will specify detailed procedures for the utilization of each of the foregoing items.²⁴

As a *Mujtahid* (high-ranked Islamic scholar), Ayatollah Mohaghegh Damaad asserts that the concept of *Anfal* enshrined in Article 45 of the Iranian Constitution should be read to purport

²³ «النَّاسُ مَسْلُطُونَ عَلَى أَمْوَالِهِمْ».

²⁴ "Constitution of the Islamic Republic of Iran, (amended in 1989)" Article 45. Accessed June 25, 2020. <https://en.parliran.ir/eng/en/Constitution>

'national properties.' This means that the origin of such properties can never be owned or transferred by any person, including the Islamic government.²⁵

He explains that *Anfal*, translated into natural resources in this article, must be distinguished from another Islamic concept known as *Bait al-mal*, which can be translated into government treasury or public budget. Unlike *Bait al-mal*, the origin of which can be distributed among people, *Anfal* can only be managed for the benefit of all generations in a manner that the origin of the source would always be preserved.

In the same vein, Ayatollah Mohaghegh opines that energy resources such as oil and gas reserves are clear instances of *Anfal* or national properties. Therefore, Islamic governments should only play the role of 'manager' with respect to them, i.e. should sustainably exploit them and conserve their origin so that they can benefit the future generations, as well.

In addition, article 50 of the Iranian constitution which incorporates the general obligation of the Islamic State to protect the environment can be presented in support of this progressive *fiqhi* interpretation:

The preservation of the environment, in which the present, as well as the future generations, have a right to flourishing social existence, is regarded as a public duty in the Islamic Republic. Economic and other activities that inevitably involve pollution of the environment or cause irreparable damage to it are therefore forbidden.²⁶

This article outlines a general framework for the Iranian Government in which national development and economic plans can operate. The takeaways of this progressive constitutional obligation are that the Iranian Government has bound itself to environmental protection, sustainable utilization of the environment, recognition of the right of the future generations to a healthy environment, and refraining from any activity involving environmental pollution.

Conclusion

It is true that international law has endowed peoples and nations, and therefore, their representing States with the permanent sovereignty over their natural wealth and resources, and accordingly, the right to exploit these resources in the interest of their national development and economic policies. However, the gradual progress of public international law over the past decades in areas related to State responsibility, international human rights law, and most importantly, environmental law appears promising in constraining States' freedom of action in dealing with those domestic decisions that can have environmental implications. That being said, these developments are not sufficient to counteract the detrimental effects of the environmental challenges facing the Earth. The contemporary international law cannot effectively regulate, enforce, and sanction international environmental obligations. Moreover, a large proportion of States' obligations are still

²⁵ This part is extracted from presentations of Dr. Mostafa Mohaghegh Damad in his course "Oil and Gas Fiqh" taught in the doctorate seminars of Shahid Beheshti University in Iran as well his interview with the Center for the Great Islamic Encyclopedia (Center for Iranian and Islamic Studies), published as "Fiqh and Environment" on 13 August 2017 in Farsi, available at: accessed June 25, 2020 <https://cgie.org.ir/fa/news/179068>.

²⁶ "Constitution of the Islamic Republic of Iran", Article 50.

perceived as internal regulatory measures that squarely fall within their domestic affairs. As a result, the international community must strive to reach an international consensus with respect to erga omnes character of environmental obligations. As effective actors of the international community, Muslim countries can also participate in these efforts in that environmental sustainability under international law is also in conformity with the Islamic views. The obligations arising of such Islamic notions as *Anfal*, as explained by Islamic legal scholars, can encourage Muslim communities not only to prevent environmental degradation within their territories but also to comply with their environmental obligations in regional and international scales.