TEXTBOOK ON PUBLIC INTERNATIONAL LAW

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Chapter One
Introduction to International Law

- Definition:

The classic meaning of international law means a set of rules which govern the relations between States, during war or peace. However, this definition is no longer used as a result of dramatic changes which have occurred within the international relations scene. Contemporary international law can now be defined as a body of rules which regulate the conduct of the subjects of international law, such as States and other international organizations, in their dealings with each other.

- Is International Law Law?

International law is law. Most States acknowledge this and some States refer to international law in their own constitutions so that they can act in accordance with it. States will employ their own legal advisers to formulate, present and defend their State's position in international law. Even though international law is recognized, its effectiveness has been criticized. Such critics may have high expectations of how international law should operate which could prove to be unrealistic. International law cannot enforce States upon political issues. International law cannot, of itself and by itself, dictate the policies of States. As a result, the fact that law can be violated does not in itself actually negate a legal system's effectiveness. This may appear a rather contradictory statement.

International law is concerned with promoting international co-operation, and achieving co-existence among States. When international law is weakened, it is not the fault with international law itself, but with those who operate within the international legal system.

- The characteristics of International Law:

• International law is not imposed upon States and there is no international legislature. The international legal system is decentralized and it is established on consensus. International law is established essentially in one of two ways:

- Through the practice of States which is known as *customary international law*.
- Through agreements entered into by States which are known as *treaties*.

• Critics may argue that the lack of a strong enforcement mechanism within international law is a weakness. Two examples of the absence of enforcement measures within international law are:

- There is no international police force.
- There is no international court with compulsory jurisdiction to which States are required to submit.

• However, this does not mean that international law cannot be effective. International law can impose sanctions upon a State in an effort to control that State's conduct. Though some may argue that sanctions have not always proved that effective and can actually be counter-productive. If international law is violated, there is a recourse of action to which the Victim State can refer to. Treaties can be suspended or even terminated, or the assets of an offending State may be frozen. The United Nations Security Council has the power to authorize economic sanctions and force may be used in specific circumstances.

• Public opinion can also be an effective sanction. States want to be seen to be complying with international law. This can be demonstrated in the way that some States will take considerable measures to justify their own particular position in international law.

• There is an international court to which States can refer their disputes to for settlement. States, however, must agree to submit to the court but there is no legal compulsion on them to do so. This in itself could also be seen as another element of weakness within international law as it is seen as both contradictory and excusatory.

• Despite this, the role of reciprocity in a State's observance to international law is important. One example is with regard to the position of sovereignty. It is within a State's own interest to respect territorial sovereignty of other States as they in response should respect its territorial sovereignty.

- The Development of International Law:

• International law is a relatively modern system. Contemporary international law has its roots in the growth of the secular sovereignty of Western Europe. There was a need for law to regulate the relations of States with each other. The rules of war and the rules concerning diplomatic immunity were the earliest expression of international law. The Age of Discovery in the sixteenth and seventeenth centuries brought with it the development of rules governing the attaining of territory. At the same time, the principle of the freedom of seas was being established. As such, international law grew out of necessity in order for States to co-exist and co-operate with each other.

• International law established the perimeters of State action and national competence so that States enjoyed freedom of action. International law continued to expand as international dealings increased and by the nineteenth century had evolved, geographically at least, into a universal system of law. It remained, however, rooted in Western European traditions maintaining values in both its concept and content with a European bias.
• The twentieth century has witnessed major changes which have had repercussions for the international legal system. The sovereign independent State has been challenged in many ways. Two world wars brought devastation but also former colonial territories gained their independence. The twentieth century has seen a greater emphasis on international co-operation which enable States to work together rather than individually. Those matters which were once considered exclusively within the domain of domestic jurisdiction are now susceptible to international regulation. However, the use of force has been prohibited except in defined circumstances.
• International law is no longer the preserve of some 50 states, as it now includes 193 States. As international law expands and encompasses more States, it can no longer be considered as an exclusively western domain. The "new" States may hold and present their own viewpoints which can be contrary to those held by the "old" States. They do not challenge the existence of international law *per se*, but they do challenge the substantive content of some of the rules of international law. Examples include:
• The measure of compensation to be awarded in respect of the expropriation of property belonging to foreign owners.
• With respect to human rights, the articulation of "third generation" rights.
• The European bias of international law has now been effectively dismantled. Political ideologies other than those of capitalism are now heard within international discourses including those ideologies once considered as being communist or socialist. Modern technology has allowed more regular international contact and has created new areas for international regulation. Two examples of new areas for international regulation are outer space and the deep sea-bed.
• In addition, international law has had to meet new challenges which demand an international response either at governmental level or at the international level when individual State action proves to be inadequate or deficient. Two contemporary examples which have been the subject of international regulation are the environment and human rights.
• However, international regulation will only be effective if States respond by pursuing domestic policies which comply with common international opinion.

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Chapter Two
Sources of International Law

- How is the legal quality of the alleged rules of international law assessed?
The answer to the above question can be found in the provisions of Article 38 of the Statute of the International Court of Justice (ICJ). Article 38 does not actually mention the term "sources", but it does indicate how the court should decide disputes which may come before it for settlement. The Statute provides that the court is to 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 both parties are in agreement.
Sources may be characterized as formal or material, Formal sources constitute what the law is, Material sources only identify where the law may be found. Therefore, Article 38(1) (a)-(c) (treaties, custom, and general principles) are formal sources but in Article 38(1) (d) (judicial decisions and juristic teachings) are material sources.
Article 38 is essentially a direction to the International Court of Justice on how disputes coming before it should be resolved. Despite the absence of the term "sources", Article 38 is regarded as an

authoritative statement on the sources of international law. Article 38 does not stipulate that it is establishing a hierarchy, but it is self-evident that Article 38 is nonetheless establishing a hierarchy of procedure for the application of international law in the settlement of international disputes.
Each category of law referred to in Article 38 will be examined. Custom is cited secondly in Article 38 because it has historically preceded treaties. A consideration of what is custom shall be examined first.

I- CUSTOM

Custom, through the absence of an international exclusive and legislature, has exercised an influential role in the formation of international law.

Definition of Custom:

Custom in international law is a practice followed by those who feel legally obliged to behave in a certain way. Custom must be distinguished from mere usage.
A rule of customary international law derives its law hallmark through the possession of two elements: (i) a material and (ii) a psychological element.

A- Material Element

The material element refers to the behavior and practice of States.

- Duration of Practice:

There is no set time limit and no demand that the practice should be engaged in since "time immemorial". The fact that a practice has been engaged in only for a brief period of time will not prevent the formation of a customary rule, provided that the other requirements of custom are met.

- Extent of State Practice:

Before State practice can be acknowledged as law, it has to be in compliance with a "constant and uniform usage" practiced by the States in question.
State Practice: Treaties, diplomatic correspondence, and statements made by national legal advisers on domestic and international affairs are some of the indicators of State practice. Despite these indicators of State practice, public manifestations of State practice remain an important component.

