# Unit One: Background, Development and Sources

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**Unit Summary**

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UNIT INFORMATION

Unit Overview
Unit 1 introduces the field of international environmental law as a distinct branch of international law, exploring its history and identifying the sources of international environmental legal norms.

Unit Aims
• To describe international environmental law and its place in international law.
• To introduce the sources of international environmental law in order to find emerging environmental legal norms.
• To provide an overview of the development of international environmental law.
• To identify the paradigm shift that occurred in the period from the Rio Conference on Environment and Development to the Johannesburg Summit on Sustainable Development.

Unit Learning Outcomes
By the end of this unit students should be able to:
• define, describe and characterise international environmental law
• list and critically assess the sources of international environmental law and know where to find emerging international environmental legal norms
• explain and critically interpret the historic development of international environmental law as part of public international law
• appraise critically the paradigm shift that occurred in international environmental law from the Rio Conference to the Johannesburg Summit

Unit Interdependencies
This unit introduces international environmental law and several key terms and concepts that will be used in later units. It should normally be studied before all other units.
**Key Readings**


This first reading in the textbook will provide an introduction to international environmental law, and why and how it has developed. International environmental law is a new branch of international law. It is important to understand its standing as a novel body of law and what are the sources of that standing. This reading will introduce you to basic concepts and ideas. It will also give an overview of landmark events in the evolution of international environmental law, what were the influences and their outcomes. The major outcome has been the emergence of sustainability as a governing issue combined with the ongoing efforts to reconcile divergent interests of developed and developing nations.


This article analyses the place of the environment in the international agenda from the early 1970s when the environmental movement really began. Specifically, the article examines the ‘comprehensive’ international environmental agenda that has emerged within the sphere of the United Nations.


This critical review of the concept of the Brundtland’s concept of sustainable development has the benefit of hindsight but is a thoughtful summary of the strengths and weaknesses of the concept.


This provides a readable and accessible overview of the reasons for providing governance and law to address the problems facing global welfare.
REFERENCES


# TREATIES, INSTRUMENTS AND CASES

The information below is provided for your reference. Documents denoted with an asterisk (*) are also available in your e-study guide.


**1938** UN (1938) *Trail Smelter Case (United States, Canada).* United Nations.


Washington 2 December 1946.
Available from: [http://iwcoffice.org/commission/convention.htm](http://iwcoffice.org/commission/convention.htm)

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1988


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Available from:  [http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf)
**MULTIMEDIA**


This is a series of video lectures from the University of California, Berkeley, that can be viewed online. It is recommended that you only sample particular topics of interest, noting the strong US perspective and references to environmental legislation in the USA.

Learners TV (undated) *International Environmental Law Course*.


Similar to the above, this is a series of recorded lectures and student seminar presentations from the University of California. This series is more generic and international in content and several topics are of direct relevance to this module. However, again note the frequent references to context and legislation in the USA. Again this is a resource to sample as an alternative medium for your studies.

Public Broadcasting Service (7 September 2010) *The Most Powerful Environmental Law on the Books*. Need to Know, PBS Video, Video. [Duration 5:16 minutes]


Need To Know talked with David Skelly, Professor of Ecology at Yale University, about the power of the Endangered Species Act and how fear of its consequences has produced some reluctant conservationists.


Available from: [http://www.youtube.com/watch?v=ihFkyPv1jtU](http://www.youtube.com/watch?v=ihFkyPv1jtU)

A short clip about industrial mercury poisoning at Minamata Bay, Japan.
1.0 SCOPE OF INTERNATIONAL ENVIRONMENTAL LAW

In the context of international law, international environmental law is an adolescent. If youth is the ‘season of hope’ then aspirations for international environmental law are high as it responds to the critical challenges facing humanity. Such challenges were famously anticipated and described by Rachel Carson. Her book *Silent Spring* published in 1962 helped to set in motion the environmental movement both nationally and internationally. As a body of law we see today, international law can therefore be viewed as being only a half-century in age. As such it is only formatively defined.

1.1 Definition

The formative character of international environmental law reflects ambiguities of definition. This is largely due to its boundaries being indefinite. Disagreements about its definition include declining to be definitive. This view recognises that the protection of the international environment derives its legal underpinnings from institutions of general international law (Brownlie 2008). Sands, in his *Principles of International Environmental Law*, defines international environmental law to comprise ‘those substantive, procedural and institutional rules of International Law which have as their primary objective the protection of the environment’ (Sands 2003 p. 13). However, the environment comprises a multiplicity of aspects and issues that defy neat precision. The UK Environmental Protection Act of 1990 defines the environment in conventional terms as consisting of all, or any of the following media, namely, the air, water and land. The *Oxford Dictionary* defines the environment as the set of circumstances, or conditions, especially physical conditions, in which a person or community lives, works and develops. There is a tendency for the circumstances comprising the environment to be viewed as encompassing both the natural environment as well as the social human environment. With such inclusiveness international environmental law not only addresses aspects of the natural environment such as pollution, climate change, water use, desertification, and conservation of biodiversity, but also covers the protection of the international cultural heritage of mankind. This breadth is a consequence of international environmental law having fuzzy boundaries. More fundamentally, it reflects that the way human beings work and play is integral to the environment in which they live. Climate change, for example, is closely coupled to energy management and consumption, which in turn is governed by economics and politics. There are no neat boundaries to international environmental law. This is one of its challenges.

1.2 Multidisciplinary nature

It is clear from the breadth of subject areas covered by international environmental law that, as a field of law it is inherently multidisciplinary. Decision-making on questions of international environmental law is usually influenced by various factors including scientific concepts, economic effects of decisions, and other moral and social imperatives. Increasingly, decision-makers and implementers of international environmental law are required to balance opposing interests in interpreting and
applying international environmental legal norms. The Preamble of the United Nations Framework Convention on Climate Change (UNFCCC 1992), for example, recognises that, ‘steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas’.

International environmental treaties typically establish legal obligations on the basis of scientific evidence with varying degrees of uncertainty. The threshold of environmental harm is commonly undetermined or a matter of disagreement. For example, the USA and the European Union (EU) differ on restrictions to international trade of fish products or genetically treated beef products based on environmental and health grounds. The USA considers economic benefits and favours hard scientific evidence to justify such limitations on international trade. Conversely, the EU takes a precautionary position accommodating scientific uncertainties. Accordingly, scientific doubts justify banning the importation of hormone-treated beef from the United States to the EU in the Beef Hormones Case (WTO 1998).

1.3 Why do we need international environmental law?

The environmental challenges facing individuals, communities, private companies and governments throughout the world are numerous and complex. Most governments, companies and civil society organisations now recognise that environmental issues are intertwined with social, cultural and economic issues.

Promoting economic growth with environmental, human health and cultural safeguards in place seems to be the path forward for most governments, but decades of environmental mismanagement have created severe legacy issues in most countries.

Two huge challenges are determining how to clean up legacy problems, restore natural resources, and achieve human health protection and health ecosystems; and designing strategies to enable future growth while protecting the environment, maintaining biodiversity, safeguarding human health, and preserving cultural and social values. This results in a very complex set of decisions for government at all levels, and a regulatory framework that is supportive, facilitating and enabling is essential.

