CONSCIENTIZING THE HISTORY, NATURE AND SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW*

Abstract
Issues concerning the environment have in recent times become so trivialized to the extent that environmental resources have deliberately and otherwise been misused and the environment so degraded that it poses a threat to human survival and existence. It is in that wise that the writers herein intend to do an exposé of the history, nature and sources of International Environmental Law. By this the consciousness of general populace will to a greater extent improve and environmental resources secured, sustained and safeguarded which will invariably ensure the availability and sustainability of environmental resources.

Keywords: Environment, Development, Sustainability and Law.

1. Introduction

For some years now, issues concerning the environment have reared out as requiring serious global attention and action. This may be so because the environment is part and parcel of humanity.[1] General public awareness of the problems relating to the global environment and the need for coordinated multilateral action to address these problems was not evident even a few decades ago.[2] Generally speaking, Environmental law is a broad category of laws that include laws that specifically address environmental issues and more generally laws that have a direct impact on environmental issues. The definition of what constitutes an environmental law is as wide as the definition of environment itself. According to the Training Manual on International Environmental Law,[3] 'environment' in the modern context of sustainable development encompasses the physical and social factors of the surroundings of human beings and includes land, water, atmosphere, climate, sound, odour, taste, energy, waste management, coastal and marine pollution, the biological factors of animals and plants, as well as cultural values, historical sites, and monuments and aesthetics. Environmental law can be divided into two major categories namely, international environmental law and national environmental law.[4] The relationship between international environmental law and national environmental law is mainly on the purposes for which each of the two categories of law was created as well as on the scope that each of the two types of law covers.[5] Environmental problems stem from two main categories of human activities: 1) use of resources at unsustainable levels and 2) contamination of the environment through pollution and waste at levels beyond the capacity of the environment to absorb them or render them harmless.[6] Resulting ecological damage seen around the world include: biodiversity loss, pollution of water and consequent public health problems, air pollution and resulting increase in respiratory diseases, deterioration of buildings and monuments, loss of soil fertility, desertification and famine, depletion of fishing resources, increase in skin cancers and eye diseases in certain areas due to ozone layer depletion, new diseases and more widespread disease vectors and damage to future generations.[7] The laws of nature are inescapable and must be acknowledged. One such law is that all human activities have an impact on the environment.[8] One such law is that all human activities have an impact on the

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[1] O.V.C Ikpeze, 'International Environmental Law', Ph.D Lecture Notes Nnamdi Azikiwe University, Awka 2016 at p..1
[2] L. Kurukulasuriya and N. A Robinson (eds), *Training Manual on International Environmental Law* (Nairobi: United Nations Enironment Programme 2005) at p.1
[3] *Ibid* at p. 15
[4] L. Kurukulasuriya and N. A Robinson (eds), *Op. Cit* at p. 15
[5] *Ibid*
[6] D. Shelton and A. Kiss (eds) *Judicial Handbook on Environmental Law* (Nairobi: United Nations Environment Programme 2005) at p. 2
[7] D. Shelton and A. Kiss (eds), *Op cit* at p. 2
[8] *Ibid*

environment.[9] Indeed, each individual has an 'ecological footprint'[10] that represents the sum of that person's resource use and contributions to pollution. The ecological footprints of individuals vary considerably both within states and from one region of the world to another.

The development of international environmental law is typically divided into three periods.[11] The first demonstrates little environmental awareness but rather views environmental benefits as incidental to largely economic concerns such as the exploitation of living natural resources. The second phase demonstrates a significant rise in the number of treaties directed to pollution abatement and to species and habitat conservation. Here an overt environmental focus is evident, yet the approach is still largely reactive and piecemeal. The final phase which characterises current international environmental law, demonstrates a precautionary approach to environmental problems of global magnitude such as biodiversity conservation and climate change.[12] Concern transcends individual states, the certain global problems now considered the common concern of humankind. Developments in international environmental law paralleled this evolution within states, reflecting a growing consensus to accord priority to resolving environmental problems.[13] Today, national and international environmental law is complex and vast, comprising thousands of rules that aim to protect the earth's living and non-living elements and its ecological processes.[14]