B- Psychological Element

Practice in itself does not establish custom. An alleged rule of customary international law has to manifest not only a material element, but a psychological element, which is known as *opinio juris*.
Opinio juris refers to the subjective belief maintained by States that a particular practice is legally required of them. This means a practice which is generally followed but which States feel they are legally free to disregard at any time cannot be characterized as law.
Opinio juris may be cautiously derived from, inter alia, the attitude of the parties and States towards General Assembly resolutions. It was emphasized that the effect of consent to the text of such Resolutions cannot be understood as merely that of "reiteration or elucidation" of the treaty commitment in the Charter. Instead it is an acceptance of the validity of the rule or set of rules declared by the Resolutions.
The problem with *opinio juris* is one of proof. It can be difficult to determine when the transformation into law has taken place. How can a State's conviction be proven to exist? Essentially, what must be proved is the State's acceptance, recognition or acquiescence in the binding character of the rule in question. The onus of proof is on the State relying upon the custom. It is on the party alleging the existence of custom which must demonstrate that the custom is so established that the other party is bound by it and insufficient evidence of *opinio juris* is fatal to a case. *Opinio juris* and State practice are complementary in the creation of customary international law.
Finally, there is another category of custom known as "instant custom" which refers to spontaneous activity practiced by a great number of States acting as they want to act. Instant custom is rare. Two examples of "instant custom" are the doctrine of the continental shelf originating from President Truman's Proclamation in 1945 and the unilateral seaward extension throughout the 1970s by coastal States.
The term "instant custom" may appear to be an unsuitable term, yet there is no other term in usage. However, the activity it describes, while not fitting into the mould of traditional custom, still falls under any "new" source of law. As stressed already, "instant custom" is an exception from the norm.

II- TREATIES

Treaties are only examined here in so far as they constitute a source of law. Treaties, as Article 38(a) infers, may be between two States (bipartite) or between several States (multipartite).

A distinction is sometimes drawn between law-making treaties ("*traite-lois*") and "treaty contracts" ("*trait-contracts*"). The essence of the distinction is because "treaty contracts", being agreements between relatively few parties, can only create particular law between the signatories. However, treaties to which there are many signatories, create law per se.

All treaties involve a contractual obligation for the parties concerned, and consequently, they create law for all parties agreeing to the terms of the treaty. So, a bipartite treaty does not create a lesser law than does a multipartite treaty. Multipartite treaties may have a wider effect, and as such, may be regarded as law-making, in that not only do they have a greater number of signatories, but the provisions of such a treaty may become customary international law.

Multipartite treaties may never have the truly legislative effect of municipal legislation; have a quasi-legislative effect which at least prima facie denied to bipartite treaties. Conversely, a multipartite or bipartite treaty may merely clarify what has been accepted as customary international law, and a provision contained repeatedly in bipartite treaties may provide evidence that a particular rule of customary international law exists. Alternatively, it may be argued that the very fact that States insert the rule in a bilateral treaty is evidence that such a rule does not exist under customary international law.

Treaties, therefore, regulate diverse and extensive subject-matter including, inter alia, drug control, space exploitation, the establishment of organizations, extradition and safety regulations in the air and at sea. Customary law and law made by treaty have equal authority as international law, but if a treaty and a customary rule exist simultaneously on the issue in dispute, then the treaty provisions take precedence.

Nevertheless, though the modification of customary law by treaty is common, there are few instances of rules of customary law developing in conflict with earlier agreements. In such cases, the principle that the latter in time prevails will be applied on the presumption that the parties to the treaty have impliedly given their consent. A presumption exists against the replacement of customary rules by treaty and vice versa. Treaties are not intended to derogate from customary law, and a treaty which seemingly modifies or alters established custom should be construed so as to best conform to, rather than derogate from, accepted principles of international law. This is unless the treaty in question is clearly intended to alter the existing rules of custom. A treaty will not however prevail over prior customary law if the latter is *jus cogens*. There are two types of treaties which, because of their purpose, produce consequences which non-signatories cannot ignore.

These are: Treaties which establish a special international regime.

Treaties which establish an international organization.

These treaties are unusual. Constitutive treaties establishing international institutions, such as the U.N, have created organizations which possess varying degrees of international personality. This personality has allowed such entities to operate on the international stage and which has, in certain instances, been enforced against non-member States.

III- GENERAL PRINCIPLES OF LAW AS RECOGNISED BY CIVILIZED NATIONS

"General principles of law" were formed to simplify the understanding of international law to enable easier judgments. The general principles were principles which were understood by the so-called "civilized nations". However, the term "civilized nations" is no longer used due to its colonial associations.

It is not clear whether general principles refer to those of the international legal system or those of municipal legal systems. This lack of clarity can be an advantage as it imposes no restraint on the principles which may be applied. These legal principles are based on the developed municipal legal systems, so the general principles are common to the major legal systems of the world.

Legal principles which are applied by international tribunals and the International Court and its predecessor, have been those of a State's responsibility for acts of its agents; the principle of estoppel (personal bar), i.e. no one must be a judge of his/her own case; and the principle of reparation.

Similarities with municipal legal systems have been utilized in new areas of international law and can be found within commercial and administrative law. There is no agreed definition of the extent or scope of general principles but, despite the lack of a precise definition, their importance remains that recourse to them has prevented a case from being rejected on the grounds that current international law is inadequate for dealing with a particular issue raised. Whether a particular general principle is eligible for inclusion by international law depends upon the development of international law at the

time in question. The prohibition on the use of torture is now enshrined within international law based on the fact that the prohibition of torture is, prima facie, common to all legal systems.

IV- EQUITY

Equity is part of international law and equitable principles are referred to in multipartite treaties including the 1982 Convention on the Law of the Sea and certain General Assembly Resolutions.

The principles of equity such as fairness, justice and reasonableness are associated with general principles. Equity differs from the general principles which are most frequently applied because general principles are mainly involved with procedural techniques.

Equity is a concept which reflects values that can affect the application of the law but equity cannot be a source of law itself as although it does not contribute to substantive law, it can affect the way substantive law is administered and applied.

So equity can assist in supporting existing rules. Equity must be distinguished from the International Court's power "to decide a case ex aequo et bono, if the parties agree thereto". This means that the court may apply equity in precedence over all other rules. A judge can only exercise power under Article 38 (2) if he/she has been expressly authorized to do so.

- THE MATERIAL (SUBSIDIARY) SOURCES:

- Judicial Decisions

- The International Court of Justice (ICJ):

Despite the absence of the rule of *stare decisis* (binding precedent) in international law, in which the court is obliged to follow its previous decisions, the ICJ and international tribunals examine previous decisions, and take them into account when seeking the solution to a subsequent dispute.

The ICJ has delivered several judgments and advisory opinions which have made an influential contribution to the development of international law. Examples of these can be seen in the Reparations Case (legal personality of the UN) and also arbitration decisions have contributed to the growth of international law such as seen in the Alabama Arbitration Awards (duties of a neutral State). So a judicial decision by the ICJ may legitimize an alleged rule of custom.

To conclude, although the ICJ is disbarred from participating in the law-making process, in practice this is not the realistic view. Decisions of the ICJ have a similar impact upon international law as do the decisions of the House of Lords, (now known as the Supreme Court), in United Kingdom law, without the formal doctrine of *stare decisis* (binding precedent).

- DECISIONS OF MUNICIPAL COURTS:

Article 38 of the ICJ Statute does not place limitations on judicial decisions of the international tribunals. Therefore, if a decision of a municipal court is relevant it may be applied. The actual weight of any decision of a national court will depend upon the standing of the court concerned.

The United States (US) Supreme Court is held in high esteem and, in its decisions dealing with individual State boundaries, it has both applied and played a role in developing the relevant principles of international law. Similarly, decisions of the English Prize Courts contributed to the growth of prize law relating to vessels captured at sea during war.