A very summarised list of global environmental issues includes:

- air and water pollution
- climate change
- deforestation
- depletion of non-renewable energy sources
- environmental impacts of reservoirs and water abstraction
- impacts of mining
- invasive species
- land and soil degradation
- loss of biodiversity and habitat fragmentation and degradation
• non-sustainable depletion of natural resources
• nuclear risks and waste management
• ocean and freshwater deoxygenation
• ozone depletion
• persistent toxins
• population pressure
• waste management

Many of these problems and issues traverse national and other administrative boundaries, and many of the natural resources affected are examples of a global commons. Such transboundary challenges highlight the need for decision-making processes, management agreements and procedures for dispute resolution that go beyond the borders of individual nation states. They illustrate the necessity of creating administrative and legal structures capable of enabling ecologically sustainable and socially acceptable development.

Relate the discussion above to your personal experiences, and note down any examples you are aware of. Firstly, do you know of any examples in your region where government failed to implement environmental protection measures required by international environmental agreements because of local protest or objection? Secondly, are you aware of any environmental projects in your region funded by government, donor states or international institutions?

Section 1 Self Assessment Question

Question 1

Why does international environmental law include social considerations such as culture?
2.0 Development of International Environmental Law

It is commonly accepted that the history of international environmental law can be divided into four different periods of development. Two events in Stockholm and Rio played a crucial role in the development of international environmental law and represent key threshold periods:

- Prior to 1945
- After the Second World War in 1945 to the Stockholm Declaration of 1972
- Post-Stockholm period to the Rio Declaration in 1992
- Post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and to date

2.1 Pre-1945 period

The youthfulness of international environmental law is clearly shown by the scarcity of relevant legal instruments prior to the Second World War. Only following the Second World War did the disparate bilateral and regional treaties on international environmental issues start to grow into a more coherent body of international law. The first period has its origin in the bilateral treaties on fishing of the 19th century and ended in 1945 with the creation of the United Nations.

It can be argued that the early agreements were motivated largely by competing economic interests to regulate better limited resources such as fish. Indeed purely economic interests may be viewed as driving struggles for navigation rights on shared river systems. The French Republic proclaimed the principle of free navigation in 1792. Navigation remained a principal basis for international agreements governing shared uses of international rivers until the early 20th century. By the beginning of the 20th century, relevant international environmental agreements concerned three main areas: boundary waters; freshwater fisheries; and the conservation of natural resources. A leading example of an agreement concerning boundary waters is the 1909 USA–Canada Boundary Waters Agreement (BWT 1909). This states that boundary waters and waters flowing across the US–Canadian boundary ‘shall not be polluted on either side to the injury of health or property on the other’. The question of apportioning rights over boundary waters shared by the United States and Mexico also led to conventions. For example, the 1889 convention established the International Boundary and Water Commission to administer boundaries and water-rights agreements between the two countries. An agreement in 1906 provided for the equitable distribution of the Rio Grande waters between the USA and Mexico.

Other early boundary water conventions that have environmental provisions include the London Agreement between British and German territories regarding the Yola to Lake Chad, the 1908 Berlin Convention which defined the frontier between the Cameroons and French Congo, and the 1913 Cameroons–Nigerian agreement. In 1911, the Institute of International Law (IIL) issued the Madrid Resolution on international regulations governing the use of watercourses.
With respect to freshwater fisheries, their increasing importance regionally and globally was reflected in many agreements concerning fishing rights and the conservation of fisheries. An early agreement was the Russia–USA, Convention Regulating Navigation, Fishing, Trading and Establishment on the Northwest Coast of America, St Petersburg, 17 April 1824. In 1839, France and Great Britain adopted the Convention for defining the Limits of Exclusive Fishing Rights. Great Britain’s economic interest in fisheries was further expressed in the Treaty with the United States Regarding the North Atlantic Fisheries. This was followed by a further agreement between the two countries captured by the Treaty for the Settlement of the Fishery Question on the Atlantic Coast of North America in 1888. Also in Europe, in 1869, the Berne Convention established regulations over fishing in the Rhine between Constance and Basel followed by other agreements. Rumania and Serbia adopted the Bucharest Convention in 1908 concerning fishing in the Danube.

From the beginning of the 20th century there was increasing interest in protecting natural resources in addition to fish. A landmark convention was the 1911 Fur Seals Convention. Lesser-known agreements were a 1900 convention for the protection of wild animals, birds and fish in Africa, and in 1902 there was a convention for the protection of birds useful to agriculture which again had an economic basis.

Examples of such international treaties, codifications attempts and important decisions of international tribunals in the first half of the 20th century are:

- Convention for the Protection of Birds Useful to Agriculture (Paris 1902)
- Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary between the United States and Canada (Washington 1909) (1909 Boundary Water Treaty)
- Convention for the Regulation of Whaling (1931)
- Convention relative to the Preservation of Fauna and Flora in their Natural State (London 1933) (1933 London Convention)
- in 1911 the Institut de Droit International adopted the Regulations on the Use of International Watercourses for Purposes other than Navigation
- important international environmental disputes were referred to arbitration in the Bering Sea Fur Seal Fisheries case (Great Britain v. United States) in 1893 on the UK’s overexploitation of fur seals beyond its national jurisdiction; and in the Trail Smelter case (United States v. Canada).

The Trail Smelter case (UN 1938) is foundational in international environmental law. In 1896, smelting operations began in Trail in British Columbia in Canada. 30 years later, coincidental to an increase in the smelting, two stacks were built to emit waste gases including sulphur dioxide at a height of 409 feet. This correspondingly caused increased transboundary emissions and consequent damage in Washington State immediately south of British Columbia. In June 1927, the United States Government took up the issue. A referral to the Canada–USA International Joint Commission (IJC)
failed to deliver an acceptable outcome. Subsequently, under an agreement reached in 1935, both governments agreed to establish a Tribunal. The decision of the Tribunal was reported in two parts, in 1938 and 1941. The decision established two fundamental principles of liability for transboundary harm. A state must show that there is harm caused by the emission from another state and not simply that a transboundary emission has occurred. The tribunal also affirmed the principle that a state has a duty to prevent polluting activities that cause evident injury in a neighbouring state.

In October 1938, the International Union for the Protection of Nature (IUPN) formed to promote the preservation of wildlife and the natural environment, improvement of wildlife education, scientific research and wildlife legislation. The IUPN was later renamed as the International Union for Conservation of Nature and Natural Resources (IUCN). The IUCN, with its seat in Switzerland, is today one of the most active international non-governmental agencies working on international environmental protection.

### 2.2 1945–1972

**General developments**

An outcome of revulsion to the Second World War was the creation of the United Nations. President Roosevelt first proposed the name expressed in the ‘Declaration by United Nations’ in 1942 when 26 nations pledged to fight together against the Axis Powers. In 1945, representatives of 50 nations met in San Francisco to draft the Charter of the United Nations. All representatives signed the Charter on 26 June 1945 (UN 1945). By October, a majority of the countries ratified the Charter and the United Nations came into existence on the 24th of that month. This landmark event did not then recognise the issues to which international environmental law apply. However, a closely related issue was explicitly recognised by the UN General Assembly’s adoption and proclamation of the Universal Declaration of Human Rights on 10 December 1948 (UN 1948). In subsequent years, human and environmental rights have increasingly been regarded as being integral to one another. It is fitting to note that President Roosevelt’s then widow, Elinor, played a leadership role in the drafting of the Declaration.

