Environmental law

CHAPTER 1
INTRODUCTION TO ENVIRONMENTAL LAW

What is "Environment" Of course, defining an Environment is not an easy task. The term environment have no exhaustive definition. But there are common grounds to define what environment is all about.

as Caldwell remarks '**it is a term that everyone understands and no one is able to define**'.

1. According to blacks law dictionary environment is'' is the totality of physical, economic, cultural aesthetic and social circumstance which affect quality of life''

- This definition is broad in the sense that it encompasses all physical, economical & cultural circumstances **having direct or repercussion/consequence effect on human being.**

- ✓ **2. Definition by Merriam Webster** : It is the surrounding or condition in which a person, animal and plant lives or operates
- It is a natural world as a whole or every thing which is around us it can be biotic/ living or a biotic/non living, includes physical, chemical and other natural force and in particular geographical area which as affected by human activity.

Some treaties and instruments does not define the environment directly but in different ways considering the subject matter they want to address.

- **The 1992 Rio Declaration on Environment and Development , The world commission on environment and development (WCED) , the Declaration of the 1972 Stockholm Conference on the Human Environment (UNCHE)**

- ✓ **3. The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment** defines the environment as including;

*''**Natural resources both abiotic and biotic, such as air, water, soil, fauna and flora** and the interaction between the same factors; **property which forms part of the cultural heritage**; **and the characteristic aspects of the landscape**''*

- ✓ **4.** When we come back to our legal system, **the Environmental Protection Organs Establishment Proclamation No. 295/2002**, art 2(3) defines the environment broadly.

*'**The totality of all materials whether in their natural state or modified or changed by human**, their external spaces and interactions which affected their quality or quantity and the welfare of human or other living beings, including but not restricted to, land, atmosphere, weather and climate, water, living things, sound, odor, taste, **social factors, and aesthetics**.''*

- Things made or modified by man.eg hydroelectric dam, road.
- Social factor= culture of man.
- Aesthetic = beauty of land scape.

Is man part of the environment.?

Environmental Law From International and National Law Perspectives

Environmental law is a collective terms describing the network of treaties, statutes, regulations and customary laws. Or it involves **a series of laws, policies, procedures enforced by various agencies with the goal of protecting the environment**.

Hence, **Environmental law encompasses all the protections for our environment** and generally defined as the body of law that contains elements to control the human impact on the Earth and human health.

International Environmental Law?

Q1. Is Environmental Law a self-contained discipline? Or does it have its own sources and methods of law-making deriving from principles peculiar or exclusive to environmental concerns?

- There are two arguments on the issue

The first argument is

Some scholars argue that there is no distinct body of international environmental law with its own sources and methods of law-making deriving from principles peculiar or exclusive to environmental concerns. **Rather, they stress that such relevant law as does exist originates from the application of general rules and principles of general international law and its sources**.

- ✓ *Thus international environmental law is nothing more, or less, than the application of international law to environmental problems*

The second argument is

- While international EL is merely part of international law as a whole, **rather than some separate, self-contained discipline**, but
- as environmental problems have worsened, to try to overcome these inadequacies **it has become necessary to develop a body of law more specifically aimed at the protection of the environment**.
- *Due to this A study of contemporary EIL requires us to consider both **new body of specifically environmental law** and the application of general international law to environmental problems.*
- *Moreover, EIL also includes **not only public international law**, but also relevant aspects of private international law, and in some instances has borrowed heavily from national law.*

- *In general IEL is used simply as a convenient way to encompass* ***the entire corpus of international law, public and private,*** *relevant to environmental issues or problems, in the same way as the use of the terms law of the sea, Human Right law, and International Economic Law is widely accepted.*
- *It is not intended thereby to indicate the existence of some new discipline based exclusively on environmental perspectives and strategies, though these have played an important role in stimulating legal developments in this field.*

What is National Environmental Law?

- ✓ In the context of the ELS, NEL includes **the provisions concerning the environment in the constitution.**
- the Constitution of the (FDRE) addresses issues concerning the environment in Articles 43, 44 and 92 where the concept of environmental protection, sustainable development and environmental rights emanate**.**
- ✓ **In** anticipation of the conduct of the Government to conform to a **Bill of Right**s, different environmental agreements and international instruments ratified by HPR is part of ethio laws.art9(4).
- ✓ and all laws (federal and regional) concerned with the environment (**Forestry, Land, Water use and other sectoral laws**).
- Article 43 states that the People of Ethiopia have the **right to sustainable development** and improved living standards **and the right to participate in national development regarding policies and projects affecting their community.**

- According to article 44, all persons have the right to live in a clean and healthy environment, while those who have been displaced or whose livelihoods have been adversely affected as a result of state programmes **have the right to monetary or alternative means of compensation**, including relocation with adequate state assistance.
- Similarly, article 92 states the responsibility of the Government in striving to ensure a clean and healthy environment for all Ethiopians, **in maintaining the ecological balance while conducting any economic development activity**.
- The people concerned shall be made to give their opinions in the preparation and implementation of **policies and programs** concerning environmental protection.

What are the factors that gave raise to their emergence(IEL and NEL)

- ✓ **First the e**xistence of an extensive range of environmental problems.

These include

- atmospheric pollution,
- marine pollution,
- global warming and ozone depletion,
- the danger of nuclear and other extra-hazardous substances
- and threatened wildlife species.

Such problems have an international dimension in two obvious respects.

(1)Pollution generated from within a particular state often has a serious impact upon other countries.

- The prime example would be acid rain, whereby chemicals emitted from factories rise in the atmosphere and react with water and sunlight to form acids.
- These are carried in the wind and fall eventually to earth in the rain, often **thousands of miles** away from the initial polluting event.
- It acidify in land water(lakes),forest.

(2). The fact that these environmental problems cannot be resolved by states acting individually. Accordingly, co-operation between the polluting and polluted state is necessitated.

- However, the issue becomes more complicated in those cases where it is quite impossible to determine from which country a particular form of environmental pollution has emanated. This would be the case, for example, with ozone depletion.

- ✓ **Secondly, determining** the relationship between the protection of the environment and the need for economic development is another factor underpinning the evolution of environmental law.
- The correct balance between development and environmental protection is now one of the main challenges facing the international community
- It also raises the issue as to **how far one takes into account the inheritance of the future generations for activities conducted at the present time** or currently planned.

Overview of Historical evolution of International Environmental Law

- Prior to the 20th century, there were few multilateral or bilateral international environmental agreements.
- Before **1900** few international agreements were concerned with international environmental issues. The prevailing rule of international law was that of national sovereignty over natural resources within a country's territory or jurisdiction.
- The few international agreements focused primarily on **boundary waters, navigation, and fishing rights**.
- During the **1930s** and 1940s, countries concluded several agreements aimed at protecting fauna and flora in specific regions.