A decision of a municipal court may also act as evidence of a State's position on a particular issue. However, it must also be noted that even though a national court may seem to be applying a rule of international law, it may actually be applying a rule of national law, as in issues concerned with sovereign and diplomatic immunity.

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- WRITINGS OF PUBLICISTS

"Teachings of the most highly qualified publicists of various nations" may be referred to as a subsidiary means in an attempt to settle a dispute.

Writers have played a considerable role in the development of international law. Their influence has been due, partly, to the absence of an executive and a legislative body and, in part, to the fact that the international legal system is still fairly young. During the formative period of the international legal system, writers were, because of insufficient State practice, able to help determine, mould and articulate the scope, content and basic principles of international law. (For example, Grotius "freedom of the seas"- in 1625).

However, as the substantive law of International Law increased via, for example, State practice and the growth of customary international law, the role of writers declined. Nevertheless, international law is still a relatively young system and its boundaries are constantly being extended; with writers who may still make a contribution in identifying and highlighting areas where international regulation should be introduced, for example with regard to the issues of environmental pollution.

Writers may also prompt an assessment of the aims and values of international law. Writings, though they have receded in importance, are utilized not as a source of law in themselves, but as a means of ascertaining what the law actually is on any given subject. They are a subsidiary means of determining what the law is on a particular issue at a particular point of time, and in the absence of any rule of *stare decisis* (binding precedent) in international law, writings do not necessarily carry less weight than judicial decisions. Obviously, which of those publicists are "the most highly qualified" cannot be conclusively proved.

- OTHER POSSIBLE SOURCES OF INTERNATIONAL LAW:

- Acts of the International Organizations

The last 40 or so years has witnessed the formation of numerous international organizations. The best known, enjoying almost universal membership, is the United Nations (UN). Every member state of the UN possesses one vote within the General Assembly. Voting on important questions requires a two-thirds majority, whilst on all other questions a simple majority will suffice.

Only those Resolutions adopted by the Assembly on procedure and budgetary questions are legally binding on members. All other Resolutions are recommendations or statements on a given issue. However, certain General Assembly (G.A.) Resolutions, which are "Declarations of Principle", possess considerable force in although they carry no legal obligation. Examples are: Resolution 1514(XV), "Declaration on the Granting of Independence to Colonial Countries and Peoples", and the G.A. "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations" 1970. Although such Resolutions may contribute to the development of international law, the status of customary international law was denied to G.A. Resolution 3281(XXIX) "Charter of Economic Rights and Duties of States" 1974 by the arbitrator in the Texaco Case.

General Resolutions are an example of what is known as "soft law". Soft law is used to describe non-legally binding international instruments. The term "soft law" includes treaties ("legal soft law") containing general obligations and non-binding or voluntary resolutions; statements of intent and codes of conduct produced by international and regional organizations; and statements by individuals, for example, groups of eminent international lawyers purporting to articulate international principles ("non-legal soft law"). A necessity of soft law is that it be in written form. The subject-matter of such instruments is becoming increasingly diverse and includes inter alia economic measures and environmental instruments.

Soft law is intended to influence conduct on the international scene and may be transformed into hard law and subsequent State practice may be such to change the status of the soft law or the soft law may ultimately result in a hard law treaty being concluded. An example of this was the 1948 Universal Declaration of Human Rights which was a statement of intent leading to the promulgation of the 1966 Covenant of Civil and Political Rights, and the 1966 Covenant on Economic, Social and Cultural Rights.

- THE INTERNATIONAL LAW COMMISSION (ILC)

In 1946 the ILC was established, and charged with the task of furthering the progressive development and codification of international law. "Progressive development" means "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States". Codification, however, is defined as "the more precise formulation and systemization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine". All codification has, accordingly, since 1946, been effected via the ILC.

The ILC has 34 members who sit as individuals rather than as representatives of their governments. The ILC may be invited by the G.A. to look at a particular area of law. However, this is rare, and the ILC normally initiates its work programme for itself. Draft articles are prepared and submitted to Member States for their comments. A conference is convened which will, on the basis of the draft articles, produce a Convention, which will eventually be opened for signature.

The value of the ILC's work lies not only in that a multipartite treaty may be produced, but that in its preparatory work, State practice can be identified and, as such, may assist the formation of customary international law.

- Jus Cogens

Jus cogens is the technical term given to those norms of general international law which are of a peremptory force and from which, as a consequence, no derogation may be made except by another norm of equal weight. A treaty, for instance, which conflicts with such a norm is void and should a new peremptory norm develop then any existing conflicting treaty becomes void and terminates.

Jus cogens refers to the "public policy" rules of the international legal system. There is considerable uncertainty as to the scope and extent of *Jus cogens*.

Examples of *Jus cogens*:

- The prohibition on the use of force,
- The prohibition on genocide and torture,

The realization of the principle of self-determination new peremptory norm develop then any existing conflicting treaty becomes void and terminates.

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Chapter Three
International Personality

The term 'international personality' used in law refers to a body that is a subject of international law and has international rights and duties with the capacity to maintain its own rights by bringing international claims.

International law has developed and expanded in its scope over time. As a result, new bodies have joined the international scene and the international personality of these new bodies has widened.

States were previously considered the exclusive subjects of international law. Although States remain the primary subjects of international law, they are no longer the exclusive subjects of the international legal system. Throughout the 20st Century, the scope of international legal personality has widened considerably. This is as a result of the growth and expanse of international organizations and the growing awareness of the issue of human rights. However, whilst States possess full international legal personality due to characteristics of their Statehood, all other bodies possessing legal personality do so only to the extent that States allow them to. The personality of States can be classed as original and that of other bodies as derivative.

A- STATES

States are the principal providers of international law. International law is basically the product of relations between States. These relations can be through the practice of establishing customary international law, or through international agreements which are known as treaties. States can also be brought before the International Court of Justice (ICJ).

WHAT IS A STATE?

A "State", under international law, is an entity which has a defined territory, a permanent population, and is under the control of a government and engages in, or has the capacity to engage in, formal relations with other entities.

The criteria which establishes Statehood is found in Art. 1 of the Montevideo Convention on Rights and Duties of States 1933. This clarifies that the "State, as a person of international law, should possess the following qualifications: (a) a permanent population, (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".

A- Permanent Population:

States consist of a collection of individuals and accordingly a permanent population is an essential requirement of Statehood. There does not have to be a minimum population to satisfy this requirement. Just two examples of States which have small populations are Nauru, which has a population of 6,500 and Liechtenstein which has a population of 20,000. Both of these are still considered and respected as States.

B- Defined Territory:

Territorial sovereignty involves the exclusive right to display the activities of a State. With this right there is an obligation to protect within the territory the rights of other States. This includes their right not to be violated in peace and in war, and any rights which each State may claim for its nationals in

foreign territory. However, while territory is a necessary component of a State, there is no defined size as regards its geographical scope. The requirement of territory may be satisfied even if the State's territorial boundaries are not precisely defined or may even be a matter of dispute.

C- A government:

Another factor which is essential for the purposes of Statehood must be the establishment and existence of an effective government. This means that it is a government which is independent of any other authority and is competent in both its legislative and administrative duties. An established State's Statehood will not be regarded as legally void even if there is a temporary absence of an effective government. This could be during a period of civil war. A State's Statehood is also not considered void during times of military occupation. One example is during the Second World War when large parts of Europe where under Nazi occupation. The fact that some European States were under Nazi occupation did not diminish the Statehood of those European States.