2. Definitions

By way of definition, one can say that environmental law is that body of law that contains elements to control the human impact on the earth and on public health.[15] It is defined as comprising 'legal strategies and procedures designed to combat the pollution, abuse and neglect of our air (atmosphere), earth (lithosphere) and water (hydrosphere) resources.[16] It is the totality of these resources that make up the environment. To the extent that the scope of international environmental law covers the environment on an international scale, it is pertinent to define or describe the environment. 'The environment' is an amorphous term that has thus far proved incapable of precise legal definition save in particular context and for the purpose of different laws. For example, Article 2(10) of the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment. It defines the environment to include 'natural resources both abiotic and biotic, such as the air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape'. This broad definition encompasses natural and cultural heritage protection (regulated by the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage); species and habitat protection (for example, the 1992 United Nations Convention on Biological Diversity); and pollution prevention (regulated *inter alia* by the by the 1972 London (Dumping) Convention and the 1979 UN ECE Convention on Long-Range Transboundary Air Pollution (LRTAP)). The foregoing in fact, encapsulates the development of international law, especially treaty law, in the field of the environment: from sectoral pollution and conservation treaties to ecosystem and holistic environmental protection, with increasing attention to issues of liability, compensation and compliance.[17] It demonstrates 'the broad range of issues now addressed by international environmental law, including conservation and sustainable use of natural and biodiversity; conservation of endangered and migratory species; prevention of deforestation and desertification, preservation of Antarctica and areas of outstanding natural heritage, protection of oceans international watercourses, the atmosphere, climate and ozone layer from the effects of pollution; safeguarding

[9]Ikenga K.E. Oraegbunam, MVC Ozioko & Chukwubuikem J. Azoro, 'Mechanisms for Enforcement of Environmental Standards in Nigeria,' *International Journal of Innovative Development and Policy Studies*, 7(2):129-134, April-June, 2019.
[10] *Ibid*
[11] C. Redgwell, *International Environmental Law*....
[12] *Ibid* at p. 23
[13] D. Shelton and A. Kiss (eds), *Op cit* at p. 2
[14] *Ibid*
[15] *Ibid*
[16] O.V.C Ikpeze, 'International Environmental Law', Ph.D Lecture Notes *Op. Cit* at p.2
[17] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford: Oxford University Press 2009) p. 4

human health and quality of life'.[18] Fagbohun[19] defined environment as a term derived from the French word environ or environment meaning 'around' or 'round about' or 'to encompass' which in turn is rooted in old French word virer or viron which means around or circle. O.V.C Ikpeze *et al*[20] maintain that in a nutshell environment refers to our surroundings often understood to include not only land, air and water but also the built environment and condition of the local neighbourhood. The environment has been defined as a complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, human health, the cultural and historical heritage and the landscape.[21] The totality of the surroundings and all the elements therein both living and non-living things for the benefit of human beings also include places in which we live, work and interact with other people in our cultural, religious, political and socio-economic activities for self-fulfilment and advancement of our communities, societies or nations. It is within this environment that both natural and man-made things are found.[22] Still the term is inherently technical in scope and application. Environment means the total surrounding of an organism or group of organisms.[23] Some other scholars related environment to include water, land, air and all plants and human beings or animals living therein and the inter-relationship which exist among these or any of them.[24] In a limited sense,[25] which is essentially physical and biological, environment encompasses an array of ecosystems, consisting of both living and non-living components such as water, land, air and so on. According to the Black's Law Dictionary[26] the environment is defined as the totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of people's live. This is also the explanation by the United States of America (USA) court on the meaning of environment in *US v. Amadio.*[27] In Nigeria, the extant law, the National Environmental Standard Regulations Enforcement Agency (NESREA) Establishment Act,[28]defined environment to include water, land, air and all plants and human beings or animals living therein and the inter-relationship which exist among these or any of them.

In the overall, the effort of human beings to sustain the environment is a mandatory and inescapable concern. The success at it concurrently enriches the quality of human life and time here on earth while failure merely confirms the perceived desires for irresponsibility and untimely suicide.

3. History and Development of International Environmental Law

The origin of international environmental regulation can be traced to the nineteenth century. Prior to 1950 and before 1900, there were few multilateral or bilateral agreements concerning international environmental issues. Relevant international agreements were based on unrestrained national sovereignty over natural resources and focused primarily on boundary waters, navigation, and fishing rights along shared waterways, particularly the Rhine River and other European waterways. They did not address pollution or other ecological issues. The dramatic exception to this pattern emerged in 1909 in the United States-United Kingdom Boundary Waters Treaty, which proved in Article IV that water 'shall not be polluted on either side to the injury of health or property on the other'. Notwithstanding the existence of the US-UK Boundary Waters Treaty, the modern development of the subject dates from the post-Second World War Era. Other agreements include the 1902 Convention for the Protection of

[18] *Ibid*

[19] O. Fagbohun, *The Law of Oil Pollution and Environmental Restoration* (Ibadan: Pdade Publisher 2010) p. 25

[20] O.V.C. Ikpeze, E. Osaro and N.G Ikpeze, 'Analysis of Energy Sources, Impact on Environment and Sustainable Development Referencing Landmark Cases in the USA, South Africa and Nigeria' in *Journal of Environment and Earth Science* Vol. 5 No. 18, 2015p.147 available at www.iiste.org accessed on 17 April 2016.