- ✓ Beginning in **the 1960s environmentalism**(concern about and action aimed at protecting the environment) became an important political and intellectual movement in the West.
- ✓ **By** the late 1960s, environmental concerns had broadened.

After World War II, the international community responded to specific environmental threats caused by technological change and expanded economic activities.

- ❑ A 1963 treaty, restricted military uses of radioactive materials.
- ❑ See **Treaty Banning Nuclear Weapons** in the Atmosphere, in Outer Space, and Underwater (Moscow, Aug. 5, 1963) .

- The evolution of international environmental law can be separated into three distinct periods: from **1900-1972,** from **1972-1992;** and from **1992-2012. and from 2012 on ward.**

From 1972-1992: Development of Basic Framework

- This period begins with the **1972** United Nations Conference on the Human Environment and includes many developments that took place up until the **1992** United Nations Conference on Environment and Development.

1. 1972: The United Nations Stockholm Conference on the Human Environment

- The year **1972** was historic, because for the first time countries across the world came together in Stockholm(Sweden) in **1972** to identify and address environmental problems. IEL discussed globally for the first time. The declaration is not legally binding .
- the most central issue that arose in the Stockholm Conference was the need **to address the potential conflict between economic development and environmental protection.**
- Developing countries were concerned that an international effort to protect the environment would come at the expense of their own development.

- It laid a foundation for later acceptance of the concept of sustainable development, which governments confirmed as an overarching policy twenty years later at the Rio Conference on Environment and Development
- It resulted in the adoption of the **U.N.** Stockholm Declaration on the Human Environment.
- This document set the stage for further development of principles of IEL.
- In particular, Principle 21, which provides that

  "*States have **[...]** the **sovereign right to exploit their own resources pursuant to their own environmental policies**, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,*"

  *sets forth a basic obligation, which **the ICJ** subsequently recognized as part of international law**.“ CIL***

After the Stockholm Conference

- The period between **1972-1992** witnessed changes in the focus of international environmental agreements.

The scope expanded

- ✓ from agreements controlling transboundary pollution to ones addressed to global pollution problems, such as depletion of the ozone layer;
- ✓ from a focus on protecting certain kinds of wildlife to conserving ecosystems;
- ✓ from **controlling trade across borders** to **controlling activities within national borders** that threatened the environment, as **by** protecting natural world heritage sites, wetlands, and biologically diverse areas.

2. Vienna Convention on the Protection of the Ozone Layer (adopted in 1985)

- ✓ The Vienna Convention , did not specify the measures that signatory states were required to adopt to protect human health and the environment from the effects of ozone depletion,
- ✓ nor did it mention any of the substances that were thought to damage the ozone layer.

3. Montreal Protocol on Substances that Deplete the Ozone Layer (known as the Montreal Protocol 1987)

The Montreal Protocol entered into force on 1 January 1989.

The result has been a ban on the production and use of several industrial chemicals.

control of production and trade of ozone-depleting substances and trade in products containing controlled substances.

The Protocol lists controlled substances in Annexes:

✓A (CFCs and Halons);

✓B (Other halogenated CFCs, carbon tetrachloride and methyl chloroform);

✓C (Hydrochloroflurocarbons and Hydrobromoflurocarbons); and E (Methyl bromide).

4. **The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal. 1989**

- The Basel Convention resulted from the concern of developing countries, particularly in Africa, that they could become the dumping ground for hazardous wastes whose disposal in the developed world had become difficult and expensive.
- Developing countries and non-governmental organizations have played a significant role in the regime since its inception.
- The seriousness of hazardous substances problems was acknowledged at the Stockholm Conference) in 1972 on Principle 6.

If hazardous waste is

- indiscriminately dumped,
- accidentally spilled
- or improperly managed, it can poison the surrounding land and water for decades, and cause severe health problems – even death.

Therefore movement and dumping of hazardous wastes, particularly illegal dumping in developing nations by companies from developed countries, needs to be managed and controlled.

From 1992-2012

1. 1992: The United Nations Rio Conference on Environment and Development

also known as the **Earth Summit**

- In June 1992, countries met in Rio de Janeiro, Brazil, to commemorate the twentieth anniversary of the **1972** Stockholm Conference on the Human Environment.
- The Rio Conference became an important sign in the development of IEL and policy.
- In contrast to the **SC the RC** **was more about the development of developing states as developing states were able to make their voices heard for the first time.**
- This caused many discussions between representatives of developed states and developing states.

The main outcomes of the Rio Conference/The Rio Conference produced important documents for international environmental law:

i. an Action plan called Agenda 21, an action programme designed to integrate the environment and sustainable development,

ii. the Rio Declaration on Environment and Development, which sets out important principles, and rules of IEL.

iii. the opening for signature of the **UN Framework Convention on Climate Change and the UN Biodiversity Convention.**

- The best known principle of the Stockholm Declaration Principle 21, later reaffirmed at the 1992 Rio Conference as Principle 2.
- The International Court of Justice confirmed this Principle has attained the status of CIL.

✓ Since Rio, in addition to the Framework Convention on Climate Change , many other MEAs have been adopted, including the following:

- ✓ the Protocol to the London Dumping Convention (adopted in 1996)
- ✓ Kyoto protocol to the Framework Convention on Climate Change (known as the Kyoto Protocol – adopted in 1997)
- ✓ the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (known as the Rotterdam Convention – adopted in 1998)
- ✓ the Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from the Trans-boundary Movements of Hazardous Wastes (adopted in 1999)

2. United Nations Framework Convention on Climate Change and the Kyoto Protocol. The UNFCCC, adopted at the Rio Conference in 1992

- the UNFCCC , or Global Warming Convention, adopted by 178 countries meeting in Rio de Janeiro at the 1992 (**popularly known as the "Earth Summit"),**
- **Ethiopia adopted this convention through the proc no 97/1994.**
- it aims to stabilize/eliminate the emission of various greenhouse gases (such as carbon-dioxide or methane) that contribute to global climate change. buttttt
- IT did not set **binding targets** for reducing the emission of the "greenhouse" gasses which cause global warming.

3. In December 1997 the Kyoto Protocol was adopted, entering into force in February 2005, There are currently 192 parties

- is the **world's only legally binding treaty** to reduce greenhouse emissions.
- It created two categories of countries—those with greenhouse gas limitation commitments (industrialized countries) and those without.
- The Protocol is based on the principle of common but differentiated responsibilities: it acknowledges that individual countries have different capabilities in combating climate change, owing to economic development,
- and puts the obligation to reduce current emissions on developed countries b/c they are historically responsible for the current levels of greenhouse gases in the atmosphere.