D- Capacity to enter into international relations:

The capacity to enter into international relations is also an important indicator of a State's Statehood. However, this depends on the response of other actors on the international stage. The satisfaction of the first three criteria of establishing a State's Statehood is essential based upon factual attributes. In contrast, the fulfillment of this criterion depends upon recognition. This means that an entity may have the capacity to enter into foreign relations, but if the other States decide to decline to enter into relations with it, or withdraw their relations, then that entity in question is denied the opportunity to demonstrate this capacity in actual practice. Example: Southern Rhodesia was a British self-governing territory until it declared unilateral independence from Britain in November 1965. It had a population, territory, a government and the capacity to enter into relations with other States. However, no other State was willing to enter into relations with Southern Rhodesia at that time. As a result, Southern Rhodesia was refused recognition as a State by the rest of the international community. An entity which is able to conduct foreign relations does not terminate its Statehood if it voluntarily hands over all or part of the conduct of its foreign relations to another State. Examples of these are San Marino in Italy and Monaco in France.

Similarly, the personality of a protected State which existed before the conclusion of the agreement establishing its dependent status is not nullified. Examples of this are the Nationality Decrees in Tunis and Morocco. Likewise, participation in a regional economic organization, such as the European Union (EU), does not negate the Statehood of the individual members. Existing States may refuse "Statehood" to an entity which has attained a characteristic of Statehood in violation of international law. An example of this would be the acquisition of territory by the use of force contrary to Article 2(4) of the United Nations Charter, or to the principle of non-intervention. Territory acquired by the legitimate use of force, for example in self-defense, and then annexed from the aggressor, may be considered an exception to the non-recognition of conquest rule.

Since the 1960s, political self-determination has been considered in issues of Statehood. This basically means that where the political future of a colony or any other similar non-dependent territory is determined by the wishes of its inhabitants towards their own political self-determination then this is a factor which will be taken into account as regards establishing or recognizing Statehood.

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Chapter Four
International Humanitarian Law

- TERMINOLOGY

The terms 'international humanitarian law', 'law of armed conflict' and 'law of war' may be regarded as all being similar to each other in meaning. However, the ICRC, international organizations, universities and States tend to prefer to use the one term, 'international humanitarian law' (or 'humanitarian law') which can apply to all the other terms which may be used.

- GENEVA AND THE HAGUE

IHL has two branches:

The 'law of Geneva', which is the body of rules that protects victims of armed conflict, such as military personnel who are hors de combat and civilians who are not or are no longer directly participating in hostilities.

The 'law of The Hague', which is the body of rules establishing the rights and obligations of belligerents in the conduct of hostilities, and which limits means and methods of warfare.
These two branches of IHL have derived their names from the cities where they were initially codified. With the adoption of the Protocols of 8 June 1977 additional to the Geneva Conventions, which combine both branches, this distinction has become a matter of historical and scholarly interest.

- Military necessity and humanity

IHL is a compromise between two underlying principles, of humanity and of military necessity. These two principles shape all its rules. The principle of military necessity permits only that degree and kind of force required to achieve the legitimate purpose of a conflict, i.e. the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources. It does not, however, permit the taking of measures that would otherwise be prohibited under IHL. The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict.
"War is in no way a relationship of man with man but a relationship between States, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers...
Since the object of war is to destroy the enemy State, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives." (Jean-Jacques Rousseau, 1762).

- Essential IHL Rules:

- The parties to a conflict must at all times distinguish between civilians and combatants in order to spare the civilian population and civilian property. The civilian population, as a whole and including individual civilians, may not be attacked. Attacks may be made only against military objectives. Parties to a conflict do not have an unrestricted right to choose methods or means of warfare. It is forbidden to use weapons or methods of warfare that are indiscriminate including weapons or methods of warfare that are likely to cause superfluous injury or unnecessary suffering.

- It is forbidden to wound or kill an enemy who is surrendering or who can no longer take part in the fighting. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must be protected and treated with humanity in all circumstances, without any unfavourable distinction whatsoever. The wounded and the sick must be searched for, collected and cared for as soon as circumstances permit. Medical personnel and medical facilities, transport and equipment must be spared. The Red Cross, Red Crescent or Red Crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.

- Any captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. Their basic judicial guarantees must be respected in any criminal proceedings against them.

- These rules are the essence of IHL. The ICRC formulated these rules with the aim of promoting IHL. This version does not have the authority of a legal instrument and does not in any way seek to replace the treaties in force.

WHAT ARE *JUS AD BELLUM* AND *JUS IN BELLO*?

Jus ad bellum refers to the conditions under which States may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it (self-defence and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients *of jus ad bellum*.
Jus in bello regulates the conduct of parties engaged in an armed conflict. The meaning of IHL is equivalent to that of *jus in bello* as it seeks to minimize suffering in armed conflicts, by protecting and assisting all victims of armed conflict. IHL applies to the belligerent parties regardless of the reasons for the conflict or the justness of the causes for which they are fighting. If it were otherwise, implementing the law would be impossible, since every party would claim to be a victim of

aggression. IHL is intended to protect victims of armed conflicts regardless of party affiliation. That is why *jus in bello* must remain independent of *jus ad bellum*.

3. WHAT ARE THE ORIGINS OF IHL?

Since ancient history, there have always been efforts to protect individuals from the worst consequences of conflict and war. However, it was only during the second half of the 19th century that international treaties regulating warfare, including rights and protection for victims of armed conflicts, emerged. Modern IHL was not established as a result of the founding of the Red Cross in 1863 nor as a result of the adoption of the original Geneva Convention in 1864.

There has never been a war in history that did not have its own rules governing the conduct of hostilities, from their outbreak to their cessation.

"Taken as a whole, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules determining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether." (Quincy Wright)

The first laws of war were proclaimed in ancient times and are not an invention of our modern era:

"I establish these laws to prevent the strong from oppressing the weak."(Hammurabi, King of Babylon)

Many ancient texts such as the Mahabharata, the Bible, and the Quran all contain rules advocating respect for the adversary. For example, the Viqayet, which was a text written during the period when the Arabs ruled Spain towards the end of the 13th century, contains a code for warfare. Similarly, in medieval Europe, knights were required to follow rules of chivalry, which was a code of honour that ensured respect for the weak and for those who could not defend themselves. All these examples can be considered as reflecting the universality of IHL.

- Who were the founders of contemporary IHL?

There were two men who played a vital role in the emergence of contemporary IHL. These were Henry Dunant, a Swiss businessman, and Guillaume-Henri Dufour, a Swiss army officer. In1859, while travelling in Italy, Dunant witnessed the grim aftermath of the battle of Solferino. After returning to Geneva he recounted his experiences in a book entitled "A Memory of Solferino" which was published in 1862. General Dufour, who also had experience of war, was keen to offer his active moral support for Dunant's ideas, notably by chairing the 1864 diplomatic conference at which the original Geneva Convention was adopted.

In 1863, together with Gustave Moynier, Louis Appia and Théodore Maunoir, Dunant and Dufour founded the 'Committee of Five'. This was an international committee for the relief of wounded military personnel. This committee later developed and became known as the International Committee of the Red Cross in 1876.

- How did contemporary IHL come into being?

In 1864, the Swiss government, at the prompting of the five founding members of the ICRC, organised a diplomatic conference. This conference was attended by 16 States, who adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This was the birth of modern IHL.