[21] Section 1 (1) Environmental Protection Act (Supp.) (1991), Bulgaria

[22] R. Dworkin, *Laws Empire,* (Massachusetts: Harvard University Belkwap Press, 1987) p.5

[23] U. D Ikoni, *An Introduction to Nigeria Environmental Law,* (Lagos: Malthouse Press Ltd) p. 18

[24] L.A Atsegbua, 'Legal Framework for Renewable Energy Development in Nigeria', *University of Benin Law Journal* Vol.12 Nos. 1 & 2 2009. See also *Ikenga K.E.Oraegbunam, MVC Ozioko & Chukwubuikem J. Azoro,* 'A Critical Review of the Legal Regime for the Maintenance of Environmental Standards in Nigeria: Bio and Hydro Energy Sectors In Focus' *International Journal of Innovative Development and Policy Studies,* 7(3):105-116, July-Sept., 2019.

[25] M.T Ladan, 'Environmental Law and land Use in Nigeria' A conference paper presented at the Grand Regency Hotel on 4th October 2004

[26] B. A. Garner, *Black's Law Dictionary* (6th edn) (Minnesota: West Publishing Co. 1990) p. 534

[27] (2015) C.A. India F. 2nd 605, 611 cited by O.V.C Ikpeze *et al Op. Cit* at p. 147

[28] No. 25 2007

Birds Useful to Agriculture, the 1916 Convention for the Protection of Migratory Birds in the United States and Canada, and the Treaty for the Preservation and Protection of Fur Seals signed in 1911. Only one convention focused on wildlife more generally: the 1900 London Convention for the Protection of Wild Animals, Birds and Fish in Africa.[29] By 1930s and 1940s, states recognized the importance of conserving natural resources and negotiated several agreements to protect fauna and flora generally. These include the 1933 London Convention on Preservation of Fauna and Flora in Their Natural State (focused primarily on Africa), and the 1940 Washington Convention on Nature Protection and Wild Life Preservation (focused on the Western Hemisphere). During this period, states also concluded the well-known International Convention for the Regulation of Whaling, as well as other conventions concerned with ocean fisheries and birds.[30]

Indeed, the development of domestic environmental law which arose concomitantly with concerns about environmental degradation highlighted especially in the 1960s.[31] Between the 1950s and early 1960s, the international community was concerned with nuclear damage from civilian use (a by-product of the Atoms for Peace Proposal) and marine pollution from oil. Thus, countries negotiated agreements governing international liability for nuclear damage and required measures to prevent oil pollution at sea.[32] Internationally, during the 1960s, multilateral international environmental agreements increased significantly. Conventions were negotiated relating to interventions in case of oil pollution casualties, to civil liability for oil pollution damage, and to oil pollution control in the North Sea. The African Convention on the conservation of Nature and Natural Resources was concluded in 1968.[33] By 1970, hundreds of international environmental instruments had been concluded. Including bilateral and multilateral instruments (binding and nonbinding), there are close to nine hundred international legal instruments that have one or more significant provisions addressing the environment.[34]

A turning point was undoubtedly the United Nations-sponsored 1972 Stockholm Conference on the Human Environment which produced a non-binding Declaration of Principles and a Programme for Action.[35] The Stockholm Declaration can be said to be the forerunner of the modern era of International Environmental Law. Before the Stockholm Declarations, countries had begun to conclude agreements to protect commercially valuable species. The classic *Trail Smelter case*[36] is one of the major landmarks in the development of international environmental law. The trail smelter dispute was a Transboundary case involving the federal governments of both Canada and the United States, which eventually contributed to establishing the No Harm principle in the environmental law of Transboundary pollution. The tribunal affirmed Canada's responsibility for the damage from copper smelter fumes that transgressed the border into the state of Washington. The language of the Arbitral tribunal has been cited widely as confirming the principle that a state is responsible for environmental damage to foreign countries caused by activities within its borders. One of the most important aspects of the Arbitration is the tribunal's decision that if there is a threat of serious continuing harm, the state must cease the harmful conduct (which implies that damages would not be sufficient). The tribunal required the parties to effectuate a monitoring regime to ensure that further damaging pollution did not occur. Because the Trail Smelter Arbitration is a rare example of international environmental adjudication in this early period, it has acquired an unusually important place in the jurisprudence of international environmental law.