- The Protocol's first commitment period started in 2008 and ended in 2012.
- A second commitment period was agreed on in 2012, **known as the Doha Amendment to the Kyoto Protocol**(2013-2020).
- The Protocol obliges developed nations to reduce their collective greenhouse gas emissions by 5.2% (compared to 1990 levels) by the end of the first commitment period (2008–12).
- However, the United States – at the time the world's number one emitter – did not ratify the Protocol, seriously limiting its effectiveness.
- Canada withdrew from the Kyoto Protocol in 2011.

During the second commitment period (from 2013 to 2020), Parties committed to reduce GHG emissions by at least 18% below 1990 levels.

- The second commitment period affects only 14% of global emissions because only EU Member States, other European countries and Australia have commitments.
- The USA, Russia, Canada, Japan and developing countries do not.

4. Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. 1998

✓The Rotterdam Convention is designed to help countries monitor and control trade in certain hazardous chemicals.

- **Some chemicals** when released into the world can cause toxic reactions that persist in the environment for years (even decades), and can travel thousands of **K.M** from where they were used.
- While aware to such dangers, citizens and governments also remain in favour of using chemicals for certain tasks **because of cost and job implications.**

5. The Copenhagen summits with in the UNFCCC

- When the first period of the Kyoto Protocol runs out in 2012, the 15th annual UNFCCC conferences of parties will be held in **Copenhagen, Denmark, to determine another international climate agreement.**
- **In 1997, the** UNFCCC spawned the Kyoto Protocol. But neither of these agreements can curb the growth in greenhouse gas emissions sufficiently to avoid the climate impacts.
- In particular, the Kyoto Protocol's targets for reducing emissions apply only to a small set of countries and expire in 2012. Governments want a new treaty that is bigger, bolder, wider-ranging and more sophisticated than the Kyoto Protocol.

The three main outcome of the conference

i. we must reduce annual worldwide emissions at least 50% below 1990 levels.

ii. Developing countries, also need to limit the growth of their emissions, but in ways that are consistent with their ambitions for continued economic growth and the reduction of poverty.

iii. Since the rich countries responsibility for the past emissions, developing countries must receive reliable and substantial support from the rich nations for their climate action plans.

- This is necessary both for their plans to reduce emissions
- and also to overcome the additional challenges that climate change will pose for their efforts to tackle poverty.

- The head of the African group of nations at the UN climate change conference in Copenhagen has proposed a financial deal where rich countries would pay for schemes to help poor states adapt to climate change and develop their economies using clean technology.
- The proposal, from the Ethiopian prime minister, Meles Zenawi, of $50bn (£44bn) a year for poor countries by 2015 and $100bn (£89bn) by 2020.

- Meles also proposed that 50% of the fund created should be allocated to vulnerable and poor countries as well as "regions such as Africa and small island states".

The Sources and the Law Making Process of Environmental Law

- ✓ Governments protect the environment on the basis of their various constitutional and statutory powers to promote the general welfare, regulate commerce and manage public lands, air and water.
- ✓ National authorities may accept additional duties to protect the environment by entering into bilateral and multilateral treaties containing specific obligations.
- ✓ Promulgation of regulations and permits by administrative authorities (Reporting, monitoring and civil and/or criminal actions to enforce environmental law)
- ✓ Some constitutions also contain reference to environmental rights or duties, **making these constitutional provisions and their interpretation and application** another potentially important source of environmental law.

Sources of National Law

1.Constitutional Law

- constitutions contain provisions establishing environmental rights(refer to a right to a clean and healthy environment), or set forth governmental duties to protect the environment and the state's natural resources. art 44 and art 92.
- Even where the right to a healthy environment is not expressly provided, other constitutional rights are being interpreted and enforced by courts in an environmental context.
- E.G The Supreme Court of India was one of the first courts to develop the concept of the right to a healthy environment as part of the right to life guaranteed by the constitution.
- the Court observed that the **"right to life includes the right to enjoy pollution-free water and air for full enjoyment of life**''

2. Environmental Legislation

i. It is a single law w/c provide legal and institutional framework for env.tal management without legislating comprehensively. It lays down basic principles

Legislative texts establish general environmental policy, supplemented by **specific laws and administrative regulation.**

These specific laws/ statutes **use common techniques and procedures of environmental protection**

- ✓ including environmental impact and risk assessment,
- ✓ prior licensing, and
- ✓ emission standards respond to specific environmental concerns in the particular country, such as the safety and environmental consequences of nuclear power plants, large dams, or extractive industries like oil or coal)

ii. It provide a basis and reference point for realization and harmonization of environmental laws.

iii. It is umbrella legislation to indicate its main role as a guide for purpose of drafting environmental law.

iv. It establish a link and hierarchy with other laws implementing env.tal issues. E.g which gov.t authority is in charge of protecting the env.tal polution.

3. Administrative Regulations

Legislation on environmental matters often delegated to administrative agencies, including rule-making, standard-setting and enforcement, to achieve the legislative mandate.

- In permit or licensing proceedings, the court is typically asked to determine whether an administrative agency or governing body's licensing decision was consistent with the legal requirements.
- While assessing the consistency of agency decision with legal requirements, the courts review administrative record of decisions and facts that was b4 the agency at the time the decision was made.
- Then the court can reject an administrative decision by an administrative agency or governing body if it determines that the law has been applied in an arbitrary manner or infringes basic rights

4.Industrial Standards and Codes of Conduct

A guidelines or codes of conduct have been developed within industry,

- ✓ including the World Industry Council for the Environment,
- ✓ the FAO International Code of Conduct on the Distribution and Use of Pesticides,
- ✓ the Responsible Care Initiative of the Chemical Manufacturers Association

With the advent of globalization, IO's have devoted to drafting codes that apply to multinational enterprises.

- ✓ The UN Sub-Commission on Human Rights approved Norms on the Responsibilities of TNC's in the area of environmental protection

The Law Making Process: National and International Perspective

The Law Making Process of Environmental Law in Ethiopia

- Accordingly, for the national environmental law, there is national parliament which is endowed by the constitution of the country with the power to legislate laws which could be relevant to the environment.

  HPR is endowed by the constitution with the power to legislate laws which could be relevant to the environment. Art51(5)
- Considering the structure of the government of the country at hand there could also be Regional State Councils which are endowed with the same power. Art52(2)(d)
- Depending on the case there could also be a possibility for courts to make laws. Proclamation No 454/2005

The Law Making Process of International Environmental Law

- In IEL there is no international legislature, comparable to the national parliament, but there are **generally accepted sources from which international law derives,** and a variety of international processes through which new international law is made or existing law changed.

