INTERNATIONAL ENVIRONMENTAL LAW

This is a system of principles or rules that govern the relationships between states and other internationally recognised persons/organisations e.g. UN, AU, WHO, FAO etc. These are laws which though are neither created nor enforced like domestic laws are nevertheless laws that govern state behaviour e.g. if there is a conflict between Uganda and Tanzania.

In June 1992, over 100 government leaders, representatives from 170 countries, and some 30,000 participants met in Rio de Janeiro at the U.N. Conference on Environment and Development (UNCED or the "Earth Summit"). There they formally recognised the need to integrate economic development and environmental protection into the goal of sustainable development. UNCED also affirmed the growing importance of international environmental law as a mechanism to help codify and promote sustainable development.

Even though there is no effective central authority, breach of international environmental law may result in a variety of sanctions, including corrective sanctions under the UN or state sanctions. Effectiveness of international environmental law can also be done under the International Court of Justice, arbitration, economic sanctions and economic protests.

Sources of International Environmental Law:

There is no legislation as to how one would know what applicable rules are to guide international or state behaviour. i.e. there is no international parliament.

Article 38 of the statute of the International Court of Justice defines sources of international laws as follows:

i. International conventions whether general or particular
ii. International customs as evident of general practice accepted as law
iii. The general principles of law recognised by civilised nations
iv. Judicial decisions and teachings of the most high courts, publicists and jurists.

General sources of International Environmental Law:

1. Conventional norms: These sources can be called treaties, convention, protocol, pact etc. Examples include:
   a) 1979 Geneva convention on long-range trans boundary pollution
   b) 1946 international convention for regulation of whaling
   c) 1973 convention in Endangered Species

2. Customary law: This is law that has been established over time. It is established by a consistent compliancy by state (state practice) and the acceptance of states that are

practicing these rules are bound by them (opinojuris). These may easily acquire universal application for e.g. common concern, sustainable development, common heritage etc.

3. UN general assembly resolutions and declarations: UN resolutions may be said to be generally representative of world opinions. Article 10 of the UN Charter gives the assembly power only to make recommendations.

4. General Principles of International Law: Article 38 I of the ICJ statute recognises general principles as sources of law. General principles refer to common world major legal systems. These are norms available and acceptable to states to regulate their international relations. They are declaration of principles through documents such as the World Charter or UNEP and various sets of principles.

5. Judicial Decisions: Are decisions made by International tribunals and are sources of int. law e.g. the Trail-Smelter case between USA and Canada which laid a principle of no injury of one state to another.

6. The writings of Jurists. These include scholarly writings by jurists e.g. those developed by the Institute of International Law or the International Law Commission on utilisation and exploitation of international rivers.

Relevance and functions of International Environmental Law:

States rely on International law in their diplomatic relations, in their negotiations and in their policy making. States defend their actions and policies by reference to the international law, and challenge the conduct of other states on reliance on it.

Enforcement:

Article 33 I of the UN Charter provides that the parties to any dispute, the continuance of which is likely to endanger the continuance of international peace and security shall first of all seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means of their own choice or International Court of Justice.

Defining important Concepts:

1. **Permanence of sovereignty over natural resources:** This is a principle of international law which states that every state has a sovereign right to dispose of its resources and wealth

in accordance with their national interests. It states that every state has and shall freely exercise free power of sovereignty including use and disposal of its natural resources.

2. **Shared resources:** These do not fall wholly within the exclusive control of one state. They can be property of two or more states e.g. who owns R. Nile or L. Victoria? One can't claim exclusive ownership or control of such a property.
3. **Common Property:** There are areas beyond natural jurisdiction such as the high seas and outer space, fish and mammals in the high seas, air for breathing etc.

4. **Common heritage:** Loosely defined to refer to all living and non-living resources of nature and global environment. These must be conserved and exploited for the benefit of all without discrimination e.g. the moon, sun, sea bed, birds in the air, mosquitoes and rain.

THE STOCKHOLM DECLARATION, 1992

This human environment conference represented the first international forum to consider the protection of the environment on a comprehensive basis. This conference on making its declaration on human environment legitimised environmental policy as a universal policy. In doing so it created a place for environmental issues on many national agendas where it had previously been unrecognised. It provides several principles relating to environmental management. In the preamble, it recognises the need for sustainable development. It stipulates that to defend and improve the human environment for present and future generations has become an imperative goal for mankind.

Key Principles:

1. Requires man to have sole responsibility to protect and improve the environment for future generations
2. Principles 2 to 5 recognises the need for preservation of natural resources
3. Principle 3 states that capacity for the earth to produce vital renewable resources must be maintained practicable, stored or improved
4. Principle 4 states that it is human responsibility to safeguard and wisely manage the heritage, wildlife and its habitats, and it requires that nature conservation be stressed in economic development planning. Thus accepting the right of continued exploitation of natural resources.