Although the UN Charter did not address environmental protection or the conservation of natural resources, various specialised agencies were established under the auspices of the UN with functions that concerned environmental matters, for example, the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Although not within the UN sphere, 23 countries concluded the General Agreement of Tariffs and Trade (GATT) in Geneva in 1947 (UN 1947). The underlying purpose, as proposed by the United States, was to conclude a multilateral agreement to institute a reciprocal reduction in tariffs. This economic goal merged with environmental interests in subsequent years.

In 1949, the UN held the United Nations Conference on the Conservation and Utilization of Resources (UNCCCUR) to promote awareness and need for international action to ensure a balanced management and conservation of natural resources.
However, the success of the UNCCUR was limited due to a lack of international political will to meet this ambitious objective.

During the 1950s, the effects of post-war industrialisation and economic development on water resources were increasingly being recognised. Belgium, France and Luxemburg concluded a first treaty devoted entirely to controlling water pollution (*Protocol to Establish a Tripartite Standing Committee on Polluted Waters, Brussels 8 April 1950*). Multiple similar agreements were concluded for many European freshwater resources over the following years.

In the later 1950s, people became aware of the disaster experienced by residents of the small Japanese town of Minamata. Over three decades, the Chisso Corporation had dumped an estimated 26 tons of mercury compounds into Minamata Bay (see 2.2.1). In consequence, an estimated 3000 persons succumbed to poisoning from the mercury. Many died and those that lived suffered appalling degenerative diseases. This disaster was a horrific demonstration of the possible consequences of industrial pollution.

2.2.1 Map of Minamata, illustrating the Chisso factory and its effluent routes

A modest step towards dealing with pollution in marine waters was also taken in the 1950s. The UK Government convened an International Conference on Pollution of the Sea by Oil in London from 26 April to 12 May 1954, The aim was ‘to take action by common agreement to prevent pollution of the sea by oil discharged from ships, and considering that this end may best be achieved by the conclusion of a Convention’. (UN 1954). This came into force on 26 July 1958. This was the first of a series of global conventions for the prevention of oil pollution.

Three Conventions regarding marine pollution and conservation were adopted on 29 April 1958 in Geneva: the Convention on the High Seas to Prevent Oil Pollution and Dumping of Radioactive Waste on the High Seas (UN 1958a); the Convention on
Fishing and Conservation of Living Resources of the High Seas to Protect Marine Living Resources (UN 1958b); and the Convention on the Continental Shelf to Regulate Jurisdiction to Exploit the Natural Resources of the Continental Shelf (UN 1958c).

The Nuclear Arms race in this period greatly heightened public anxieties and focused attention on the threats to life on earth. In 1959, a newly agreed Antarctic Treaty prohibited any nuclear activity on that continent. Twelve nations agreed ‘that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord’ (ATS 1959).

African nations also achieved groundbreaking agreement in 1968 by concluding the African Convention on the Conservation of Nature and Natural Resources (OAU 1968). This agreement innovatively recognised the vital importance to humanity of the capital of soil, water, flora, and faunal resources. The several states declared it to be their duty ‘to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour’.

Also of crucial importance is the Ramsar Convention on Wetlands of International Importance. This was adopted in the Iranian city of Ramsar in 1971 (Ramsar 1971). Its mission in seeking the conservation and ‘wise use’ of wetlands is to repair a previously neglected and wasted vital component of the biosphere. Wetlands play a key role biologically and hydrologically. They provide vital ecological functions that include sustaining biodiversity.

In the post-war period, there were two judicial cases of relevant importance for international environmental law. In 1946, tension between the British government and Albania over the safe passage of ships in the Corfu Channel culminated in two British warships being seriously damaged by mines in the Channel. Forty-two men were killed and as many injured. To resolve the dispute the two governments submitted the case to the International Court of Justice (ICJ). The ICJ declared in its findings certain and now well-recognised principles including ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ (ICJ 1949).

The second case concerned a dispute between Spain and France over the latter diverting waters that Spain considered damaging to its downstream use of those waters (UN 1957). This dispute led to an important arbitration. The Lake Lanoux arbitration held that downstream states, such as Spain did not have a right to veto decisions over its use of water made by the upstream state. However, the upstream state did have an obligation to consider the position of the downstream state in reaching its decision. Together with the Trail Smelter case (UN 1938), this case is regarded as contributing to the formulation of Principle 21 of the Stockholm Declaration (UNEP 1972) and Principle 2 of the Rio Declaration (UNEP 1992a) that recognise the international obligation of states not to allow trans-national pollution from their territory that will affect the rights of other states. In addition, the 1957 Lac Lanoux case recognised the duty on states not to abuse their shared river water sources to the detriment of riparian owners.

During the 1960s, especially in the developed world, there was increased awareness about the status of the environment at both national and international levels that elevated public concerns. In April 1968, an international group representing fields
across the professions established the Club of Rome. Four years later, the Club of Rome published the highly influential ‘The Limits to Growth’ (Meadows et al 1972). In 1969, the US Senator Gaylord Nelson was moved to propose a ‘national teach-in on the environment’. As a result ‘Earth Day’ was born on 22 April 1970. In this period Sweden increasingly objected to acid rain. In 1968, the Swedish ambassador to the UN placed on the agenda of the UN Economic and Social Council the topic ‘the Human Environment’. This led to the UN-convened Conference on the Human Environment (UNCHE).

1972 Stockholm Conference on the human environment

As part of the preparations for the United Nations conference, Maurice F Strong, the Secretary General of the United Nations, commissioned Dr René Dubos to serve as the Chairman of a group of experts charged with preparing an unofficial report. The result was the book ‘Only One Earth: The Care and Maintenance of a Small Planet’ by Barbara Ward and René Dubos (1972). This book was a first authoritative attempt to assess environmental concerns in the economic context of development and, as such, anticipated the post-Stockholm report ‘Our Common Future’ (WCED 1987). The conference was held from 5–16 June 1972 in Stockholm and was attended by 113 states and international non-governmental organisations (NGOs). This was the first such international conference and it was the foundation for international actions addressing the environment.

Major outcomes of UNCHE were the Stockholm Declaration and Action Plan. These defined principles for the preservation and enhancement of the environment and represent important expressions of ‘soft’ law (norms of international environmental law which are not legally binding). The Conference recognised that problems such as habitat degradation, toxicity and pollution of the air, were not necessarily of highest importance for all countries. Development strategies place a responsibility on industrialised countries to recognise the gap between them and underdeveloped countries. UNCHE developed a comprehensive set of recommendations.

Stockholm Declaration of Principles (1972)

The Stockholm Declaration of Principles for the Preservation and Enhancement of Human Development contains 26 non-binding statements of principles for international actions. As stated above, these represent important principles of international environmental soft law. Although the Declaration affirms that the foremost responsibility for environmental responsibility lies with national and local governments, it also recognises the necessity for international co-operation. ‘Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field’ (UNEP 1972). The most important principles with legal effect can be summarised as follows:

Principle 1 firmly states that:

‘Man[kind] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’
Principle 21 is an especially important affirmation of international environmental law doctrine:

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 of areas beyond the limits of national jurisdiction.

While thus confirming the position especially important to the developing world that a state has the right to develop its natural resources according to its own interests, it also has a duty to ensure that activities within its jurisdiction or control, do not harm other states or of areas beyond the limits of that state’s jurisdiction. Principle 21 therefore explicitly affirms the ‘good-neighbour’ duty to prevent and address atmospheric pollution, dumping of hazardous material and hazardous (nuclear) waste, climate change etc. In other words, it is a balance between national sovereignty and international environmental responsibility.