The United Nations General Assembly has also played a significant role in shaping international environmental law and policy notwithstanding the absence of any mention of the environment in the

[29] E.B Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Orde*r, 81 GEO. L.J. p.10
[30] *Ibid*
[31] C. Redgwell, *Op Cit* at p. 26
[32] E.B Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Orde*r, *Op. Cit* p.11
[33] *Ibid* at p.12
[34] *Ibid*
[35] C. Redgwell, *Op Cit* at p. 27
[36] A 1941 Case

United Nations (UN) Charter. However, by a dynamic interpretation of the Charter – especially of Articles 1 and 55 – and the implied powers approach adopted by the International Court of Justice (ICJ) in the *Reparations case*[37] would support reading environmental matters into the competence of the UN. The establishment of the United Nations Environmental Programme (UNEP) following the Stockholm Conference in 1972, and of the UN Commission on Sustainable Development following the Rio Conference on Environment and Development, are ample examples of the development of Charter treaty text on the subject. Currently, there are a number of significant global treaties most of which were made on the auspices of the UN. An example is the 1992 Conventions on Climate Change and Biological Diversity. The UN has also played a significant role in regional developments through, example, the Regional Seas Programme of UNEP and the UN's Economic Commission.[38] The UN Economic Commission for Europe (ECE) has been particularly active in the environmental field and is responsible for two significant procedural treaties addressing environmental impact assessment (the 1991 Espoo Convention on Environmental Assessment in a Transboundary Context) and access to environmental information, public participation, and access to justice (the 1998 Aarhus Convention on Access to Information, Public Participation in Environmental Decision-Making, and Access to Justice in Environmental Matters) as well as for sectoral pollution regulation (the 1979 Convention on Long-Range Transboundary Air Pollution and the 1992 Conventions on the Transboundary Effects of Industrial Accidents, and on the Protection and Use of Transboundary Watercourses and International Lakes).[39]

Thus, the period between 1985 and 1992, illustrate the increasingly rapid development of international environmental law. During this period, countries have negotiated a surprisingly large number of global agreements. These include the Vienna Convention on the Protection of the Ozone Layer; the Montreal Protocol on Substances that Deplete the Ozone Layer with the London Adjustments and Amendments; the Protocol on Environmental Protection (with annexes) to the Antarctic Treaty; the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal; the two International Atomic Energy Agency (IAEA) Conventions on Early Notification of a Nuclear Accident and on Assistance in Case of Nuclear Accident or Radiological Emergency; the International Convention on Oil Pollution Preparedness, Response and Co-operation, the Framework Convention on Climate Change; the Convention on Biological Diversity; the Principles on Forests; the non-binding legal instrument of the Arctic Environmental Protection Strategy; and the London Guidelines for the Exchange of Information on Chemicals in International Trade.[40]

Developments at the regional level have proceeded at a similar rate. Member states of the United Nations Economic Commission for Europe have negotiated three protocols to the UN-ECE Convention on Long-Range Transboundary Air Pollution: a protocol providing for a thirty percent reduction in transborder fluxes of sulphur dioxides, a protocol freezing the emissions of nitrogen oxides, and a protocol controlling emissions of volatile organic chemicals. These countries have also concluded agreements on environmental impact assessment, transnational industrial accidents and Transboundary fresh waters and lakes.[41] As part of the United Nations Environmental Programme's regional seas program, countries have negotiated the South Pacific Resource and Environmental Protection Agreement with two protocols, one on dumping and the other on emergency assistance. Under the UNEP Caribbean Regional Seas Convention, parties have concluded a protocol on protected areas and were considering negotiation of a protocol on land-based sources of marine pollution.[42] There have been similar advances in legal instruments to safeguard freshwater resources. States concluded an unusually comprehensive agreement to protect the Zambezi River Basin. In 1987, Canada and the United States agreed to a protocol to their 1978 Great Lakes Water Quality Agreement which addresses ground water contamination affecting the Great Lakes and the airborne transport of toxics into the Great Lakes.

[37] *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949,* p.174
[38] C. Redgwell, *Op. Cit*. at p. 27
[39] *Ibid* at p.28
[40] E.B Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, *Op. Cit* p.12
[41] *Ibid* at p.13
[42] *Ibid*

Amazon basin countries issued the Declaration of Brasilia and provided for the establishment of two new commissions under the auspices of the Amazon Pact, one to conserve the fauna and flora and the other to protect indigenous peoples. In Asia, members of the Association of Southeast Asian Nations (ASEAN) concluded the Convention on the Conservation of Nature, which provides ecosystem protection and controls on trade in endangered species. And in Africa, the Bamako Convention on Hazardous Wastes which bans the importation of hazardous wastes and creates a strict regimen for moving such wastes within the African continent.[43]