5. WHEN DOES IHL APPLY?

IHL applies only in situations of armed conflict. It offers two systems of protection: one for international armed conflict and another for non-international armed conflict. Therefore the rules which can be applied in a specific situation will depend on the classification of the armed conflict as to whether it is international armed conflict or non-international armed conflict.

A) International armed conflict (IAC)

IACs occur when one or more States resort to the use of armed force against another State. An armed conflict between a State and an international organization is also classified as an IAC. Wars of national liberation, in which the people of that nation are fighting against colonial domination; racist or/and dictatorial regimes and/or foreign occupation with the aims of exercising their right of self-determination, are classified as IACs under certain conditions.

B) Non-international armed conflict (NIAC)

Many current armed conflicts today are non-international in nature. An NIAC is an armed conflict in which hostilities are taking place between the armed forces of a State and organized non-State armed groups, or between such groups. For hostilities to be considered an NIAC they must reach a certain level of intensity and the groups involved must be sufficiently organised. IHL treaty law has

established a distinction between NIACs within the meaning of common Article 3 and NIACs falling within the definition provided in Article 1 of Additional Protocol II.

Common Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties." These include armed conflicts in which one or more organised non-State armed groups are involved. NIACs may occur between State armed forces and organised non-State armed groups or only between such groups.

Additional Protocol II applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." The definition of an NIAC in Additional Protocol II is narrower than the notion of NIAC under common Article 3.

6. WHAT ARE THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOL?

- The origins of the 1949 Geneva Conventions:

It was only in 1949, after the Second World War had ended, that States adopted the four Geneva Conventions, which remain the present cornerstone of IHL. While the first three Geneva Conventions of 1949 grew out of existing treaties on the same subjects, the fourth Geneva Convention was absolutely new, being the first IHL treaty to deal specifically with the protection of civilians during armed conflict. The death toll among civilians during the Second World War was one of the reasons for the development and adoption of such a treaty.

- The origins of the 1977 Additional Protocols:

The 1949 Geneva Conventions were a major advance in the development of IHL. After decolonization, however, there was a need for rules, which could be applied, to wars of national liberation as well as civil wars, as the occurrence of these increased significantly during the Cold War.

Treaty rules on the conduct of hostilities had not evolved since the Hague Regulations of 1907. Revising the Geneva Conventions might have jeopardized some of the advances made in 1949, so a decision was made to adopt new texts in the form of Protocols additional to the Geneva Conventions, which took place in June 1977. In 2005, a third Protocol additional to the Geneva Conventions was adopted. This instrument recognizes an additional emblem round – which has come to be known as the 'red crystal'.

- Content of the Geneva Conventions and the Additional Protocols

The Geneva Conventions protect every individual or category of individuals who are not or no longer actively involved in hostilities:

- First Geneva Convention: Wounded or sick soldiers on land and members of the armed forces'

-**Second Geneva Convention:** Wounded, sick or shipwrecked military personnel at sea, and members of the naval forces' medical servicesmedical services.

- Third Geneva Convention: Prisoners of war.

- Fourth Geneva Conventions:

Civilians, such as:

. foreign civilians on the territory of parties to the conflict, including refugees

. civilians in occupied territories

. civilian detainees and internees

. medical and religious personnel or civil defence units.

Common Article 3 provides minimum protection in non-international armed conflicts. It is regarded as a mini treaty because it represents a minimum standard from which belligerents should never depart. The rules contained in common Article 3 are considered to be customary law.

Additional Protocol I supplements the protection afforded by the four Geneva Conventions in international armed conflict. For example, it provides protection for wounded, sick and shipwrecked civilians and civilian medical personnel. It also contains rules on the obligation to search for missing persons and to provide humanitarian aid for the civilian population. Fundamental guarantees are provided for all persons, regardless of their status. In addition, Additional Protocol I codified several rules on protection for the civilian population against the effects of hostilities.

Additional Protocol II develops and supplements common Article 3 and applies in non-international armed conflicts between the armed forces of a State and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this

Protocol." Additional Protocol II strengthens protection beyond the minimum standards contained in common Article 3 by including prohibitions against direct attacks on civilians, collective punishment, acts of terrorism, rape, forced prostitution and indecent assault, slavery and pillage. It also provides rules on the treatment of persons who have been deprived of their liberty.

9. WHAT IS THE DIFFERENCE BETWEEN IHL AND HUMAN RIGHTS LAW?

Human rights law is a set of international rules which have been established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain rights that must be respected and protected by their States. The body of international human rights standards also contains numerous non-treaty-based principles and guidelines which are known by the term, 'soft law'. While IHL and human rights law have developed in their separate ways, some human rights treaties include provisions that come from IHL. Two examples of this is the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, and the Convention on Enforced Disappearance.

IHL and international human rights law are complementary bodies of international law that share some of the same aims. Both IHL and human rights law aim to protect the lives, the health and the dignity of individuals, although this may be achieved in different ways. So although both IHL and human rights law are different in their formulation, the actual essence of some of the rules of both is the same.

For example, both IHL and human rights law prohibit torture or cruel treatment; prescribe basic rights for persons subject to criminal processes; prohibit discrimination; contain provisions for the protection of women and children; and regulate aspects of the right to food and health. However, it is important to note that there are still important differences between IHL and human rights law. These differences include their origins, the scope of their application and the bodies that implement them.

- Origins

It has already been stated that the origins of IHL can be traced back to ancient times. However, current IHL was codified in the second half of the 19th century, under the influence of Henry Dunant who was the founding father of the International Committee of the Red Cross. Human rights law is a more recent body of law and it had its origins in certain national human rights declarations which were influenced by the ideas of the Enlightenment (such as the United States Declaration of Independence in 1776 and the French Declaration of the Rights of Man and of the Citizen in 1789).

It was only after the Second World War that human rights law emerged as a branch of international law, which was influenced by the United Nations. The Universal Declaration of Human Rights of 1948 first defined human rights law at the international level in a non-binding General Assembly resolution. It was only in 1966 that this Declaration was translated into universal human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966.

- Temporal scope of application

While IHL applies exclusively in armed conflict, human rights law applies, at least in principle, at all times both during times of peace and during armed conflict. However, unlike IHL, some human rights treaties permit governments to derogate from certain obligations during public emergencies that threaten the life of the nation. However, derogation must fulfil certain criteria: it must be necessary and proportional to the crisis, it must not be introduced on a discriminatory basis and must not obstruct or violate other rules of international law – including provisions of IHL. There are certain human rights which can never be derogated from. These human rights include the right to life, the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude and the prohibition against retroactive criminal laws.

- Geographical scope of application

Another major difference between IHL and human rights law is their extraterritorial reach. That IHL governing international armed conflicts applies extraterritorially is not a subject of controversy, given that its purpose is to regulate the conduct of one or more States involved in an armed conflict on the territory of another. The same reasoning applies in non-international armed conflicts with an extraterritorial element: the parties to such conflicts cannot be absolved of their IHL obligations when the conflict reaches beyond the territory of a single State.

Despite the views of a few important dissenters, it is widely accepted that human rights law applies extraterritorially based, inter alia, on decisions by regional and international courts. To date, there is no precise extent of such application which has been determined. Human rights bodies generally

admit the extraterritorial application of human rights law when a State exercises control over a territory (e.g. occupation) or a person (e.g. detention). Human rights case law is unsettled, however, on the extraterritorial application of human rights norms governing the use of force. Personal scope of application IHL aims to protect persons who are not or are no longer taking direct part in hostilities. It protects civilians and combatants hors de combat, such as the wounded, the sick and the shipwrecked or prisoners of war. Human rights law, which was developed primarily for peacetime, applies to all persons within the jurisdiction of a State. Unlike IHL, it does not distinguish between combatants and civilians or provide for categories of 'protected person'.