Principle 21 also implicitly expresses the conflict between developed and developing nations (a North-South dichotomy). Through the Principle, developing nations assert their sovereignty over development and exploitation of their natural resources, whilst developed nations emphasise the limitation of such sovereign rights with the duty to prevent and address the negative environmental impacts caused by such development actions. Principle 21 has sufficiently gained acceptance as state practice that it is now regarded as a principle of customary international law.

As a significant aspiration, under Principle 22:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Deferring to the interests of developing nations, Principle 23 acknowledges differentiated treatment.

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

A most significant outcome of UNCHE was the United Nations Environment Programme (UNEP) based in Nairobi, Kenya. UNEP is a global catalyst for the protection of the environment. The mission of UNEP is: ‘To provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations.’ (UN undated)
UNEP now works toward this mission by:

- encouraging international participation and co-operation in environmental issues and policy
- monitoring the global environment and interpreting environmental data
- fostering environmental awareness in governments, society, and the private sector
- co-ordinating UN activities pertaining to the environment
- developing programmes to achieve sustainability
- helping environmental authorities, especially in developing countries, to formulate and implement policy
- assisting the development and application of international environmental law

It is generally accepted that modern international environmental law originates from this period around 1972, when countries gathered for the United Nations Stockholm conference on the Human Environment, and the United Nations Environment Programme (UNEP) was established.

2.3 The period 1972–1992

General development

During the 20 years following UNCHE, the increasing awareness and concerns for the diverse environmental issues led to a corresponding proliferation of international non-governmental organisations as well as international and regional treaties on the environment. Important treaties concluded after the conference include:

- Convention concerning the Protection of the World Cultural and Natural Heritage (Paris 1972) (WHC 1972)
- Convention on the Conservation of Migratory Species of Wild Animals (Bonn 1979) (CMS 1979)
- Protocol on Substances that Deplete the Ozone Layer (Montreal 1987) (Montreal Protocol) (UNEP 1987)

The amount of work undertaken by the UN, specifically by UNEP, increased substantially and new techniques for monitoring and implementing technical environmental standards developed. Furthermore, various influential non-binding instruments were adopted by international organisations.

(a) UNEP adopted in 1978 the Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States (UNEP 1978).

(b) The IUCN, UNEP, WWF, UNESCO and the FAO introduced the World Conservation Strategy in 1980 (IUCN 1980). This strategy proposed the notion of sustainable development by emphasising the interdependence of conservation and development and was subsequently manifested in many nations' conservation strategies. In 1991, these organisations launched the Caring for the Earth Strategy that refined sustainable development and proposed guidelines for its practical implementation in the legal systems of states and to strengthen international law. As the Foreword to the World Conservation Strategy affirms:

‘Human beings, in their quest for economic development and enjoyment of the riches of nature, must come to terms with the reality of resource limitation and the carrying capacities of ecosystems, and must take account of the needs of future generations. This is the message of conservation. For if the object of development is to provide for social and economic welfare, the object of conservation is to ensure Earth’s capacity to sustain development and to support life.’


(c) In 1982, the UNEP Governing Council adopted the Montevideo Programme (UNEP 1982) for the Development and Periodic Review of Environmental Law. Under this programme, several international legal instruments were developed and adopted. These included international conventions on the protection of the ozone layer, control of transboundary shipments of hazardous wastes, marine pollution from land-based sources and environmental impact assessment. The UNEP Governing Council adopted an elaborated version of the Programme in 1993.

(d) In 1982 the UN General Assembly adopted the World Charter for Nature (UN 1982b). The Charter sets out principles of conservation on the basis that nature should be respected. It states that unique areas should have special protection. The charter emphasises that nature conservation should be integrated into social and economic planning. Although it does not have legal force, the Charter has standing due to strong support by developing countries, in contrast to the Stockholm Declaration that was mostly supported by developed countries. Despite being admonitory, it has some moral and political
force. Hence, Sands concludes that the Charter is ‘a standard of ethical conduct’ that strongly influenced subsequent treaty law (Sands 2003 p. 45).

(e) The UN General Assembly in 1983 voted to establish the World Commission on Environment and Development (WCED) to provide a critical analysis of the relationship between environmental objectives and development. The Commission published a highly influential report in 1987, the Brundtland Report, after its Norwegian Chairwoman, Gro Harlem Brundtland, see 2.3.1. This report defined Sustainable Development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ (WCED 1987 p. 43). It contains two key concepts:

- the concept of 'needs', in particular, the essential needs of the world's poor, to which overriding priority should be given
- the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs

This seminal document was instrumental in prompting the United Nations to convene the second global conference on the environment. This was held in Rio de Janeiro in 1992 under the title of the United Nations Conference on Environment and Development (UNCED).

2.3.1 Dr Gro Harlem Brundtland

Source: GAD (2009)

(f) This period is also characterised by increased emphasis on the interaction between the environment, development and international trade and financial activities. For example, the GATT established a Group on Environmental Measures and International Trade; the World Bank formed an environmental department due to pressure to integrate environmental and developmental considerations into the processes and decisions regarding its loan-making. On a regional level, the OECD established the Environmental Committee. In 1991, the World Bank, UNEP and the UNDP established the Global Environmental Facility (GEF) to provide financial assistance to environmental beneficial programmes.
(g) In addition, during this period leading up to the Rio conference, international non-governmental organisations (NGOs) steadily gained more influence. Examples of effective results of NGOs are the moratorium that the International Whaling Commission in 1982 placed on commercial whaling; the moratorium that was introduced in 1983 on commercial whaling in terms of the 1972 London Convention; and the decision in 1982 by CITES to ban trade in elephant ivory.

1992 Rio Conference

The two-week United Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil from 3–14 June 1992 with participation by 172 states with 108 represented by their Heads of State or Government. There were also more than 50 international organisations and 2400 representatives of NGOs. Informally named the ‘Earth Summit’, the UNCED represents a major development in international environmental law.

The influential Brundtland report, as an input to the Conference, might have been regarded as a guide to a more cohesive conceptual framework for international environmental law. The concept of sustainable development unites economic and environmental considerations. However, some developing countries were not persuaded by the concept. They were suspicious about potential constraints on their economic development interests, despite shared enthusiasm for the Conference. Organisers of the Conference had hoped it would lead to major environmental treaties. In this ambition they had to accept less. The Conference instead adopted three influential but non-binding instruments.

(a) Rio Declaration on Environment and Development (Rio Declaration) (UNEP 1992a)

(b) Agenda 21 (UN 1992a)

(c) Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest (UNCED Forest Principles) (UN 1992b)

It also opened for signature two important binding conventions.


The Rio Declaration and Agenda 21 will be introduced in this section, whereas the Biodiversity Protocol and UNFCCC will be discussed under the relevant topical chapters in forthcoming sections.

(a) Rio Declaration

Although the Rio Declaration does not create binding law per se, its 27 Principles are a benchmark for the international law of sustainable development. It balances the potentially competing interests of developed and developing nations with respect to environmental and developmental goals and actions (UNEP 1992a).
(a) Principle 1 confirms the central role of humans in achieving sustainable development and that humans have right to a healthy and productive environment.