In Europe, the Single European Act now provides clear authority for the European Community to act on environmental and natural resources issues. The community has already issued many directives and regulations aimed at controlling pollution and protecting the environment, and more are under consideration. The European Court of Justice has assumed an important role in ensuring that measures adopted by individual nations conform to Community directives. A new European Environmental Agency is being established as part of the institutional framework of the European Community.[44] At the bilateral level, many international environmental legal instruments have been concluded during this period. In North America, the United States has signed bilateral agreements with Canada and Mexico on the transport of hazardous wastes. An agreement between Mexico and the United States addresses urban air pollution problems in Mexico City. In 1991, Canada and the United States concluded an agreement to control acid precipitation. In Latin America, Brazil and Argentina concluded an agreement that provides for consultation in case of nuclear accidents in either country.

At the national level, Nigeria has not been left out in the development of environmental law. As far back as 1988, the federal Government passed the Federal Environmental Protection Agency (FEPA) Decree 58 of 1988 setting up FEPA to work out rules governing the handling of Nigeria's environment.[45] However, prior to the 1988 Decree (which established FEPA), there were some laws and acts of Government relating to environmental protection. They include; the Mineral Act of 1969, 1973 and 1984, Oil in Navigable Water Decree of 1968, Associated Gas Injection Act of 1969 and Chad Basin Development Act of 1973 to mention but a few.[46] These laws and/or acts were promulgated to address specific and identified environmental problems. They were narrow in scope and spatially restricted. Decree No. 58 of 1988 as amended by Decree No.59 of 1992, which gave birth to the FEPA (now Ministry of Environment) empower the agency to have control over all issues relating to Nigeria Environment, it resources, exploitation and management.[47] Today, the Nigeria's environmental regulation is the National Environmental Standards Regulations Enforcement Agency (NESREA) and its enabling act, the National Environmental Standard Regulations Enforcement Agency Establishment Act (NESREA Act), No. 25 of 2007.

Summarily, it is common to divide the development of international environmental law into three[48] or four[49] stages. The first predates the 1972 Stockholm Conference and is characterised by piecemeal and reactive responses to particular problems of resource use and exploitation, including shared resources and pollution. The second stage commencing with the creation of international institutions from 1945 and seeing its culmination in the 1972 Stockholm Conference on the Human Environment inaugurating on this analysis the third phase of development. The third (or fourth) period witnessed instruments adopting a holistic approach to environmental protection and seeks to marry such protection with economic development, embraced in the concept of sustainable development. This was the theme of the 1992 Rio Conference on Environment and Development which in addition to producing a Declaration

[43] The Evolution of International Environmental Law ..... p. 5
[44] *Ibid*
[45] S.I Omofonmwan and G.I Osa-Edoh, 'The Challenges of Environmetal Problems in Nigeria' *J. Hum. Ecol*., 23(1): 2008 at p.55
[46] *Ibid* at p. 56
[47] *Ibid*
[48] F. Francioni, 'Developments in Environmental Law from Sovereignty to Governance: The EC Environmental Policy', in Markesinis, B (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (Oxford: Clarendon Press 1994), p. 205
[49] P. Sands, *Principles of International Environmental Law*, 3rd edn (Cambridge: Cambridge University Press 2003) p.18; M. Fitzmaurice, *International Environmental Protection of the Environment*, (293 Recueil des Cours 2001) p.13

of Principles and a programme of action for the twenty-first century, saw the conclusion of two major treaties under the UN auspices – the 1992 Framework Convention on Climate Change and the !992 Convention on the Conservation of Biological Diversity.[50]

4. Nature of International Environmental Law

International Environmental Law is in the nature of public international law marked by the application of principles which have evolved in the environmental context, such as the precautionary and no harm principles, which also forms part of, and draws from the general corpus of public international law such as the sources of public international law principles of the exercise of State jurisdiction and State responsibility. It is thus part and parcel of general public international law and not an entirely separate, self-contained discipline.[51] For H. C. Bugge International Environmental Law is that part of general international law, aiming at protecting the environment and thus supporting sustainable development.[52] It is a law developed between sovereign states to develop standards at the international level and provide obligations for states including regulating their behaviour in international relations in environmental matters.[53] International Environmental Law is based on philosophical thought that human kind is inherently separate from the rest of nature. Thus, natural resources are to be exploited for the benefit of human beings.[54] The scope of international environmental law expanded significantly since 1972[55] from Transboundary pollution agreements to global pollution agreements; from control of direct emissions into lakes to comprehensive river basin system regimes; from preservation of certain species to conservation of the ecosystems; from agreements that take effect only at national borders to ones that restrain resource use and control activities within national borders, such as for world heritages, wetlands, and biologically diverse areas. The duties of the parties to these agreements have also become more comprehensive: from undertaking research and monitoring to preventing pollution and reducing certain pollutants to specified levels.[56]