A key provision in the 1972 declaration is principle 21 which states that in accordance with the Charter of the UN and principles of international law, states have a sovereign right to exploit their own resources pursuant to their own environmental policies and responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the development of other states or areas beyond the limits of natural jurisdiction. This principle states the principle of international

law i.e. “sicuteretuoutalumun non leads” which is a principle of good neighbourliness. It lays down that states on the one hand have the sovereign right to exploit their own resources pursuant to their own environmental policies but on the other hand have the responsibility that activities within their jurisdiction or control do not cause significant damage to the environments of other states or areas beyond the limits of national jurisdiction. This principle creates an international liability for environmental harm (i.e. having committed environmental harm you are liable).

Principle 22 creates the duty of states to co-operate for the purpose of further development of international law.

THE WORLD CONSERVATION STRATEGY (WCS)

This was launched in 1980 by the efforts of the International Union for Conservation of Nature (IUCN) with the sponsorship of the United Nations Environment Programme (UNEP) and with financial assistance of the World Wildlife Fund (WWF). The purpose of this strategy was to bring a sharper focus to the task of national and international environment protection and provide policy guidelines on how the objectives of sustainable development may be realised. The WCS provides several principles relevant to environmental management. It defines conservation in general as a management of the human use of the biosphere so that it may yield the greatest sustainable benefits to the present generations while maintaining its potentials to meet the needs and aspirations of the future.

The strategy suggests that conservation improves the prospects of sustainable development by integrating conservation into the development process. The strategy emphasises that conservation and development should be combined.

The strategy also stresses the need for development of international conservation lawsand the means of implementing them. It states that strong international conventions or agreements provide a legally binding means of ensuring the conservation of those living resources that cannot be conserved by national legislation alone.

THE RIO DECLARATION

The Rio declaration recognised that development should go hand in hand with conservation. Principle 2 states that states have in accordance with the Charter of the UN and principles of international law the sovereign right to exploit their own resources pursuant to their own environment and development policies and responsibly ensure that activities within their jurisdiction and control do not cause damage to the environment of other states and areas beyond limits of national jurisdiction.

The key document from the Rio Conference, agenda 21, interalia emphasised conservation and management of resources for development based on basic principles.

BASIC PRINCIPLES:

There are a number of principles and concepts which are important for achieving sustainable development. Some of these principles are independently emerging as customary law, while others are best thought of as guiding principles. They may be organised under three broad categories:

a. Principles relating to the duty to cooperate
b. Principles relating to the duty to avoid environmental harm
c. Principles relating to the duty to compensate for environmental injury.

These are principles that have been widely accepted to solve environmental problems internationally e.g.

1. THE **DUTY TO CO-OPERATE**:
   Much of international environmental treaty has general provisions requiring cooperation in generating and exchanging of relevant information. Within the obligation to cooperate are more specific duties relating, for example to the exchange of information, need to notify and consult with potentially affected states, and the requirement to coordinate international scientific research.

   i. Exchange of information:

   These are more specific duties related to exchange of information. Virtually all international environmental laws have general provisions requiring cooperation in generating and exchanging information e.g. the Vienna Convention for protection of ozone layer requires exchange of scientific, technological, socio-economic and commercial data as well as legal information. The UN Convention on the law of the sea requires exchange of data related to the pollution of marine environment. The biodiversity convention requires exchange of information for the conservation and sustainable use of biological diversity.

   Besides increasing our understanding of the environmental issues, the exchange of information through specific, periodic reporting requirements is also one of the most important tools for monitoring the domestic implementation of international environmental obligations. Thus e.g. countries are obliged to report on a broad range of activities, including efforts to curb wildlife trade, reduce greenhouse gas emissions, reduce levels of ozone destroying substances and conserve biological diversity.

   ii. Cooperation in Scientific Research and systematic observations:

Many environmental treaties include special provisions for guiding and facilitating the research, analysis and dissemination of scientific research. Although many provisions on scientific research are general, some provide specific and detailed direction on research necessary to identify and clarify the nature and extent of environmental problems. Efforts to promote cooperation in scientific research and systematic monitoring also promote transfer of technical and financial assistance from developed to developing countries e.g. The Vienna Convention called for international research on a set of complex issues critical to understanding, and forming policy responses to ozone depletion. The Vienna Convention's ability to coordinate scientific research was a major reason for the ultimate success of the parties in phasing out ozone destroying/depleting chemicals in the Montreal Protocol and subsequent revisions.

iii. **Prior notification**: This principle of prior notification obliges states planning an activity to transmit to potentially affected states all necessary information sufficiently in advance so that the latter can prevent damage to its territory and if necessary enter into consultation with the acting state. Principle 19 of the Rio Declaration confirms this principle and states that states shall provide prior or timely notification and relevant information to potentially affected states on activities that may have significant transboundary pollution.