Much of IEL is the product of an **essentially legislative process involving the**

- interaction b/n international organizations,
- conferences,
- diplomacy,
- codification and progressive development of some customary law
- and a relatively interaction of treaties, non-binding declarations or resolutions, and customary international law

international institutions,

- including the UN and
- its specialized and
- regional agencies and programmes, **have played a leading role in setting law-making agendas and providing negotiating forums and expertise**.

Above, all these processes are political, involving law-making primarily diplomatic means rather than codification and progressive development by legal experts,

although codification and judicial decisions do play a part in affirming the status of customary rules and general principles, leading in some cases to modest evolution in international law.

Nature of Environmental Problems, and Damages

- ✓ Now-a-days, it is clear that the mad rat race among nations over the use of natural sources for development is increasingly jeopardizing the quality of the environment.

  b/c it resulted in over extraction of every bit of natural resources, and this unchecked exploitation of natural resource by man disturbed the ecological balance between living and non-living components of the environment.

- ✓ The basis of the emphasis on human acts in environmental protection is, the fact that, we are part of the environment and simultaneously we human beings have a capacity and capability not only to improve but also to destroy and destruct nature.
- ✓ environmental danger could possibly jeopardize the very

The preamble of Tokyo Declaration on Financing Global Environment of 1992 has briefly put the inter-relationship and the danger posited in the following manner:

- *Human future is at risk due to wasteful pattern of production and consumption in industrialized countries and* ***pervasive poverty and population growth in developing countries which are primarily leading to the destruction of the earth's ecological base.***

This Declaration reveals that the current environmental problems are caused by factors related to unsustainable use of natural resources, and unprecedented growth of population.

So that, environmentalists are warning the world community that we have reached an alarming stage, thus we need to take serious measures to improving the quality of our environment to make it last long.

- We are part of that system: our actions affect the system and we are in turn affected by it.
- This calls for putting in place an early warning system and a system of prioritizing risks,
- since resources are always limited; and often the damage to the environment are irreversible or **even if reversible can be done only at excessive costs.**

- In other words, many of the damages done to the environment **may have long term effects** or they may not be effectively reversible.
- So human kind may set off unchecked degradation that will pass a point of no return, making it impossible to restore a healthy environment .

- To save humanity, we have to depend on sustainable development principle.

This approach unifies protection of the environment and development programs by formulating the concept of sustainable development.

In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

- Today, environmental problems are serious and imminent threats, which suggest a need for drastic or emergency action.
- This emanates from the magnitude of man's impact on his environment which necessitated a full scale reconsideration of the relationship between the environment and development programmes.

- To have a full picture of environmental problems, it is also important to see environmental problems arising apart from development activities, which are deliberate actions aimed at destroying the human being and the environment.
- One of such deliberate acts is the indiscriminate bombardment of cities, towns and countryside areas **in effect which renders the civilian population to a military target** of a new form of **warfare-environmental warfare.**
- In such a situation the irreparable alteration to the environment may threaten the entire population, and **it is tantamount to a crime against humanity, perhaps to a greater extent than genocide which may be limited only to a given ethnic minority in a specified area**.
- To avert this situation, we should not postpone our decision to resolve catastrophic disputes peacefully.

CHAPTER 2 BASIC PRINCIPLES OF ENVIRONMENTAL LAW

. Principles of environmental law

- (i)The sustainable development principle
- (ii)The integration principle
- (iii)The prevention principle
- (iv)The precautionary principle
- (v)The polluter pays principle
- (vi)The public participation principle

i)The prevention principle

The preventive approach is based on the idea that it is better to prevent environ-mental damage than to employ measures to restore the environment thereafter.

Although much environmental legislation is drafted in response to catastrophes, preventing environmental harm is cheaper, easier, and less environmentally dangerous than reacting to environmental harm that already has taken place.

- ✓ In some instances, it can be impossible to remedy environmental injury once it has occurred: the extinction of a species of fauna or flora, erosion create intractable, even irreversible situations. Even when harm is remediable, the cost of rehabilitation is often very high. so the prevention is Golden Rule for the environment, for both *ecological* and *economic* reasons.
- ✓ Prevention is also linked to the notion of *deterrence* and the idea that disincentives *such as penalties and civil liability* will cause actors to take greater care in their behavior.
- ✓ The prevention principle is the fundamental notion behind laws regulating the generation, transportation, treatment, storage, and disposal of hazardous waste and laws regulating the use of pesticides.
- ✓ It was the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which sought to minimize the production of hazardous waste and to combat illegal dumping.
- ✓ The prevention principle also was an important element of the EC's Third Environmental Action Programme, which was adopted in 1983.

- The “historical” case (“Trial smelter” – the name goes back to the village named “Trial” where the case took place), decided by the International (Arbitral) Court in 1941, can be considered as a first reference dealing with transboundary pollution.

- The village Trail is located in British Columbia, Canada, near the border to the United States, at the Columbia River. At this place a smelter is located where zinc and lead are smelted in large quantities since 1896. At the time when the decision was taken, about 5.000 to 7.000 tons of Sulphur dioxide were emitted monthly, causing serious damage to agriculture, forests and private property in the USA.

- The arbitrary tribunal there for finds that under the principle 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 on the territory of another, property or person therein when the case have serious consequence or the injury is established by clear and convincing environment

- The principle laid down by the Arbitral Tribunal in the Trial Smelter case is reproduced in Principle 21 of the Stockholm declaration and literally adopted by principle 2 of the Rio Declaration on environment and development.
- The Stockholm declaration of 1972 principle 21,impose the responsibility of state to ensure that activities within their jurisdiction or control do not cause damage to the environment of other state of or areas beyond the limit of national jurisdiction.
- In addition to this this principle is enshrined in many convention(on the marine environment, climate ,waste biodiversity)

The main point is, that the preventive approach tries to anticipate possible (probable) negative effects and uses instruments to avoid that damage will occur.

Function of preventive principle

- ✓ Avoid trans-boundary pollution
- ✓ Prevent pollution at the source
- ✓ Minimize environmental damage
- ✓ Avoid risk of harm

Instrument for implementation of preventive principle

- ✓ EIA
- ✓ Emission standard
- ✓ Best available techniques
- ✓ Environmental quality standard
- ✓ Authorization of hazardous activities
- ✓ Information ,participation and access to justice
- ✓ Economic instrument
- ✓ Criminal law

ii) Precaution

The precautionary principle is based on the premise that action on environmental matters should be taken even if there is a lack of total scientific certainty, often reversing the burden of proof and placing it on those who claim that an activity is not damaging.