- Parties bound by IHL and human rights law

IHL binds all parties to an armed conflict and establishes an equality of rights and obligations between the State and the non-State side for the benefit of everyone who may be affected by their conduct. This is seen as a 'horizontal' relationship. Human rights law explicitly governs the relationship between a State and persons who are on its territory and/or subject to its jurisdiction. This is seen as a 'vertical' relationship. It extends the obligations of States vis à vis individuals across a wide spectrum of conduct. So, human rights law binds only States, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-State armed groups. The reason for this is that most groups of this kind are unable to comply with the full range of obligations under human rights law because, unlike governments, they cannot carry out the functions on which the implementation of human rights norms is premised.

There is a notable exception to this generalization about non-State armed groups: those cases in which a group, usually by virtue of stable control of territory, has the ability to act like a State authority and where its human rights responsibilities may therefore be recognized de facto.

- Substantive Scope of Application

IHL and human rights law both share common rules, (such as the prohibition of torture), but they also contain very different provisions. IHL deals with many issues that are beyond the purview of human rights law, such as the status of 'combatants' and 'prisoners of war', the protection of the red cross and red crescent emblems and the legality of specific kinds of weapon. Similarly, human rights law deals with aspects of life that are not regulated by IHL, such as the freedom of the press, the right to assembly, to vote, to strike, and other matters.

In addition, there are areas that are governed by both IHL and human rights law, but these can be in different, and even in contradictory ways. One specific example is the case for the use of force and detention.

- Regarding the Use of Force

The rules of IHL regarding the conduct of hostilities recognise that the use of lethal force is inherent to waging war. This is because the ultimate aim of military operations is to prevail over the enemy's armed forces. Parties to an armed conflict are thus permitted, or at least are not legally barred from, attacking each other's military objectives, including enemy personnel. Violence directed against those targets is not prohibited by IHL, regardless of whether it is inflicted by a State or a non-State party to an armed conflict. Acts of violence against civilians and civilian objects – as well as indiscriminate attacks – are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians and civilian objects the effects of hostilities; and, under IHL, precautions must be taken in order to minimize civilian losses. Human rights law was conceived to protect persons from abuse by the State. Human rights law does not regulate the conduct of hostilities between parties to a conflict, but it does regulate the manner in which force may be used in law enforcement.

Law enforcement asserts itself upon what is known as a 'capture-rather-than-kill' approach. This means that the use of force must be the last resort for protecting life, when other means are ineffective or without promise of achieving the intended result. It must also be strictly proportionate to the legitimate aim to be achieved (e.g. to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders, and to maintain public order and security).

- Concerning Detention

Both IHL and human rights law provide for rules on the humane treatment of detainees concerning conditions of detention and the right to a fair trial. However, there are differences when it comes to procedural safeguards in internment, i.e. the non-criminal detention of a person based on the seriousness of the threat that his or her activity poses to the security of the detaining authority.

Internment is not prohibited during armed conflict and, in general, a judicial review of the lawfulness of the detention is not required under IHL. Outside armed conflict, non-criminal (i.e. administrative

detention) is highly unusual. In the vast majority of cases, people are deprived of their liberty because they are suspected of having committed a criminal offence. The International Covenant on Civil and Political Rights guarantees the right to liberty of person and provides that every individual who has been detained, for whatever reason, has the right to judicial review of the lawfulness of his or her detention. This area of human rights law is based on the assumption that the courts are functioning, that the judicial system is capable of absorbing all persons arrested at any given time regardless of their numbers, that legal counsel is available, that law enforcement officials have the capacity to perform their tasks, etc.

Circumstances are very different during armed conflict, which is reflected in the provisions of IHL. The interplay of IHL and human rights rules governing the use of force and procedural safeguards for internment, at least in international armed conflicts, must be resolved by reference to the lex specialis, that is the provisions of IHL that were specifically designed to deal with those two areas.

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Chapter Five
International Human Rights Law (IHRL)

"All human rights are universal, indivisible and interdependent and interrelated."
P1, Para. 5, Vienna Declaration and Programme of Action, 1993.

- WHAT ARE HUMAN RIGHTS?

Human rights are those fundamental and non-transferrable rights which are the essential ingredients of life for a human being. However, there is no absolute agreement as to what these rights should be, which means that what human rights may be interpreted as being differs according to the particular economic, social and cultural society in which they are being defined.

However, under contemporary international law, human rights have been increasingly sub-divided into three classifications: "first, second, and third generation" rights. Civil and political rights constitute the "first generation" rights; economic, social and cultural rights, the "second generation"; whilst group rights are characterized as "third generation" rights. The distinguishing feature of the latter is that the focus is on collective human rights as opposed to individual human rights. The right to development and the right to self-determination are two of the principal examples of "third generation" rights. Many States regard human rights as an issue which falls only within the scope of domestic jurisdiction, and not an issue which should be addressed by international law. However, the international law position is that severe violations of human rights can no longer only be the exclusive jurisdiction of individual States. Human rights are a subject of contemporary international law and the efforts to regulate human rights at an international level only gained momentum after World WarII.

- Rights of the individual recognized by international law: Pre-1945

Minority groups, which comprise of those people of a different race, religion or language from the majority group within a state, are guaranteed certain rights, such as equality of treatment; freedom from slavery and these guaranteed certain rights have been recognized under customary international law since 1815 and was later reaffirmed in international conventions.

The trafficking of women and children was similarly prohibited by convention, but, with the exception of such isolated ad hoc intervention, there was no attempt to regulate human rights at an international level until after 1945. Prior to World War II, minority groups and foreign nationals were in a privileged position vis-à-vis majority groups and nationals of the host State. They were recognized as deserving at least a minimum standard of treatment.

- Rights of the individual recognized by international law: Post-1945

The signing of the United Nations Charter marked the formal realization that human rights are a matter for international concern.

One of the purposes for which the United Nations was founded was "to achieve international co-operation…. In promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." Article 55 and 56 charge the United Nations and Member States with achieving inter alia, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to a race, sex, language and religion," However, the language and text of the Charter is rather vague, and although Members have

pledged themselves to the realization of human rights they were not required to do so within a particular time period. The United Nations Charter while acknowledging certain benefits for which individuals should enjoy, it does not actually confer rights upon them.

- UNITED NATIONS:

The Universal Declaration of Human Rights was one of the first resolutions which were adopted by the United Nations General Assembly on December 10, 1948. This Declaration spells out a series of political, civil, economic, social and cultural rights. However, the resolution is not, legally binding.

The Declaration has been tacitly accepted by all Member States and has served as an outline for the constitutions of many newly independent States.

It has been a debatable issue that, if not all, the rights and freedoms which were proclaimed in the Charter have now become accepted as customary international law. The rights which are spelt out in the Universal Declaration are diverse and include, inter alia, the right to life, liberty, and security of the person, freedom from slavery or servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment; recognition as a person before the law; the right to nationality; the right to own property; freedom of thought, conscience and religion; the right to participate in government; the right to social security; the right to work and the right to education. The rights and freedoms are to be enjoyed without "distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

In June 1993, a conference was organized in Vienna with the aim of expanding the protection and promotion of human rights within the international community. This conference provided an opportunity for an extensive analysis of the international human rights system and the mechanisms used to provide such protections.