(b) Principle 2 acknowledges the sovereignty of states to follow their own environmental and developmental policies, while recognising a duty of care to prevent transnational environmental damage. This Principle reflects the rule of customary international law in Section 21 of the Stockholm Declaration with the addition of the word developmental.

(c) Principles 3 and 4 are salient provisions of the Rio Declaration representing a trade-off between the developed and developing nations. Principle 3 declares the right to development must equitably meet the developmental and environmental needs of future generations. This is the first time that the right to development is generally recognised in a formally adopted international legal instrument.

(d) Principle 4 provides that sustainable development can only be met through the integration of environmental protection as an inherent part of development. This implies, for example, that international agreements to finance development programmes should incorporate environmental provisions as part of lending conditions.

(e) Principle 6 recognises the special needs of developing and least developed countries that are environmentally most vulnerable and should be accorded special priority.

(f) Principle 7 recognises the principle of common but differentiated environmental responsibility. Developed countries have a special obligation to promote international sustainable development due to the negative environmental impacts caused by their economies and the greater technological and financial resources they command.

(g) Principle 11 requires states to enact effective environmental legislation, although the standard, management objectives and priorities of environmental legislation can vary according to a state’s development status. High standards of environmental legislation may be less appropriate for developing nations compared with the developed.

(h) Principle 15 confirms the precautionary principle of international environmental law by requiring spatial development planning to avoid adverse effects to the environment. '[F]ull scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

(i) Other Principles recognise the provision of and access to environmental information and environmental education, the right of citizens to participate in environmental decision-making, the importance of environmental impact assessments, the relationship between free trade and environmental protection, liability and compensation of victims of pollution etc.

Of particular note is Principle 7 that explicitly affirms: ‘In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.’ This is a principle of equity in international law. It plainly recognises the disparate views and economic circumstances of developing versus developed countries in the concluding sentence of Principle 7: ‘The developed
countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’

This principle is illustrated by 2.3.2 and 2.3.3 below. In relation to the first, all countries can claim ‘climate credits’ by their phasing out of ozone depleting substances (ODS) under the Montreal Protocol, and some are beginning to document this contribution. However, Article 5 countries are those listed as developing and these do not have the same goals as industrialised nations.

### 2.3.2 Common but differentiated responsibilities

[Diagram showing common but differentiated responsibilities]

Source: UNEP/GRID-Arendal (2007)
Figure 2.3.3 shows that Africa represents only a small fraction, 3.6%, out of the total carbon dioxide ($CO_2$) emissions per year, yet 14% of the population of the world lives here. The emissions per inhabitant in Libya, the Seychelles and South Africa compare to the lowest among OECD countries with the other African countries below this. Regionally, emissions (both per capita and in total) are at their highest in North Africa and in South Africa.

### 2.3.3 Emissions of carbon dioxide, in Africa and selected OECD countries

(b) Agenda 21

As its Preface states, Agenda 21 is a blueprint (UN 1992a). It is a non-binding comprehensive plan to promote and achieve ecological sustainable development through the implementation of national strategies, plans, policies, programmes and processes with international support. Section I covers social and economic development and focuses on topics such as international co-operation, poverty alleviation, consumption patterns, population, human health, human settlement, integration of the environment and development in decision-making. Section II focuses on conservation and resource management for development and covers issues such as atmospheric protection, planning and management of land resources, deforestation, desertification and drought, sustainable development of fragile environments such as mountains, sustainable agricultural and rural development, biodiversity protection, biotechnology, conservation of the oceans, seas, coastal areas and marine living resources, protection of the quality and supply of freshwater resources, and the management of toxic chemical, hazardous wastes, of solid and sewage wastes and of radioactive wastes. Section III focuses on the strengthening of important interest groups, for example, women, children, indigenous peoples, and NGOs and public participation in decision-making.

It also covers financial resources, technology transfer, institutions and legal instruments and mechanisms.

Parts of Agenda 21 reflect emerging rules of customary law, for example, the limitation on storage of radioactive waste near the sea. Otherwise it reflects an international consensus on principles, practices and rules which may contribute to the development of new rules of conventional and customary law.

In a follow-up to the Conference, the UN created, in December 1992, the Commission on Sustainable Development (CSD). A principal mission of CSD is to provide leadership and to be an authoritative source of expertise on sustainable development particularly in the context of the implementation of Agenda 21.

2.4 The Road from Rio: Post-1992 and the WSSD

General background

The period after the Rio Conference was characterised by increased environmental activities, for example, the UN General Assembly adopted five resolutions on drought and desertification, sustainable development of small island states, follow-up on the Forest Principles, Conference on Straddling and Highly Migratory Fish Stocks as well the implementation of all commitments made at the Rio Conference. Various international environmental treaties on important matters were adopted, for example:

- Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris 1994) (Desertification Convention) (UNCCD 1994)
- Agreement for the Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 1995) (Straddling Fish Stocks Convention) (UN 1995)
A particularly notable aspect of the post-Rio period was the extent to which the major multilateral international treaties now recognised environmental protection as a goal. For example, the 1994 Charter that established the World Trade Organization recognised environmental co-operation. Regional economic agreements likewise recognised the environment. Agenda 21 affirmed the primary responsibility of national and local governments in managing the environment. In the post-Rio period, there was also obvious acceptance of the need for international co-operation for many issues including those concerning the oceans, inland waters, and the atmosphere. On land, the Convention to Combat Desertification in those Countries Experiencing Serious Drought also represented notable international co-operation.

On the other hand, economic interests were also a countering force to the global environmental agenda. Globalisation with its doctrine of free trade, combined with the concerns of poorer nations, tended to compete against environmental objectives. Post-Rio globalisation may be viewed as becoming predominant. Conflicting interests carried through to the World Summit on Sustainable Development.

As the year 2000 approached, Kofi Annan proposed that the General Assembly in the first year of the new century be declared a Millennium Assembly. He further suggested that the agenda include a Millennium Summit. The latter was opened in the UN building in New York in September of 2000. 103 Heads of State and 89 Heads of Government attended the Summit. This was the highest level of representation at an international meeting in history. As an outcome, the participants unanimously adopted the Millennium Declaration (UN 2000a). It first states:

'We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 6 to 8 September 2000, at the dawn of a new millennium, to reaffirm our faith in the Organization and its Charter as indispensable foundations of a more peaceful, prosperous and just world.'

It further affirms a basic message of the Stockholm and Rio conferences in stating that a fundamental value essential to international relations in the 21st century include:
'Respect for nature. Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants.'