In some cases, the existence of an environmental problem is evident, for instance, in the case of depletion of the ozone layer. In most cases, however, especially those that have to do with the impact of hazardous substances on human health or the environment, the scientific evidence may not be conclusive. In those cases, the precautionary principle advocates that some action is better than inaction.

the precautionary principle, certainly the most controversial one of the principles we are talking about because it advocates action despite the lack of scientific certainty. Taking action under such conditions could be costly or, even worse, could be proven wrong.

On the international level, the Stockholm declaration 1972 did not yet mention the principle, but the Rio

Declaration 1992 principle in order to protect the environment, 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 damage.

Parties should take precautionary measure to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects.

The typical situation where the principle applies is, lack of full scientific certainty

(= scientific uncertainty .)

principle is limited in International law to situations where there is “Threat of

serious damage” or “reasonable grounds for concern”. Actions should be taken so that the risk of damage is avoided.

- ✓ the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) holds the

precautionary principle could be considered today as “part of customary international law.”

- Generally, the function of the precautionary principle is very close to the function of the preventive principle. But it goes further in terms of risk-reduction, if knowledge is not sufficiently available.
- Since the precautionary approach should only apply to serious risks. If the chosen level of protection is at risk, precautionary measures should apply.

- The main deference b/n prevention and precaution

1.Prevention

Actions should be taken in order to prevent damage (before damage has occured)

- ✓ Knowledge based and risk can be calculated
- ✓ There is danger
- ✓ Occurrence of damage is probable if no measure is taken
- ✓ Regulatory framework defines substantial criteria(eg substantial criteria)
- ✓ Definition of acceptable risk is primarily science based

2. Precaution

Actions should be taken so that the risk of damage is avoided

- ✓ Uncertainty and risk cannot be calculated
- ✓ there is risk
- ✓ Occurrence of damage is uncertain and cannot be predicted clearly
- ✓ Regulation through procedural requirement
- ✓ Social acceptance of the risk is considered

The main difference between prevention and precaution is that the calculation of the risk is much more difficult in the precautionary situation because of the lack of scientific knowledge. As a consequence, it is also more difficult to define regulatory standards .

If there is scientific uncertainty, it is difficult to predict if damage will occur or not. Precautionary measures could nevertheless been taken. If there is knowledge based evidence, a measure must be taken under the preventive approach.

- When we see the overlapping between the preventive and the precautionary principle. Even if the risk is known and preventive measures are taken, further measures might be necessary to reduce the probability of the risk if important damage may occur. These further risk reducing measures may be justified under the precautionary approach.

iii. Polluter Pays Principle and Equitable Sharing of Cost

The ppp was enunciated clearly in the international arena in the Rio Declaration.

The ppp basically demands for the person who is in charge of polluting activities to be financially responsible for the damage s/he causes.

Some scholars argued that the principle has merely a rhetoric value because most polluters will be able to pass the costs of pollution onto consumers. Also, in most cases, it is difficult to identify the polluter. when decisions are made about

who should bear the cost of polluting activities it is not always followed.

Historically, pollution control costs have been borne by the community at large, rather than by those who pollute.

There are at least three possible ways for the community to assume the economic costs of the pollution:

1) The river can remain polluted and rendered unsuitable for certain downstream activities, causing the downstream community to suffer an economic loss;

2) The downstream community can build an adequate water treatment plant at its own cost;

3) The polluter may receive public subsidies for controlling the pollution.

- The polluter pays principle avoids this result by obliging the polluter to bear the costs of pollution control, to “internalize” them. In most cases the enterprise will in fact incorporate the costs in the price of the products to some degree and pass them on to the consumer.
- The polluter pays principle is therefore a method for internalizing externalities. Internalization requires that all the environmental costs be borne by the producer/consumer instead of the community as a whole. Where air is fouled by a producer who bears no cost, it is a negative externality; those who buy the product also are free riders if the fouling is not reflected in the price of the goods.

- Prices will reflect the full cost if regulatory standards or taxes on the production or product correspond to the true cost of environmental protection and damage.
- Generally, polluters should pay for the cost of pollution control measures, such as the construction and operation of anti-pollution installations, investment in anti-pollution equipment and new processes, so that a necessary environmental quality objective is achieved.
- *Other means of ensuring the polluter pays principle are through taxes and charges*.
- Application of the principle may be difficult in practice where *identifying the polluter proves impracticable* because the pollution arises from several simultaneous causes or from several consecutive causes, or where the polluter has become financially insolvent.
- In such instances, there may be no alternative to community assumption of the costs of remediation.

iv. Sustainable Development

The original articulation of the principle is found in the Brundtland report, which stated that sustainable development means development that satisfies the needs of present generations without jeopardizing the ability of future generations to meet their own needs.

In the WSSD, sustainable development was further articulated as having three pillars, namely: economic development,social development, and environmental protection.

- The concept of *“sustainable development“* had already begun to emerge prior to the UN Conference on Environment and Development in 1992, but its defining role in the evolution of international law and policy on protection of the environment secured near universal endorsement at Rio.
- Sustainable development informs much of the Rio Declaration, as well as the conventions on climate change and Biological Diversity, and it is central to the elaboration of global environmental responsibility by these and other instruments.
- Since Rio, sustainable development has been adopted as policy by numerous governments, both at national and regional levels.
- It has influenced the application and the development of law and policy by international organizations, including FAO, IMO, the World Bank, the WTO; and UNDP; as well as treaty bodies such as the International Tropical Timber Organization and the European Energy Charter.

v. The integration principle

- Integrate environmental considerations into economic and other development (Stockholm Declaration, 1972; Rio Declaration, 1992; EU, Treaty of Maastrict, Art. 2)
- Environmental protection requires that due consideration be given to the potential consequences of environmentally fateful decisions.
- Various jurisdictions (e.g., the United States and the EU) and business organizations (e.g., the U.S. Chamber of Commerce) have integrated environmental considerations into their decision-making processes, through both environmental-impact-assessment mandates and other provisions.
- When we come to our legal system the Environmental Policy of 1997 under 4.1. (a) clearly depicts that one of the basic objectives of the policy is to integrate population planning, resources management, and the rehabilitation of and care for the environment to achieve a sustainability of life style.
- Furthermore, the preamble of EIA Proclamation explicitly stipulates that the integration of environmental, economic, cultural, and social considerations into a decision making process in a manner that promotes sustainable development is a pressing need.