The Vienna Conference considered "human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities" and in December 1994 the General Assembly pronounced 1994-2004 as the United Nations Decade for Human Rights Education.

The rights and freedoms set out in the Universal Declaration of Human Rights have been articulated more precisely in two separate international Covenants. These are the Covenant on Civil and Political Rights 1966, which entered into force in March 1976; and the Covenant on Economic, Social and Cultural Rights 1966, which entered into force in January 1976. A General Assembly Resolution was adopted in 1985 regarding the human rights of individuals who are not nationals of the country in which they reside.

An initial difference between the two Covenants is that the obligations assumed by a State under the Covenant on Civil and political Rights are required to be implemented immediately upon ratification of the Covenant by a State, while the Covenant on Economic, Social and Cultural rights provides that the realization of the rights it recognizes may be achieved progressively over a longer term. The fulfillment of economic, social and cultural rights depends upon a State's economic development, whereas the right to recognition as a person before the law can be put into effect upon implementation of the appropriate legal measures.

- OTHER UNITED NATIONS CONVENTIONS GUARANTEEING PARTICULAR HUMAN RIGHTS

A number of international Conventions which have guaranteed specific human rights have been concluded under the influence of the United Nations. Such conventions include the 1948 Genocide Convention; the 1966 Convention on the Elimination of All Forms of Racial Discrimination; the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1989 Convention on the Rights of Child, and the 1990 Convention on Migrants Workers. All these Conventions are now in force.

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Chapter Six
International Environmental Law

- What Is Environmental Law?

Environmental law is an organised system that utilises all the laws in the legal system to minimise, prevent, punish, or remedy the consequences of any actions that damage or threaten the

environment as well as public health and safety. In essence, environmental law is a system that can invoke any legislative processes that govern environmental, public health, and safety purposes.

A. THE BIRTH OF THE STOCKHOLM CONFERENCE

Prior to the 19th Century, some efforts had been made to address pollution on a local level, (i.e. smoke, noise, and water pollution), but it was only in the 19th Century that the first international agreements concerning shared resources were established which resulted with international fishing treaties and agreements to protect various plant species.

The first global convention to enter into force for the protection of designated wildlife species was the 1902 Convention for the Protection of Birds Useful to Agriculture. Early treaties, (the bilateral United States-Great Britain Treaty Relating to the Preservation and Protection of Fur Seals 1911 and the Interim Convention on Conservation of North Pacific Fur Seals 1957), despite being narrowly focused, were responsible for establishing legal precedents which were widely followed in later MEAs. These treaties called for strict enforcement measures, national quotas and the regulation of international trade in objects which have been sourced from seal hunting.

As a State could not protect water quality without the co-operation from another State, a number of early boundary treaties concerning water pollution contained measures aimed to reduce and prevent water pollution. The agreement for respecting boundary waters which was made between the United States and Canada in 1909 is still considered the model agreement.

Following World War I, other riparian States entered into boundary water agreements that included provisions to deal with water pollution and as such international commissions were then established.

The Convention Relative to the Preservation of Fauna and Flora in their Natural State 1933 was applied to colonial Africa. The London Convention and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere 1940, envisaged the establishment of reserves and the protection of wild animals and plants, especially migratory birds.

After World War II, the international community responded to specific environmental threats which were being caused by technology and economic expansion. The growing use of super tankers to transport oil by sea led to the first efforts to combat marine pollution during the 1950s.

Furthermore, the utilization of nuclear energy led to other international regulation.

The current ecological era was borne after the 1960s as people become more aware of the increasing damage being done not just to the environment but also to human health. As a result, a more informed public opinion demanded protective measures to be implemented to safeguard nature and people. In 1963, a treaty was established to restrict military uses of radioactive materials. (See the Treaty Banning Nuclear Weapons in the Atmosphere, Outer Space and Under Water).

It was only a matter of time before international organisations realised the urgency concerning these new environmental concerns. The catalyst for this was undoubtedly media coverage which often highlighted such concerns. One such concern which the media was keen to cover was the first oil tank disaster in 1967. The oil tanker, 'Torrey Canyon' came to ground and caused huge oil spillage off the coasts of France, Belgium and England. sharply emphasized the growing threats to the environment. It was this incident which prompted the United Nations to take action in 1968 in an attempt to address such threats.

It was not until 1972 that the United Nations General Assembly convened the World Conference on the Human Environment, which was held in Stockholm. The Conference was extremely well attended indicating the serious environmental concerns at that time. An "Action Plan" containing 109 recommendations and a resolution proposing institutional and financial commitments by the United Nations were endorsed making them the first comprehensive statements of international concern for environmental protection.

The Stockholm Meeting was held in June 5–16 and included 6,000 delegates from 113 States, including representatives of every major inter-governmental organization, 700 observers from 400 non-governmental organizations, invited individuals, and approximately 1,500 journalists.

Principle 1 is was the first statement of a link between environmental protection and human rights and as such resulted in considerable jurisprudence.

Principles 2 to 7 proclaims that the natural resources of the world include oil, minerals, air, water, earth, plants and animals as well as natural eco-systems and that it is essential that renewable resources are able to replenish while non-renewable resources should not be wasted. These are issues which do not just affect present populations but also will affect future populations. There is

also a call to stop production of toxic wastes or other matter that cannot be absorbed by the environment and for the prevention of marine pollution.
Principles 13 to 15 underline the necessity of integrated, co-ordinated, and rational development planning. The last group of principles, 21 to 26, is of particular interest in the development of international environmental law. Principle 21 is generally recognised as expressing a basic norm of customary international environmental law. Principle 22 follows this by calling on States to co-operate in developing international law regarding liability and compensation for victims of pollution and other extra-territorial environmental damage. Principle 23 recommends that States further develop international environmental law, taking into consideration the system of values prevailing in each country, and in particular in developing countries.

B. FROM STOCKHOLM TO RIO

After the Stockholm Conference, there was an expansion of international environmental law. In the 1980s, issues such as long-range air pollution and depletion of the ozone layer became a matter of concern. This led to the United Nations General Assembly voting to create the World Commission on Environment and Development in 1983, known as the Brundtland Commission. This Report led the UN to convene a second global conference on the environment in 1992 in Rio de Janeiro, Brazil. This was the UN Conference on Environment and Development (UNCED).
The Brundtland Report was an independent external body, though it was linked to the United Nations. UNCED met in Rio de Janeiro from June 3–14, 1992. One hundred and seventy-two States (all but six members of the UN) were represented by almost 10,000 delegates, including 116 heads of State and Government with Japan sending 300 delegates. One thousand four hundred non-governmental organizations were accredited as well as almost 9,000 journalists.
Five texts were generated from this meeting. Two important conventions were drafted and adopted before the Conference and were opened for signature at Rio. These were the UN Framework Convention on Climate Change and the Convention on Biological Diversity. Two texts adopted at UNCED have a general scope: the Declaration on Environment and Development and an Action Programme called Agenda 21. The Declaration is a short statement of 27 principles. The central concept is sustainable development, as defined by the Brundtland Report, which integrates both development and environmental protection. Principle 4 is important in this regard as it affirms that to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.
The Rio Declaration contains several principles of general, legal character by reinforcing some of the existing principles while proclaiming new ones. Principle 2, which concerns the transboundary effects of activities, reaffirms Principle 21 of the Stockholm Declaration but adds the word “developmental.” Other pre-existing legal norms are reaffirmed in the following principles.
Principle 10, affirms the rights to public information, participation, and remedies; Principle 13, calls for the development of liability rules; and Principles 18 and 19, require informing other States about emergencies and projects that may affect their environment. New international principles include the precautionary principle (Principle 15), the “polluter pays” principle that requires internalisation of environmental costs (Principle 16), the general requirement of environmental impact assessment for proposed activities (Principle 17). Principle 11 stresses the importance of enacting effective environmental legislation. It does however note that the standards applied by some countries may not be appropriate to others due to the economic and social costs.
Other principles are likened to policy guidelines, although the boundary between law and policy can be vague. A distinction can be made between three groups of policy provisions. The first group expresses concern for development and poverty alleviation within States. The second group of principles addresses the world economic order and trade relations. The third group of principles concerns public participation. Principle 10 recognises for individuals the rights to information, to participation, and to remedies in environmental matters. Principles 20 to 22 stress the importance of the participation of women, youth, and indigenous peoples.
However, the terms that are used show that these provisions should be regarded as guidelines rather than actual legal norms. The second general document adopted by the Rio Conference is Agenda 21.
There are four main parts contained within Agenda 21:
- Socio-economic dimensions (e.g., habitats, health, demography, consumption, and production patterns);