The importance of prior notification and timely notification is reflected as well in its close relationship to the obligation to conduct environmental impact assessments in the transboundary context as well as to inform prior informed consent.

iv. **Consultation:** The principle of consultation requires states to allow potentially affected parties an opportunity to review and discuss a planned activity that may have potentially damaging effects. The acting state is not necessarily obliged to conform to the interests of affected states, but should take them into account. The obligation to consult is often closely connected to the requirement of prior notification. The principle has been reiterated in various declarations and conventions, frequently including a requirement that the consultation "*be in good faith and over a reasonable period of time"*. Principle 6 of UNEP Rules on Shared Natural Resources states that it is necessary for every state sharing a natural resource with another or more other states to do the following;

a) Notify other state(s) of pertinent details or plans to initiate or make a change in the conservation or utilisation of resources which can reasonably be expected to affect significantly the environment in the territory of other state(s).

b) Upon request of other state(s) to enter into consultation concerning the above mentioned plans.

v. **Prior Informed Consent:** When one state wants to act in the territory of another state, simple notification and consultation has not been deemed sufficient. Most treaties require the acting state to obtain the "*other state's prior informed consent"* e.g. a party to the Basel Convention which seeks to export wastes must inform the importing state(s) of the nature of the wastes and receive a written consent of the importing state(s). Other activities requiring prior informed consent include: transporting hazardous wastes through a state, lending emergency assistance after a nuclear accident, exporting domestically banned chemical substances, prospecting for genetic resources.

vi. **Notification in case of emergency:** One of the most important aspects of international co-operation in environmental management is the obligation to notify an affected party in case of an emergency that has transboundary effects (e.g. nuclear disaster, oil spillage in seas, industrial accidents like gas escape etc.). Principle 18 of Rio declaration provides that *"states shall immediately notify other states of any natural disaster (e.g. hurricanes, fires, earthquakes, landslides etc.) or other emergencies that are likely to produce sudden harmful effects on the environment of those states"*. Emergency notification provisions are critical components of international responses to oil spills, industrial accidents and nuclear accidents.

vii. **Principle of emergency assistance:** Emergency assistance implies operations on the territory of affected states as well as financial transactions and management of kind assistance e.g. the 1986 convention on assistance in case of a nuclear accident or radiological emergency is to harmonise international response by requesting assistance and calling on the international community for prompt and effective action. Consequently some agreements relating to specific emergencies include specific operational parameters. E.g. The 1986 Convention on Assistance in the case of a Nuclear Accident, Radiological Emergency is designed to minimise international response time by opening direct channels for requesting assistance and readying the international community for prompt and effective action.

2. THE DUTY TO AVOID ENVIRONMENTAL HARM

i. **The General Duty to Prevent Environmental Harm:** It is a widely accepted principle of environmental law that states are required to ensure that activities within their jurisdiction or control do not damage the environments of other states or the commons.

Principle 21 of the Stockholm declaration states clearly the duty to avoid environmental harm and Principle 2 of the Rio declaration also states the same. It states that "*States have, in accordance with the charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".*

The principle was applied in the case of the Trail-Smelter arbitration between Canada and the US. In this case fumes from a Canadian smelter were damaging US citizens and property. The tribunal that handled the case decided that under principles of international law, "*no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another"*. Canada was then asked to stop the harm it was causing and damages awarded.

The duty to prevent harm is often written in a way that suggests states must take all measures necessary to avoid harm, but in practice it requires states to use due diligence in taking all practical steps. For example, Article 194 of the U.N. Convention on the Law of the Sea requires that: *"States shall take, individually or jointly as appropriate, all measures consistent with this convention that are necessary to prevent, reduce or control pollution of the marine environment from any source, using for this purpose the best practical means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection."*

The Basel Convention e.g. requires the *"environmentally sound management of hazardous wastes and other wastes"* defined as *"taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes"*

ii. **Principle of non-discrimination between states:** One variation of the general obligation to prevent environmental harm is the obligation not to take action to shift pollution from one states territory to that of another state. This principle of non-discrimination ensures that "*polluters causing trans frontier pollution should be subjected to legal and statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country*".

This means that domestic environmental regulations and rules for example, those setting acceptable pollution levels, providing for environmental liability, access to courts, or similar substantive and procedural rules- should apply equally regardless of whether the pollution affects domestic resources or resources in another state.

iii. **Pollution Prevention and waste minimisation:** The pollution prevention principle is perhaps the most specific articulation of the duty to avoid environmental damage. The current focus on pollution prevention, both by industry and policy makers reflects a growing knowledge that avoiding or reducing pollution is almost always less expensive than attempting to restore a contaminated area.