IV. The Public-Participation Principle

- ✓ government decisions to set environmental standards for specific types of pollution, to permit significant environmentally damaging activities, or to preserve significant resources are made only after the impending decision has been formally and publicly announced and the public has been given the opportunity to influence the decision through written comments or hearings.

In many countries citizens may challenge government decisions affecting the environment in court or before administrative bodies.

These citizen lawsuits have become an important component of environmental decision making at both the national and the international level.

- Although sustainable development focuses on integrating social justice concerns with environmental protection and economic development, this integration can only be achieved through public participation with all stakeholders.

- at the international level include the Rio Declaration and the 1998 Arhus Convention, which committed the 40 European signatory states to increase the environmental information available to the public and to enhance the public’s ability to participate in government decisions that affect the environment.

- *Firstly; sustainable development is not to be confused with zero growth.* Conversely, growth, if defined in terms of GNP, is not inevitably unsustainable, since GNP is not *per se* a measure of natural resource consumption or of pollution.
- One environmental economist has put this point succinctly as it is a mere monetary aggregate, GNP does not distinguish between different types of economic activity: it simply records the overall total.
- It is quite possible for GNP to go up with fewer resources being used and less pollution being generated, if the content of growth tends away from environmentally-degrading activities.

- Whatever else it means therefore, sustainable development need not imply a policy of no growth. Nor does the Rio Declaration envisage such an outcome.
- It firmly reiterates the sovereign right of states to exploit their own resources in accordance with their own environmental and development policies, although subject, as at Stockholm, to a responsibility for trans-boundary environmental protection; it asserts a right to development, albeit so as to meet equitably the needs of present and future generations, and it calls for an ‘open international economic system that would lead to economic growth and sustainable development in all countries.’

- sustainable development implies not merely limits on economic activity in the interests of preserving or protecting the environment, but an approach to development which emphasizes the fundamental importance of equity within the economic system.
- This equity is both intra-generational, in that it seeks to redress the imbalance in wealth and economic development between the developed and developing worlds by giving priority to the needs of the poor, and inter-generational, in seeking a fair allocation of costs and benefits across succeeding generations. Put simply, development will only be ‘sustainable’ if it benefits the disadvantaged, without disadvantaging the needs of the future

- Thus ‘sustainable development’ is intended to serve not simply the needs of the environment, but entails a reorientation of the world’s economic system in which the burdens of environmental protection will fall more heavily on the developed Northern States and the economic benefits will accrue more significantly to the underdeveloped south for the common benefit of all.
- A further element of sustainable development, however, is ‘a notion of economic welfare which acknowledges non-financial components’, in particular the quality of the environment, health, and the preservation of culture and community.

- We can see some of these concerns in principle 1 of the Rio Declaration, which places human beings' at the centre of concerns for sustainable development', and proclaims their entitlement to ' a healthy and productive life in harmony with nature,' but more especially in such international agreements as the 1972 Convention for the protection of World Cultural and National Heritage, which protects areas like Stonehenge and the Great Barrier Reef .
- Similarly, the 1991 protocol to the Antarctic Treaty on Environmental protection designates Antarctica a Special Conservation Area, and acknowledges its ' intrinsic value', including its 'wilderness and aesthetic values'.

The Elements of Sustainable Development

Sustainable development contains both substantive and procedural elements.

The substantive elements are mainly set out in principles 3-8 and 16 of the Rio Declaration. They include

- the sustainable utilization of natural resources;
- the integration of environmental protection and economic development;
- the right to development;
- the pursuit of equitable allocation of resources both within the present generation and between present and future generations (intra-and inter- generational equity), and
- the internalization of environmental costs through application of the ‘polluter pays’ principle.

The principal procedural elements are found in principles 10 and 17 dealing with public participation in decision-making and environmental impact assessment. Again, none of these is new, but never before have had they secured such widespread support across the international community.

Environmental Justice and Equity

- It is important to restate that environmental justice was historically premised on ensuring that minorities do not face disproportionate environmental burdens. One of the underlying perquisites
- in achieving this end is that the decision-making processes be fair and transparent.

- environmental justice seeks to ensure that authorities fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e. all the benefits and burdens) are equitably shared by all members of society.
- Environmental justice goes beyond traditional environmental protection objectives to consider the equitable distribution of pollution, and, more broadly, the often disproportionate burden borne by the poor and minority groups in respect to environmental harm.

- **Public Trust**

- The concept of public trust expresses the idea that the present generation holds the natural resources of the earth in trust for future generations. When applicable as a legal principle, public trust contemplates that certain things, such as *natural resources* and *the exercise of public power,* are held by governments in trust for the citizenry and must be used for the public benefit.

Differences and similarities between sustainable development and environmental justice

It is generally accepted that sustainable development and environmental justice are conceptually related.

- The Brundtland Report emphasises sustainable development as being fundamentally important in achieving global justice and justice towards future generations, thereby suggesting that equity concerns serve as a conceptual link between these two concepts.
- Environmental justice and sustainable development are increasingly intertwined concepts both of which incorporate social justice and environmental issues.

Sustainable development incorporates much of the equity concerns that environmental justice seeks to address; it also requires an equitable distribution of economic and environmental costs and benefits, community services and opportunities to participate in decisions affecting communities. Furthermore, sustainable development expands the environmental justice notion of distributive justice to incorporate concerns for the poor, future generations, and the environment.

- This is a wider ambit than that offered by environmental justice which is limited to the avoidance of environmental burdens on already disadvantaged minorities. Despite the links between sustainable development and environmental justice, there are clearly some differences. Sustainable development is a more embracing concept

State Responsibility for Environmental Protection and Preservation/**The Obligation of States Not to Cause Damage to the Environment beyond Their Jurisdiction.**

- The general substantive obligation inherent in this principle is a duty to prevent, reduce and control trans-frontier environmental harm.
- In the environmental context, there has been explicit acceptance of the principle that states must bear responsibility for the effects of their actions on the environment of other states or the common environment.
- Principles 21 and 22 of the Stockholm Declaration, which have frequently been cited in the present study embody the current community expectations, and it seems worth here:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

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

- Expressions of this principle are found in binding international instruments. One example- in addition to the ones already mentioned- is the 1982 UN Convention on the Law of the Sea para 2:
- *States shall take all measures necessary to ensure activities under their jurisdiction or control are conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities not spread beyond their jurisdiction.*

- As stated in this article, the obligation of the State does not only comprise activities carried out by or on behalf of the State itself.
- It also includes actions by any subject under the state’s jurisdiction (citizens, companies, municipalities etc). This was stated clearly already in the Trail Smelter case.
- It means that the State has the obligation to exercise its authority and to take necessary actions, in order to prevent any activity under its jurisdiction from doing harm to other States. To this effect, the State must take adequate measures, issue necessary regulations, carry out control, sanction violations of the law etc.