This declaration of a ‘fundamental value’ clearly identifies the necessity for sustainable production and consumption. The Summit’s declaration was the basis for the UN Secretariat delineating the Millennium Development Goals (MDG) (UN 2000b). There are eight goals, the seventh being:

**Goal 7: Ensure environmental sustainability**

**Targets**

Target 7a: Integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources

Target 7b: Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss

Target 7a and 7b Indicators:

- 7.1 Proportion of land area covered by forest
- 7.2 CO₂ emissions, total, per capita and per $1 GDP (PPP)
- 7.3 Consumption of ozone-depleting substances
- 7.4 Proportion of fish stocks within safe biological limits
- 7.5 Proportion of total water resources used
- 7.6 Proportion of terrestrial and marine areas protected
- 7.7 Proportion of species threatened with extinction

Target 7c: Reduce by half the proportion of people without sustainable access to safe drinking water and basic sanitation

- 7.8 Proportion of population using an improved drinking water source
- 7.9 Proportion of population using an improved sanitation facility

Target 7d: Achieve significant improvement in lives of at least 100 million slum dwellers, by 2020

- 7.10 Proportion of urban population living in slums

Thus the 21st century began with the appearance of a firm international commitment to an environmental agenda. There was a clearly expressed duty to ensuring environmental sustainability. However, this commitment looked less secure as preparations proceeded for the tenth year review of the implementation of the Rio commitments, in Johannesburg in 2002.
Johannesburg World Summit

The United Nations World Summit on Sustainable Development (WSSD) was held in September 2002 in Johannesburg, South Africa. Its title omitted the word environment. Rather, development was the key word although the declared purpose was to reaffirm commitments made in the Rio Conference and to take stock of developments since it was held 10 years earlier. In fact, as shown in its Declaration, a basic aim of the conference was to focus on the alleviation of poverty (UN 2002a). It was the biggest global environmental conference yet, attended by more than 30 000 delegates.

No Statement of Principles or treaties were adopted, but the Johannesburg Declaration on Sustainable Development and the WSSD Implementation Plan (UN 2002b) contained some general targets to achieve the UNCED goals through various commitments.

- By 2015, to halve the world population living in poverty (on less than US$1 per day), people without access to safe drinking water and to basic sanitation.
- Promote 10-year programmes of sustainable consumption and production.
- Diversify energy supply, increase the use of renewable energy sources and establish programmes of energy efficiency.
- By 2020, produce chemicals without significant negative impacts to humans.
- By 2008, implement the global harmonised system of classification and labelling of chemicals.
- By 2005, develop integrated water resources management.
- By 2015, restore depleted fish stocks to sustainable levels.
- By 2004, prevent illegal, unreported or unregulated fishing and end subsidies thereto.
- By 2010, significantly reduce loss of biodiversity, etc.

Perhaps after the celebrated success of the Rio Conference, the Johannesburg Conference would inevitably be more modest in its outcomes. It did not disappoint in being only a modest success. For example, the Declaration states: 'Between Rio and Johannesburg, the world’s nations have met in several major conferences under the auspices of the United Nations, including the International Conference on Financing for Development, as well as the Doha Ministerial Conference. These conferences defined for the world a comprehensive vision for the future of humanity' (UN 2002a). However, neither of these conferences was notable for their recognition of environmental interests.

It may be noted that the continuing development of international environmental law since the Rio Conference in 1992 and the WSSD in Johannesburg in 2002, illustrates a shift towards procedural, constitutional and institutional procedures such as new monitoring and enforcement methods and the introduction of technical and interdisciplinary methods to achieve effective and practical implementation. Examples include the use of environmental impact assessments; the wider dissemination of environmental information; increased interaction with trade and
financial factors; and the introduction of new methods of regulation that seek sharing economic benefits rather than pure reliance on command and control regulatory schemes. Humanitarian interests have also been increasingly linked to environmental considerations. In its General Comment No. 15, the UN Committee on Economic, Social and Cultural Rights proclaimed that: ‘Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity’ (UNHCHR 2002). The World Health Organization and other international bodies and charities also advocate for a human right to water, recognising its importance to life and dignity and that the availability of water is fundamental for reducing poverty. Thus is a basic environmental issue firmly linked to social and economic interests.

![Note down any examples that you know about of the effects of the Rio and WSSD Conferences on environmental protection and management in the state or country in which you reside. Try to identify and list any official programmes that have been launched and legislation that has been adopted to give effect to the commitments that your state/country made at Rio and at the WSSD.](image-url)
Section 2 Self Assessment Questions

Question 2
Define ‘sustainable development’.

Question 3
What most important Principle was enunciated in the Stockholm Declaration and repeated in the Rio Declaration?

Question 4
One key word captures the change in emphasis and direction between the Stockholm and Rio Conferences. What was that word?
3.0 SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW

International environmental law is an increasingly critical part of the international legal system. As such it has developed within the body of legal rules and procedures that constitute international law. A fundamental question that underpins law generally is what are its sources? Sources of law are the bases of its authority. A foundational source in English and American law for example is the Magna Carta. In legal systems based on the common law, law comprises decisions made by courts, legislation and constitutional documents. The other principal legal system in the world is the so-called Civil Law. In civil law systems the authority of the law is based on legislation and codes of law. Leading European examples of such codes of law are the French (Napoleonic) Civil Code and Germany’s Bürgerliches Gesetzbuch (BGB). In distinction to international law, these national systems of law are termed municipal law.

Compared with national law, or municipal law, international law lacks two foundational legal entities: an overall legislative body with powers of enforcement, and a centralised judicial system with empowerment authority. The absence of these two sources of authority, which some assume are a requirement of a legal system, poses a question: Does international law exist? However, the question assumes a simple distinction between national and international law that is, in fact, not so simple. The underlying assumption posing the question overlooks the fact that legislatures, national governments, and courts are themselves creatures of the law. Who enforces the law when the legislature or the government themselves flout the law? However, regardless of the theoretical discussions and disagreements, international law works in actual practice. Prior to the 20th century, international law functioned even without any formal overall stated basis for its rules. International trade, communications and travel all operated with reasonable safety excepting of course when and where there was war. Until the early 20th century, peaceful settlement of disputes was conventionally sought through some temporary body set up by agreement of the parties in dispute such as a Claims Commission or an Arbitration tribunal. Terms under which arbitration proceeded were determined by mutual agreement of the parties through what is technically termed the compromis. (A compromis is an agreement between two or more countries that are in disagreement, to submit their dispute to an arbitrator, a tribunal or court.) An organisation for this purpose is the Permanent Court of Arbitration (PCA). This was established under the Hague Convention for the Pacific Settlement of International Disputes of 1899. Its title is a misnomer in that it is not a court but an organisation to facilitate arbitration and other forms of dispute resolution. As such, the PCA cannot develop a jurisprudence. It was to provide for a jurisprudence that idea of a Permanent Court of International Justice (PCIJ) was nurtured and established through the Council of the League of Nations in the early 1920s. This was the precursor to the International Court of Justice established after the Second World War. Under Article 92 of the Charter of the United Nations, the Court of Justice is the principal judicial organ of the UN (UN 1945).
The Permanent Court of International Justice was the first permanent international body with responsibility for general jurisdiction. Its statute contained 68 Articles including Article 38 which authoritatively stated the legal sources the Court would use and apply (UN 1945). This Article 38 was carried forward into the Charter of the successor, the International Court of Justice as follows:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

This wording is identical with the earlier Article 38 except it adds the clause: ‘whose function is to decide in accordance with international law such disputes as are submitted to it’. This emphasises that the Court will apply international law in its proceedings. However, paragraph 2 was also an addition to the earlier article. The Latin phrase ex aequo et bono means in equity and good conscience. In other words, the Court has the reserved authority to decide a case in accord with equity and fairness rather than according to the strict letter of the law.

In its broadest sense, equity is fairness. As a legal system, equity can be considered a body of law that addresses concerns that fall outside the jurisdiction of common law. The duality of legal judgment based on equity or on common law has a long history. For example, equity and the common law were once opposing values in the English legal system. The common law was created by a judiciary independent from the Crown and was based on the strict interpretation of statutes and precedential cases. Equity was, however, determined by the king’s chancellor and thus was considered by many to be arbitrary and a royal encroachment on the power of an independent judiciary. Despite this criticism, equity assumed a permanent place in the English legal system, as the powers of the Chancery became more defined and judgments became consistent enough to be compiled and used as precedent. Despite the apparent lack of clarity and consistency, other legal systems have also recognised the advantages of allowing judges to determine remedies in cases not covered by well-established common law or statutes.