5. Sources of International Environmental Law

Since international environmental law is concerned with the application of general international law to environmental problems, it is not surprising that its sources include the traditional ones enumerated in Article 38 of the Statute of the International Court of Justice (ICJ).[57] The Article lists the four sources that the ICJ may rely upon to determine the law applicable to a case brought to its attention. The sources listed in Article 38(1) are regarded as the authoritative sources of international law and thus, also of international environmental law.[58] The provisions of the said article are 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 recognised by the contesting states;
   b. International custom, as evidence of a general practice accepted as law;
   c. The general principles of law recognised 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.

[50] P. Sands, *Op. Cit*. p. 18
[51] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford: Oxford University Press 2009) p. 4
[52] H. C Bugge, *International Environmental Law Course*....
[53] L. Kurukulasuriya and N. A Robinson (eds), *Op. Cit* at p. 15. See further *Eliseus W. Obilor & Ikenga K. E. Oraegbunam,* 'International Environmental Crimes: Examining the Ontology, Typology and Ecology', *International Journal of Comparative Law and Legal Philosophy, Vol. 2(3) September 2020, 140-148.*
[54] O.V.C Ikpeze, 'International Environmental Law', Ph.D Lecture Notes *Op. Cit* at p.2
[55]E.B Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Orde*r, *Op. Cit* p.11
[56] *Ibid*
[57] C. Redgwell, *International Environmental Law*, *Op. Cit* at p. 33
[58] L. Kurukulasuriya and N. A Robinson (eds), *Op. Cit* at p.1

Following from the above, two points should be highlighted. The first is that treaties are by far and away the most significant source of binding rules of international environmental law. Secondly, the adoption of consensus and 'package-deal' approaches to treaty negotiation have been particularly beneficial in the environmental context, permitting states to reach agreement on issues such as Transboundary air pollution, climate change and the conservation of biological diversity, even in the face of sharp differences of view about the very existence of the problems and about their solution.[59] The sources of international environmental law can be grouped into two heads for better understanding and identification.

Traditional Sources of International Environmental Law

The vast bulk of environmental law is contained in treaty texts which are given dynamic force in part because they usually provide an institutional mechanism for their implementation.[60] A common format is to provide for regular meetings of the Conference of the Parties (COP), a number of subsidiary Committees reporting to the COP, most commonly comprising at least a Committee for Scientific and Technical Advice, and a Secretariat to provide support at the end and between the meetings of these bodies.[61] The dynamic force of many environmental treaties derives from the need to respond to changes in the physical environment regulated thereby and is most generally effected through the COP via a subsidiary scientific body. A significant number of environmental treaties adopt a framework approach to facilitate more rapid change than is generally the case through the normal (and time-consuming process of treaty amendment. This approach enables the treaty to contain general principles and set forth the organisational structure of the treaty bodies (the framework), whilst further protocols and/or annexes embody specific standards and are generally subject to a more flexible amendment process. An excellent example of a framework treaty is the regional 1979 ECE Convention on Long-Range Transboundary Air Pollution, now accompanied by eight protocols; the 1992 United Nations Framework convention on Climate Change and the 1997 Kyoto Protocol is another good example at the global level.[62] More flexible amendment procedures were pioneered by the International Maritime Organisation with the use of the 'tacit amendment procedure' with its 1973/78 Convention for the Prevention of Pollution from Ships to which there are now six annexes. Changes to the annexes come into force for all contracting parties within a minimum of 16 months of adoption of the change unless objection is lodged within a certain time period (10 months) by one-third of the contracting parties or by the number of contracting parties whose combined merchant shipping fleets represent at least 50% of world gross tonnage.[63] A more recent and further example of this framework approach is the 1992 Convention for the Protection of the Environment of the North-East Atlantic, where the Convention is accompanied by five annexes and three appendices, with the latter embodying matters exclusively of a technical, scientific, or administrative nature. Both appendices and annexes are more readily amended and modified than the convention text itself, thus permitting the convention more readily to grow and adapt to changing scientific and other data.[64]

Further flexibility is found in recent treaty texts that allow for differentiation in the implementation obligations for States taking on treaty commitments.[65] For example, Article 3 (1) of the Climate Change Convention recognises the common but differentiated responsibilities and respective capabilities of States in implementing the obligation to protect and preserve the climate system for the benefit of present and future generations.[66] Developed country parties 'should take the lead in combating climate change and the adverse effects thereof';[67] indeed, under the Kyoto Protocol it is only Annex I parties