- It is a commonly held view that there is a ‘’lower threshold’’ here, that only ‘’substantial ‘’ or ‘’significant ‘’ harm to other States is a violation of international customary law. The Trail Smelter arbitration used the expression ‘’ serious consequences ‘’.
- a State has not violated international law if it has exercised ‘’due diligence’’ – that is, if it has acted in good faith and has taken reasonable measures to prevent the damage.
- ‘’Abuse’’ of rights, intentional or unnecessary harm will always be regarded as violating the ‘’due diligence’’ standard and thus be against international law. Beyond these clear situations, the ‘’due diligence’’ standard implies an appraisal of various relevant factors.
- The obligation to exercise ‘’due diligence’’ means that the State must act in a responsible way, with due regard to the interests of other States. It must consider the risks and the possibilities involved, and take reasonable measures to avoid trans-boundary harm.

- The principle of state liability for trans-frontier environmental damage is generally accepted, as the Trail Smelter arbitration illustrates. The problems of causality are present in international relations, as they are in national compensation law.
- In the Trail Smelter case the injury was established ‘’by clear and convincing evidence’’. Given the often complex cause-effects relationships of pollution damage in general, and of trans-boundary and global pollution in particular, clear and convincing evidence may be hard to establish.
- Should liability be based on strict liability or on a negligence rule? A common view is that the ‘’due diligence’’ standard applies. This may mean that a State is not liable if it has taken reasonable measures to prevent damage. But for so called ‘’ultra hazardous’’ activities, such as nuclear activities, there is general agreement that a principle of strict liability operates.

States' Obligations to Cooperate, to Inform and to Consult With Other States

- If States have conflicting interests related to an environmental problem such as trans-boundary pollution, States have a general obligation to cooperate in order to find solutions, and if necessary to negotiate in good faith in order to solve conflicts through peaceful means.
- The principle of cooperation is implicit in the numerous international treaties that have been established over the last decades. It is also expressed through the extensive work done by intergovernmental organizations in the field of environment.

- States also have a duty to inform and consult with other States, if activities within their territory may have effects across the borders. More recently, this duty of information has developed into rules on environmental impact assessment, in a trans-boundary context. This was first expressed as ‘’soft law ‘’ in UNEP’s 1987 Goals and Principles of Environmental Impact Assessment, which provides:
- *When information provided as part of an EIA indicates that the environment within another State is likely to be significantly affected by a proposed activity, the State in which the activity is being planned should, to the extent possible:*
- *a. Notify the potentially affected State of the proposed activity,*
- *b. Transmit to the potentially affected State any relevant information from the EIA, the transmission of which is not prohibited by national laws or regulations; and*
- *c) When it is agreed between the States concerned, enter into timely consultations.*

- More recently, the principle has got a detailed and comprehensive expression in the 1991 ECE Convention on Environmental Impact Assessment in a Trans-boundary Context (known as the Espoo Convention). An important principle in this context is the principle of nondiscrimination. This means that environmental effects in another State – or beyond national jurisdiction – should be given the same weight as effects in a State’s own territory. UNEP’s 1987 Goals and Principles of Environmental Impact Assessment, Principle 12.

- The non-discriminatory principle may also imply that citizens who are or may be touched by pollution from another State have the same legal rights as the citizens of the polluting State as to, for example, legal standing and right to compensation for damage.
- In case of an imminent or actual accident, States have a special duty to take emergency actions, and to adequately warn other States. This principle was highlighted in the *Chernobyl case in 1986*. The Soviet Union failed to inform neighboring countries about the nuclear accident. This was widely regarded as a breach of international customary law
- A special treaty on information in case of a nuclear accident was rapidly negotiated after the accident.

Shared Natural Resources, Common Property and Common Heritage of Man Kind

- Another group of problems are linked to the management of resources which are either shared between several states, or common in the sense that they are outside the area of national jurisdiction. The general principle not to cause significant harm outside your territory- principle 21- also applies explicitly to areas beyond national jurisdiction.

Shared Natural Resources

- The concept of *“Shared Natural resources”* is used when one natural resource comes under the jurisdiction of several states.
- A lake bordered by two or more states, or a river running through the territory of several states are typical examples.
- According to article 63 of the Law of the Sea Convention, that fish stocks occurring within the exclusive economic zones of two or more coastal states are also regarded as shared natural resources.

- It is unclear what resources should be treated as shared. In particular, there is at present not international consensus to include resources such as boarder forests, mountain chains, the atmosphere or biodiversity within natural geographic area.
- Regardless of the legal status of the concept, however, it is recognized that the above mentioned principles of cooperation and information apply particularly, in cases where a natural resource is under the jurisdiction of two or more states.

- In the *Lac Lanoux case* (arbitration 1957) France diverted water under its jurisdiction from a water course shared with Spain. The court stated that Spain had legitimate interest in the matter, and had the right to be consulted
- When it comes to a state's right to exploit such resources, relative to other states' rights, the general principle of *"equitable utilization"* is broadly recognized. This principle is expressed in the 1978 UNEP Principles which state.
- *It indicates the need to evaluate and to balance the various interests of the states concerned*.

Common Property

- Common property refers mainly to the living resources outside national jurisdiction, such as fish stocks and other living resources on the high seas. These resources are in principle free for the legitimate and reasonable use by all states.
- There is an implicit obligation to take necessary conservation measures, if limitations are needed to keep the catch within the limits of sustainability.

Common Heritage of Mankind

- a popular meaning, the common heritage of mankind is often used as a term for global environmental resources, such as the Earth's biodiversity, the tropical forests or the atmosphere. The term itself indicates an obligation to manage these resources for the benefit of mankind as a whole, and a need for international control of their exploitation.
- In international law, however, the concept has a stricter meaning. It refers to two specific non-living resources outside national jurisdiction: the sea-bed mineral resources and the moon. In principle, all states should share the benefits of these resources, even if they don't take directly part in their exploitation. On this point it is different from the rules pertaining to common property regimes, where only the states that take active part, may benefit from the exploitation of the resources.

Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection

Environmental Rights and Human Rights

- The UN Draft Declaration on Human Rights and the Environment 7 provides a comprehensive list of substantive environmental rights (such as the right to secure, healthy and ecologically sound environment; the right to freedom from pollution; and the right to safe and healthy working environment) and procedural environmental rights (such as the right to information concerning the environment; the right to effective remedies in administrative or judicial proceedings for environmental harm; and the right to association for the protection of the environment).
- Thus, despite their existence within the laws, customs and principles that make up national and international environmental laws, environmental rights have largely developed as part of human rights law. As explained below, owing to the differences between environmental law and human rights law, the category and meaning of environmental rights within human rights law is controversial.