It is important to note that the four categories of sources of law are not set up as a hierarchy. Nor are they entirely exclusive.

The formal sources of law referred to above, are also known as ‘hard law’ and establish legally binding obligations on states.
By contrast, the concept of ‘soft law’ is also found in international environmental law. International soft law refers to those norms of international environmental law which are not binding per se, but which play an important interpretive role in the construction and interpretation of principles and rules of formal international environmental law. A universally respected academic lawyer, Sir Robert Jennings, who was also President of the International Court of Justice, claimed he would not recognise a norm even if he should meet one in the street. Some also claim that the notion of soft law is itself soft. However, the concept of soft law, as a legal rule that is not strictly binding but has some legal significance, may be meaningful. Thus guidelines, codes of conduct, and declarations are not binding but, nevertheless, may gain some effect and over time merge into hard law. Examples of the principles of international environmental soft law, which will be discussed more in detail later in the course, are the principle of sustainable development, the precautionary principle, and the polluter pays principle.

The above sources of hard law and soft law in international environmental law create a disparate system of global environmental protection. The following provides an overview of the four categories of sources of law as applied by the International Court of Justice.

### 3.1 International Conventions expressly recognised

**Classification of agreements**

Listed first in Article 38 are ‘international conventions, whether general or particular, establishing rules expressly recognised by the contesting states’. (UN 1945) Some regard treaties as the most important source of international environmental law precisely because it expressly states the consent of the contracting parties to the treaty. A treaty is defined by the 1969 Vienna Convention on the Law of Treaties as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’ (UN 1969 p. 3). A fundamental point of this definition is that a treaty is a written agreement between states. Whether a non-state organisation can be a party to a treaty has been a contentious question. In 1986, the UN General Assembly convened a conference in Vienna with the purpose of drafting the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations. However, this Convention is not yet in force.

There are different types of treaties such as bilateral treaties between two states or those that are multilateral between multiple states. A bilateral treaty is an agreement between two states establishing mutual rights and obligations between them. Unless explicitly intended by the two parties, bilateral treaties confer no rights or obligations on another state. A multilateral treaty is an agreement between three or more states. Treaties are also known by multiple alternative names including conventions, agreements, pacts and covenants. Whatever its name, a treaty is a contractual form of agreement between its parties who are bound according to the terms of their agreement. This poses the question, how can a treaty be a source of law beyond the obligations the treaty represents. The answer is that some treaties have a general legal standing and effect as opposed to more specific contractual agreements such as between two or a small number of states. The former are viewed as law-making treaties.
Law-making treaties are international instruments that represent new general rules of law amongst a large number of states. Examples of law-making treaties in international environmental law are:

- Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Wetland Convention) (Ramsar 1971)
- Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage) (Paris 1972) (WHC 1972)
- Protocol on Substances that Deplete the Ozone Layer (Montreal 1987) (UNEP 1987)
Procedures governing international agreements

Bilateral treaties concerning an issue of mutual interest to the states involved signify bilateral negotiations between them. Such treaties are termed ‘contract’ treaties. Multilateral agreements on the other hand may involve multiple entities and considerations in their negotiations. This may lead to agreements which are law making. A multilateral treaty is typically initiated by a major concern prompting a study by an international institution such as the World Health Organization, the UN International Law Commission or the General Assembly itself. An outcome may be preliminary negotiations leading to an international conference with the aim of drafting a convention. Delegates at the conference must be authorised by their respective countries to act as their representatives. A delegate unauthorised to act on behalf of his or her state participates in the negotiations without legal effect (Article 8, Vienna Convention on the Law of Treaties).

Once draft language in the convention is agreed it is opened for signature. Participating states that then sign the treaty signify their agreement in principle to the document. Alternatively, a state not participating in the signing of the document may later formally accede to it. This has the effect of also binding that state in principle to the agreement. Signatures are usually subject to ratification for the treaty actually to come into force. Ratification is accomplished by the relevant organs of states consenting to be bound by the treaty. The treaty itself then comes into force when its specified minimum number of ratifications are formally exchanged or deposited. It should be noted that states have the option of ratifying a treaty with reservations. A state may opt to tend a reservation when it declines to accept a specific obligation or condition in the treaty. The effect of a reservation is that the state accepts the obligations of the treaty excluding that part of it specified in the reservation.

Once a treaty is in force, it is presumed, in accord with the Vienna Convention, that it binds the parties in good faith (UN 1969). The basic principle of law is *pacta sunt servanda*, ‘agreements which are neither contrary to law, nor fraudulently entered into, should be adhered to in every manner’. This principle applies to the interpretation of the terms of the treaty in its practice. Article 31 of the Vienna Convention sets out general rules of interpretation. However, specifying rules for the interpretation of treaties is viewed as warranting caution.

Adherence to a treaty may become a question under two particular circumstances. A treaty may be terminated or otherwise affected when a state is succeeded wholly or in part by another or a new state. This has been a critical question for some African states after they gained their independence for example. Armed conflict may also terminate or suspend a treaty while hostilities continue. Article 60 of the Vienna Convention also provides for the situation arising when a party to the treaty is in material breach of its terms. Such a breach may be seen as grounds for termination of the treaty by other states. Similarly, a fundamental change from the original circumstances of the treaty may be invoked as grounds for its termination.

A more likely circumstance is a dispute between the parties to the treaty. For such contingencies, many treaties provide for settling disputes by conciliation through commissions. Mediation is another option. More formal legal options are arbitration and adjudication. Arbitration provides for the parties to determine the arbitration procedures including the appointment of arbitrators. Settlements achieved by arbitration are binding. The use of the International Court of Justice for adjudication...
may be less favoured in practice because it does not allow the discretion to states provided in the other methods of resolving disputes. The ICJ only has jurisdiction over cases brought to it by states. Cases are most frequently brought by the parties under *compromis*. The ICJ has some advantages over other methods of resolving disputes. It is a permanent body. Its procedures and accumulated jurisprudence also afford familiarity.

### 3.2 International custom accepted as law

**State practice**

Society and rules are bound together. One could not have games, for example, without rules. Customary international law refers to binding legal rules that have developed on global or region levels through continued practice. The test of the existence of a customary rule of law is the extent to which it is observed in the practice and behaviour of states. Although this may seem a fuzzy or imprecise concept, it provides for flexibility. An example is the emergence and eventual adoption of the exclusive economic zone in the law of the sea. A measure of state practice may be provided by an array of instruments including treaties, declarations, agreements, and other pronouncements. In summary, several factors may be indicative of state practice:

- the number of states that participate in the practice
- national legislation demonstrating acceptance
- decisions of national courts
- positions adopted by ministers; diplomatic representatives and legal opinions of government lawyers
- submissions by states to international courts and tribunals
- diplomatic materials and communications; the *travaux préparatoires* of international conferences and negotiations

Although no number of states’ practice has been identified to establish a custom, the International Court of Justice (ICJ) merely requires such state practice to be a general tendency rather than a minimum number of states’ action. It is preferred that the states that participate are widely representative and that the legal rule be consistently followed.