[59] C. Redgwell, *International Environmental Law*, *Op. Cit* at p. 34
[60] R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *AJIL* 623 2000
[61] *Ibid*
[62] R.R. Churchill and G. Ulfstein *Op. Cit* at p. 95
[63] *Ibid*
[64] *Ibid*
[65] D. French, 'Developing States and International Environmental Law: The Importance of Differentiate Responsibilities', 49 *ICLQ* 38
[66] L. Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime', 9 *RECIEL* 120
[67] *Ibid*

(developed country parties) which are subject to specific targets and timetables for greenhouse gas emission reductions. In similar vein a number of the substantive treaty obligations of States party to the 1992 United Nations Convention on Biological Diversity are qualified by the words 'in accordance with (each contracting party's) particular conditions and capabilities'.[68]

Whilst the vast majority of the rights and obligations of States with respect to the environment derive from voluntarily assumed treaty obligations, it would be misleading to suggest that no customary international law norms govern State conduct. State practice has given rise to a number of customary law principles, buttressed by the process of treaty and customary law interaction. Of these, the most significant is the 'good neighbour' or 'no harm' principle, pursuant to which States have a duty to prevent, reduce and control pollution and Transboundary environmental harm.[69] State practice further supports the customary law obligation to consult and to notify of potential Transboundary harm. Other relevant principles of customary international law include the polluter pays principle, the principle of preventive action, and equitable utilisation of shared resources. More controversial is the customary law status of the precautionary principle or approach[70] and the principle of sustainable development *per se*[71]and of its buttressing principles (e.g. sustainable use; intergeneration equity; integration of the environment into economic and development projects; and common but differentiated responsibilities).[72]

General principles of law are also of significance in the environmental context, though a distinction needs to be made between the general principles of law referred to in Article 38 (1)(c) of the ICJ Statute, and general principles such as those found in the Stockholm and Rio Declarations in international environmental law. To the extent that the former embraces general principles found in national law, these are of limited utility in the international environmental context (though relied on in the popular *Trail Smelter Arbitration*).[73] If Article 38(1)(c) of the Statute of the ICJ includes general principles recognised at international law, then the scope is potentially significant, including the polluter pays principle, the precautionary principle and the principle of common but differentiated responsibilities. These operate to influence the interpretation of (but not override) treat provisions, the application of custom, and influence judicial decisions. The reference to 'the concept of sustainable development' by the ICJ in the *Gabcikovo-Nagymaro case*[74] remains the best-known example of the influence an internationally recognised principle of international environmental law may wield. Indeed, as this example illustrates, although not a formal source of international law as such, judicial decisions provide important authoritative evidence of what the law is, with a growing number of judicial and arbitral awards of importance in the environmental field. These include judgments of the ICJ (e.g. *Gabcikovo-Nagymaros*[75] the forthcoming *Pulp Mills)*;[76] arbitral awards (e.g. *Trail Smelter,*[77]*Metaclad case*),[78] and the decisions of human rights courts (e.g. *Fedeyeva's case*[79])

Soft Law

In addition to the traditional sources of international law identified above, a variety of non-binding instruments such as codes of conducts, guidelines, resolutions, and declarations of principles, may be

[68] *Ibid*
[69] C. Redgwell, *International Environmental Law*, *Op. Cit* at p. 36
[70] P. Birnie, A. Boyle and C. Redgwell, *Op. Cit* at p. 5
[71] A.V Lowe, 'Sustainable Development and Unsustainable Arguments', in A.E Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press 1999)
[72] L. Paradell-Trius, 'Principles of International Law: An Overview', 9:2 *RECIEL* 93, 2000
[73] (1941) 35 AJIL 684; also Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm) and Principle 2 of the 1992 Declaration of the UN Conference on Environment and development (Rio) reproduced in P. Birnie and A. Boyle, Basic Documents on International Law (Oxford: Oxford University Press, 1995)
[74] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports* 1997. P.7
[75] Supra
[76] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010 available at www.icj-cji.org accessed on 24th April 2016
[77] Supra
[78] *Metaclad Corporation v. United States* (ICSID Case No ARB (AF)/97/1), Award of 30 August 2000
[79] *Fadeyeva v. Russia*, no 55723/00, ECHR 2005-IV

resorted to by States and non-State actors alike.[80] These are non-binding instruments non-compliance with which does not entail international responsibility. Soft law may be employed because its origins are not law-creating either because the body promulgating the 'law' does not have law-making authority (e.g. an autonomous treaty supervisory body or an NGO) or because a law-making body chooses a non-binding instrument with which to embody a statement of particular principles (e.g. States at the 1992 Rio Conference on Environment and Development adopting the binding 1992 Climate Change Convention and the non-binding 1992 Rio Declarations of Principles on Environment and Sustainable Development). International environmental law is a particularly fertile area for soft law norms, since it allows agreement on collective but non-binding action where, for example, the scientific evidence is inconclusive or the economic costs uncertain. It may frequently lead to hard law such as the UNEP Guidelines mentioned above. Other criteria for identifying the sources of International Environmental law include:

Hard Law vs. Soft Law

Hard law represents law in its traditional meaning;[81] it is compulsory ('shall'); it reflects a real obligation that 'must' be fulfilled; if it is violated the perpetrator incurs international responsibility, which implies compensation for any loss or repair of any damage caused by the actor's behaviours.[82] Soft law is a relatively new notion; it is of a recommendatory nature ('should'). If it is violated it entails criticism and the qualification as an unfriendly act. But even these relatively weak consequences of misbehaviour can be damaging for the perpetrator; his/her reputation is at stake, which again has a certain impact on the educated and alert public open societies.

Treaty Law vs. Customary Law

This distinction mainly relates to the origins of a norm. A treaty concluded in the proper way (formalities) or a custom deemed to have the force of law are both legally binding. In both cases one assumes the consent (express or tacit) of the states concerned. Treaties are expected to follow the precepts of the Vienna Convention on the Law of Treaties, whereas the contours of custom remain vague; the frequent repetition of certain practices may indicate the existence of a customary rule. Treaty law is 'made' by negotiators and their governments; customary law 'emerges' in the daily practice, in legal opinions, writings of eminent scholars, etc. According to the aforementioned Convention, a treaty means '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'.[83]

Principles vs. Jurisprudence

There are important points of departure for any new kind of law which is international environmental law. As regards principles, one can identify those of a general nature ('good faith') and those with an environmental connotation ('precautionary approach'). The legal value of most principles is subject to dispute as they are norms which only give guidance but are not directly applicable; some of them may be precursors of customary law such as the Stockholm Principle 21 (prohibition of damage to the environment beyond one's own territory). Jurisprudence only reflects the opinion of courts; but by the mechanism of precedents such opinion may also become a reflection of customary law.[84] The drawbacks of these two sources are their uncertain normative value and the frequent lack of clarity as regards the exact contents of the norm. [85]

6. Conclusion and Recommendations

By way of conclusion, this paper has attempted to trace the history of international environmental law, in addition to its nature and sources. It was found that that the origin of international environmental law

[80] C. Chinkin and A. Boyle, *The Making of International Law* (Oxford: Oxford University Press, 2007), ch.2
[81] This is as stated in 5.1. of this Seminar Paper
[82] W. Lang, 'International Law and Institutions' in *Treaties as a Source of International Law*, Obtained from Encyclopedia of Life Support Systems (EOLSS)
[83] Article 2(1)(a) of the 1969 Vienna Convention
[84] *Gabčikovo-Nagymaros case, Trail Smelter case, Confou Channel case and Lac Lanoux case*
[85] W. Lang, 'International Law and Institutions' in *Treaties as a Source of International Law, Op Cit*

dates as far back as 1900 in the 21st Century. The subject of international environmental law came to the fore with *Trail Smelter* arbitration of 1941 and the general corpus of international environmental law, derives its validity/source from the sources of the public international law. In recapitulation, it became clear that modern concerns about the environment were as a result of the quest for development within nations which has impacted negatively on the environment. Conferences have been organised where Conventions, Treaties, Protocols and Declarations etc are adopted with regard to economic, sustainable development, protection and preservation of the environment. Examples are the Stockholm's Conference of 1972, Rio Conference of 1992 with the enunciated principles as guide to nations. It is therefore recommended that there is need to increase public awareness and enlightenment on the causes, effects and consequences of environmental degradation and the need for effective environmental protection mechanism. This recommendation is appropriate at this time especially as there is growing argument on the consequences of environmental degradation as a cause of displacement which is now a topical issue on the agenda of many countries and regions. Indeed, environmental degradation has caused internal and trans-border displacement and thus the need to include environmental degradation as a cause of displacement can no longer be handled with kits glove. Furthermore it is important in order the emphasize the fact that any deterioration or degradation of the quality of the environment can become a life threatening issue resulting in displacement of people who ordinarily will exacerbate the issue of the traditional/conventional refugees leaving them with no less protection than that afforded the traditional/convention refugee. This is particularly so, as environmental refugees are people who face hardships and are in need of legal protection.