- Conservation and resource management (e.g., atmosphere, forest, water, waste, chemical products);
- Strengthening the role of non-governmental organizations and other social groups, such as trade unions, women, and youth;
- Measures of implementation (e.g., financing, institutions).

Agenda 21 is a programme of action consisting of 40 chapters with 115 specific topics contained in 800 pages. The chapters concerning the atmosphere (Chapter 9); biological diversity (Chapter 15); the oceans (Chapter 17); and freshwater resources (Chapter 18); specific issues relating to biotechnology (Chapter 15); toxic chemicals (Chapter 19) and waste (Chapters 20–22) are essential issues which have been identified as environmental law develops. Additionally, two chapters are dedicated to international institutional arrangements (Chapter 38) and international legal instruments and mechanisms (Chapter 39). Agenda 21 pays particular attention to national legislation and refers regularly to national laws, measures, plans, programmes, and standards.

To summarise, the Rio documents unite environmental protection and economic development within the concept of sustainable development. This emphasis is understandable, because the current economic system presents numerous challenges to environmental protection.

A. SUBSTANTIVE PRINCIPLES

The international community has recognised that environmental problems are not exhaustive. To try to deal with environmental protection via legislation designed to resolve bilateral problems would provide only limited solutions. In fact, such actions may only risk transferring environmental harms elsewhere. As a result, various substantive principles emerged that apply to State conduct generally.

1. Prevention of Harm

Both case law precedents and the adaptation of general rules of international law have produced the foundational norm of international environmental law that prohibits trans frontier pollution. It was in the OECD Council Recommendation C (74) 219, 1974 that States defined the various types of pollution. The International Court of Justice has called the duty to prevent extra-territorial environmental harm a part of customary international law.

The duty to avoid trans-frontier pollution requires each State to exercise “due diligence” in addressing and/or preventing any negative environmental impact. This includes acting reasonably and in good faith, and to regulate any public and private activities under State jurisdiction that are deemed a potential risk to the environment.

2. Precaution principle

It is the precautionary principle, which is the most developed form of prevention that remains the general basis for current environmental law. This means identifying and preparing for any potential, uncertain, or even hypothetical threats even in the absence of any evidence that harm will result. This type of prevention is based on probabilities or contingencies. and considers that precaution should apply when the consequences of non-action could be serious or irreversible. As such, policy makers must consider the circumstances of any given situation and decide whether scientific opinion is based upon credible evidence and reliable scientific methodology.

3. The “Polluter Pays” Principle

The polluter pays principle seeks to impose the costs of environmental harm on the party responsible for the pollution. This principle was established by the OECD as an economic principle and as the most efficient way of allocating costs of pollution prevention and control measures introduced by the public authorities in member countries. The intention of the polluter pays principle is to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment. The polluter pays principle is more easily applied in a geographic region subject to uniform environmental law, such as within a State or within the European Union. The polluter pays principle has been well defined within EU law. The onus is on the polluters to pay any cost of pollution control measures. These would involve measures such as the construction and operation of anti-pollution installations, investment in, and implementation of, anti-pollution equipment and new processes to ensure that the necessary environmental quality objective can be achieved. One illustration of an application of this principle lies in the EC Directive 84/631 (1984) on the control within the European Community of the trans frontier shipment of hazardous waste. It instructs the Member States to impose the costs of waste control on the holder of the waste and/or on prior holders or the waste generator.

4. Sustainable Development Principle

The Sustainable Development Principle was defined in the 1987 Report of the World Commission on Environment and Development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”
The Report identified the critical objectives of sustainable development:
. Reviving growth but changing its quality;
. Meeting essential needs for jobs, food, energy, water, and sanitation;
. Ensuring a sustainable level of population;
. Conserving and enhancing the resource base;
. Reorienting technology and managing risk; and
. Merging environment and economics in decision-making.
The Johannesburg World Summit on Sustainable Development focused on this concept with particular emphasis on eradicating poverty. The concept of maintaining “environmental services” is accepted as essential to sustainable development. Environmental services are those that are provided by the functions of nature itself. These include the protection of soil by trees, the natural filtration and purification of water, and the protection of habitat for biodiversity.

B. PRINCIPLES OF PROCESS

Access to environmental information can assist enterprises in planning for and utilizing the best available techniques and technology. Access to early and complete data assists decision makers to make informed choices. In addition, the process by which rules emerge, how proposed rules become norms and norms become law, is highly important to the legitimacy of the law, and legitimacy in turn affects compliance.
When people perceive that they have a voice in governance, they may see the decisions taken as ones in which they can be active stakeholders and which they will uphold.

1. Duty to Know

Both the implementation and formulation of environmental laws and policies requires the collection of reliable information and the continuous assessment of the environmental milieu. Both international and national environmental laws use surveillance, monitoring and reporting technology to ensure the compilation of reliable information. These practices are essential for the implementation and formulation of environmental laws and policies. Once the information is obtained, it must be assembled, organised, and analysed by an appropriate agency or institution to which the information is relayed. It is common to find that environmental laws require reporting by enterprises or State institutions.

2. Duty to Inform and Consult

Any State that plans to undertake or authorize activities capable of having significant impact on the environment of another State must inform the latter and should transmit to it the pertinent details of the project, provided no national legislation or applicable international treaty prohibits such transmission.
Treaties and State practice indicate that States should immediately inform other States that could be affected by any sudden situation or event that could cause harm to their environment and thus provide those same States with all pertinent information. This duty is borne out in several international treaties.

3. Public Participation

Access to information, public participation, and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed. This is because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”
Participation may take place through elections, grass roots action, lobbying, public speaking, hearings, and other forms of governance, whereby various interests and communities participate in shaping the laws and decisions that affect them. The major role played by the public in environmental protection is usually through participation in environmental impact or other permitting procedures. Citizens should have access to information, be entitled to participate in decision-making, and have access to judicial remedy in environmental matters. In particular, States must promote access to computer telecommunication and other electronic technology. Public authorities are required to make available environmental information to an applicant on his or her request and to ensure individuals have access to procedures in which State acts or omissions can be reconsidered or reviewed administratively by an independent and impartial body established by law.