In the Nuclear Advisory Opinion the ICJ referred to the incorporation of Principle 21 of the Stockholm Declaration in the text of many treaties as confirming it as customary law. This is the principle of states having sovereignty over their natural resources and also their responsibility not to cause trans-national environmental harm. As another environmental example, the ICJ in the *Gabčíkovo-Nagymaros* Case in 1997 approved the principle of *equitable utilisation* of common water sources when it adjudicated the dispute between Hungary and Slovakia over damming the River Danube (ICJ 1997).

The length of time a rule has been common practice is also relevant in determining its standing. Some rules of maritime law have been accepted for centuries. However, a short period of time does not necessarily disqualify a rule as potentially being customary. In its judgement in the in the North Sea Continental Shelf Cases 1969 (ICJ 1969), the International Court of Justice observed that:
'while a very widespread and representative participation in a convention might show that a conventional rule had become a general rule of international law, in the present case the number of ratifications and accessions so far was hardly sufficient. As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including those States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved'.

In a few sentences the ICJ here enunciated the kind of judicial considerations that determine whether or not a rule can be regarded as customary international law.

Apart from the difficulty of determining what is customary international law in practice, there is also the necessity to show that compliance with the practice is based on the view that it is mandated by international law. This need for a legal basis to state practice is termed *opinio juris*. These requirements mean that the rule must be part of a continuous state practice that should be the result of other states’ belief that they are required by law to apply this rule.

**Opinio juris**

*Opinio juris sive necessitates*, usually shortened to *opinio juris* is the belief that a state action or practice is necessarily followed because it is a legal obligation. Evidence of the motive to this state practice can be found in various sources such as:

- comments on the acts of international organisations and international meetings
- statements by representatives of states
- conclusion of treaties

**Customary environmental rules**

It is possible to identify obligations in international environmental law which may be considered to be rules of customary international law.

- Principle 21 of the Stockholm Declaration.
- Obligation to co-operate on environmental problems regarding shared natural resources.
- Obligation to adopt measures to protect the marine environment from significant damage.
- Obligation to conserve and prevent harm to endangered species of flora and fauna.
- Obligation to use international watercourses in an equitable and reasonable manner.
- Obligation not to dump high-level radioactive waste in the marine environment.
- Obligation not to engage in commercial whaling.
- Obligation of developed states to limit emissions of noxious and offensive gases eg sulphur dioxide.
In addition, there are principles of international environmental law that may be increasingly accepted as norms of customary law.

- The polluter pays principle.
- The principle of precautionary action.
- The principle of common but differentiated responsibilities of developing countries.

3.3 General principles of law recognised by civilised nations

As is true of other aspects of international law, the question of general principles of law is a subject of disagreement. Even the drafting materials, the travaux préparatoires of the drafting committee reveals different views. The American member of the drafting committee, Elihu Root appeared to have in mind principles recognised in national legal systems. Article 38(1)(c) of the Statute of the ICJ (UN 1945) refers to the general principles of law recognised by civilised nations, not general principles of international law. However, there is reserve about inferring international law from municipal law especially if ‘Civilised Nations’ was intended to mean western nations. A reason for the inclusion of this source of international law is to assist in making decisions where there are gaps in the law. This may allow an international court to avoid declaring the matter is legally unclear, non liquet, and thus decline to resolve the dispute in question. Some basic principles of law commonly cited include: The principle of good faith, which is being faithful to a sense of obligation; the bar against a party raising a claim again after it has been settled by judicial decision (res judicata); and the bar that precludes taking a position which is contrary to a position already established either by previous admission or action and legally determined as being true (estoppel).

3.4 Teachings of most qualified publicists

Article 38(1)(d) of the Statute of the ICJ states that the ICJ will also apply ‘the judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’. This provision and the preceding Article (1)(c) are of less importance than the first two sources of law in Article 38. However, eminent scholars and distinguished authorities in international law continue to have some influence conceptually. Arbitration tribunals and other bodies engaged in resolving disputes may cite authors in the deliberations. Distinguished writings thereby contribute as a source of international law.

Note down any examples that you know about of the implementation of international environmental law through its various sources in the legal system of the state/country in which you reside.
Section 3 Self Assessment Question

Question 5

According to the Statute of the ICJ what are the four sources of Public International Law?
UNIT SUMMARY

This unit first described the character of international environmental law as it responds to and tries to deal with increasingly critical environmental problems. The multifaceted nature of the physical, social and cultural problems that pose growing stresses on our environment compels international environmental law to be encompassing and inherently multidisciplinary. The evolution of international environmental law has been driven by the increase in the number and range of environmental problems over the past century. Its development can be distinguished according to four periods: the period prior to 1945; the period after the Second World War in 1945 to the Stockholm Declaration of 1972; the post-Stockholm period to the Rio Declaration in 1992; the post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and to the present. The latter of these phases is notable for the increasing emphasis on sustainable development. This emphasis especially incorporates the needs of developing nations in terms of their economic development. Economics considerations have become a central driving force in the continuing evolution of international environmental law. This evolution recognises the disparate histories, interests, and economic and social capacities of developing versus developed countries. The complexity of the demands which international environmental law is endeavouring to meet compels an understanding of its sources. As elucidated in the Statute of the International Court of Justice, there are four sources of Public International Law: treaties, international custom, general principles of law, and subsidiary sources including decisions of courts and tribunals and the writings of eminent jurists.
UNIT SELF ASSESSMENT QUESTIONS

Question 1
Define 'international law'.

Question 2
Define 'international environmental law'.

Question 3
Explain the difference between 'hard international environmental law' and 'soft international environmental law'.

Question 4
Summarise the key characteristics of and changes in international environmental law over the following four periods:
(a) the period prior to 1945
(b) the period after the Second World War in 1945 to the Stockholm Declaration of 1972
(c) the post-Stockholm period to the Rio Declaration in 1992
(d) the post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and since

Question 5
Since its promotion in the Brundtland Report, the concept of sustainability has had and continues to have a key role in international environmental law. As would be expected, the concept has been subject to increasing critical scrutiny. Summarise the intentions, strengths, and weaknesses of the concept.

Question 6
Outline the elements which might help to determine the legal status of the principle of sustainable development.
**Key Terms and Concepts**

**Civil Law**
the legal system in most European and South American countries which is based on doctrines and rules developed by legal scholars

**Common Law**
the legal system used in England and most of the United States which relies on prior case law to resolve disputes rather than written codes

**Compromis**
more completely, a *compromis d’arbitrage* is the agreement governing the terms of arbitration reached by the parties in a dispute who have voluntarily agreed to submit their differences to arbitration

**Customary International Law**
aspects of international law derived from custom – consistent and repetitive action by nation states over time

**Estoppel**
a legal doctrine that prevents a person or agency denying or asserting something that contradicts a matter of fact already established under the law

**International Law**
laws that govern the conduct of independent nations in their relationships with one another

**Jurisprudence**
the theory and philosophy of law

**Municipal Law**
the national, domestic, or internal law of a nation state as opposed to international law

**Non Liiquit**
a situation where there is no applicable law, or the law is unclear

**Opinio Juris**
the second element of customary international law that is necessary to establish a legally binding custom. *Opinio juris* is an obligation that subjectively binds a state to the law in question. (ICJ Statute, Article 38(1)(b)). The subjective aspect of *opinio juris* means it is an unsettled and debated notion in international law