Pollution prevention has been adopted by many conventions or resolutions restricting the introduction of pollutants into the environment. Principle 6 of the Stockholm Declaration set out the principle in general terms: *"The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems."*

In some contexts, pollution prevention refers exclusively to minimising waste through design changes, input substitutions and other "Clean Production Methods". Industry now recognises that designing a product or process to minimise waste production is often more cost effective than relying on "end-of pipe" technologies or disposal options. E.g German automobile manufacturers are designing their automobiles to reduce the amount of waste when the car is scrapped. Each component of the automobile is being designed to separate easily from the whole, and the components are being individually coded to facilitate recycling and re-use.

iv. **The precautionary principle:** This is one of the most important general environmental principles for avoiding environmental damage and achieving sustainable development. The Rio declaration sets out the precautionary principle. It states that "*where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".

The principle applies in a number of contexts from protecting endangered species to preventing pollution. The Precautionary Principle evolved from the growing recognition that scientific certainty often comes too late to design effective policy responses. It thus requires action in responding to potential environmental threats by switching the burden of proof necessary for triggering policy responses.

This principle can have far reaching implications. For example implementing the Precautionary Principle in the context of pollution prevention led the UNEP Governing Council to urge countries to adopt "*alternative Clean Production methods- including raw material selection, product substitution, and clean production processes- as a*

means of implementing a precautionary principle in order to promote production systems which minimise or eliminate the generation of hazardous wastes."

Similar principles may in international treaties as well are in the Bamako Convention on hazardous wastes, Articles 3, 4 of UNEP governing Council of August 1990, requires that "*each party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or to the environment without waiting for scientific proof regarding such harm. The parties shall cooperate with each other in taking the appropriate measure to implement the precautionary principle*".

v. **The principle of Environmental Impact Assessment (EIA):** EIA is a process for examining, analysing and assessing proposed activities in order to maximise the potentials for environmentally sound and sustainable development. The EIA should ensure that:

i. appropriate government authorities are fully identified (e.g. NEMA and the other agencies) and consider the environmental effects of proposed activities as well as alternatives that avoid or mitigate the environmental effects.

ii. affected citizens have an opportunity to understand the proposed project or policy and express their views to decision makers in advance.

EIAs have become increasingly important in transboundary context e.g. the UNEP Governing Council recommends on principles of shared natural resources. Principle 4 of the recommendations provide that all states undertake "*environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another state or states sharing that resource*". (The rationale here is good neighbourliness).

Also the Biodiversity Convention states that the signatories shall: *"introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimising such effects and, where appropriate, allow for public participation in such procedures*"

3. **THE DUTY TO COMPENSATE FOR HARM:**

i. **State Responsibility:** The basic rule of state responsibility in the context of environmental protection can be summarised in the following way: *"States are*

responsible for injuries caused to environments of other states and global commons resulting from violation of the generally accepted international rules or standards." State responsibility is confirmed in Principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration: *"States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"*

ii. **State and Civil liability:** This refers to imposing liability of acts not caused by a state irrespective of fault or lawfulness of the liability. The emphasis here is the harm rather than the conduct of the state. It is important to note that it is not yet clear under international law regarding the details of how and when compensation must be paid. A number of international conventions have also been adopted to assist private injured parties' to use the civil liability system for gaining compensation e.g. the 1989 Convention of Civil Liability for damage caused during carriage of dangerous goods by road rail and inland navigation vessels and ships.

iii. **Polluter-Pays Principle:** This principle implies that the polluter should bear the expenses of carrying out pollution prevention measures or paying damage caused by pollution. Instituting the polluter pays principle ensures that the prices of producing goods reflects the cost of producing that good; including costs associated with pollution, resource degradation and environmental harm.

Environmental costs are reflected (or internalised) in the prise of every good. The result is that goods that pollute less will cost less, and polluters will switch to less polluting substitutes. This will result in a more efficient use of resources and less pollution.

Several bilateral and multilateral resolutions and declarations recognise this principle e.g. principle 16 of the Rio declaration provides that *"national authorities should endeavour to promote internalisation of environmental costs, and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the cost of pollution with due regard to public interest and without distorting international trade and investment"*.

iv. **Equal access to administrative and judicial proceedings:** Under this principle, *the affected parties in one state must be provided the same access to remedy and redress as would be provided to affected parties in the state where polluting activities are located*. The principle extends to both planning processes such as EIA provisions and to issues of liability and compensation.