Three approaches have developed over the years on the category and meaning of environmental rights within human rights law.

1. The first approach, characterized as ‘anthropocentric’, looks at environmental rights as part of civil and political rights thereby focusing on the protection of individual human beings against the harmful impact of the environment. Environmental rights understood in this sense are largely procedural rights that guarantee access to information, right to participation in decision-making process and the right to effective remedy when environmental harm occurs.

- This approach is criticized for its focus on the protection of humans from environmental harm. Consequently, the approach is described as a process of ‘greening of human rights law’.

2. The second approach looks at environmental rights as part of economic, social and cultural rights. As such, environmental rights would include substantive rights such as the right to healthy and clean environment and the protection of biodiversity. This approach has been praised as ‘ecocentric’ for its balanced focus on the protection of humans and the environment itself. Nonetheless, according to this approach environmental rights are programmatic rights and ‘vulnerable to tradeoffs against other similarly privileged but competing objectives, including the right to economic development.’ Moreover, as economic or social rights, environmental rights face the problem of enforcement akin to many economic, social and cultural rights.
3. The third approach takes environmental rights as group/ solidarity rights to healthy environment and sovereignty over natural resources that can only be invoked collectively. This approach is marred by the controversy over the validity and status of group/ solidarity rights within the human rights discourse.

- It is a well-accepted principle of international human rights law that a healthy environment is a necessary precondition for the promotion of several recognised rights.
- In his separate opinion in the *Gabcikovo-Nagymaros case before the* International Court of Justice, then Vice-President Justice Weeramantry stated:

> *the protection of the environment is. .. a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right to health*

Environmental Rights under International and Regional Treaties

- The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* article 12 establishes a ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. A similar right is also enshrined in the *Convention on the Rights of the Child,3 the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.*

Exploring the Nexus
Between Human Rights and Environmental Protection

- the international community has created a vast array of international legal instruments, specialized organs, and agencies at the global and regional levels to respond to identified problems with in human rights, health and environmental protection three areas. Often these have seemed to develop in isolation from one another.
- Yet the links between human rights, health and environmental protection were apparent at least from the first international conference on the human environment, held in Stockholm in 1972. Indeed, health has seemed to be the subject that bridges the two fields of environmental protection and human rights.

- Principle 1 of the Stockholm Declaration established a foundation for linking human rights, health, and environmental protection, declaring that

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.

- In resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being.
- The resolution called for enhanced efforts towards ensuring a better and healthier environment.

- In the three decades since the Stockholm Conference, the links that were established by these first declaratory statements have been reformulated and elaborated in various ways in international legal instruments and the decisions of human rights bodies.
- these instruments involve taking a rights-based approach to the topics.
- first approach, closest to that of the Stockholm Declaration, understands environmental protection as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health.

- Since Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water.
- The second rights-based approach, most common in international environmental agreements since 1992, is also instrumentalist, but instead of viewing environmental protection as an essential element of human rights, it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health.
- This approach is well-illustrated by the Rio Declaration on Environment and Development, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development. It formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level.

- Thus, these procedural rights, contained in all human rights instruments, are adopted in environmental texts in order to have better environmental decision-making and enforcement.
- The third, and most recent approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right. At present, examples of this are found mainly in national law and in regional human rights and environmental treaties.

Selected Treaty and Other Provisions Linking Human Rights, Health and Environment

Human Rights Instruments with Provisions on Health and the Environment

- Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues.
- The right to health contained in article 12 of ICESCR expressly calls on states parties to take steps for the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.

- The CRC refers to aspects of environmental protection in respect to the child’s right to health.
- (Art. 24(2)(c)provides that States Parties shall take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.
- Information and education is to be provided to all

segments of society on hygiene and environmental sanitation. (Art. 24(2)(e).

- The African Charter on Human and Peoples Rights, (Banjul charter) contains both a right to health and a right to environment. Article 24 states that All peoples shall have the right to a general satisfactory environment favorable to their development.

Environmental Instruments with Provisions on Health and Human Rights

- the Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and Their Disposal begins its preamble aware of the risk of damage to human health. . .and the growing threat to human health posed by hazardous wastes.
- Stockholm Principle 7 calls on States to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health. . . Article 1 of the Legal Principles
- for Environmental Protection and Sustainable Development, adopted by the Expert Group of the Brundtland Commission, expressly links the three fields in declaring that
- All human beings have the fundamental right to an environment adequate for their health and well-being.
- Rio Declaration (Principle 14) provides that states should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that, inter alia, are found to be harmful to human health.

The Jurisprudence and Comments of Human Rights Bodies

- Environmental treaties generally do not establish complaint or petition procedures. In the absence of such procedures, cases concerning the impact of environmental harm on individuals and groups have been brought to international human rights bodies. In addition, these bodies have sometimes addressed the intersection of human rights, health and environmental protection in General Comments.

- In addition to specific human rights treaties, United Nations organs concerned with human rights have taken up the links between human rights, health and environmental protection.
- The United Nations Human Rights Commission has a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, whose mandate includes consideration of complaints submitted to her.
- All of the reported cases involve harm to human health as a result of the trans boundary movement of hazardous materials, nearly always in violation of national and international environmental law.
- In its resolutions on this matter, the Commission now consistently recognizes that such environmental violations also constitute a serious threat to the human rights to life, good health and a sound environment for everyone.

Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection

DEFINITION OF AN ENVIRONMENTAL RIGHT IN AHUMAN RIGHTS CONTEXT

The Right to Environment: What Does it Comprise

Scholars are split on the issue of whether the right to environment should be procedural or substantive in character.

Procedural Rights

One view is that the right to environment should be purely procedural. There are a range of procedural rights at both international and domestic levels which are relevant to environmental protection.

- ✓ These include the right to information, the right to receive prior notice of environmental risks, the right to participate in decision-making in environmental issues at both the domestic and international level, the right to environmental impact assessments, the right to legal remedies including standing to initiate public interest litigation and the right to effective remedies where environmental damage is caused.
- ✓ Advocates of procedural rights argue that a single precise formulation of a substantive right to environment is not feasible since "the desired quality of the environment is a value judgment which is difficult to codify in legal language".

- Procedural human rights are emphasized in environmental agreements.
- Several dozen international treaties adopted since the Stockholm Conference call upon states to take specific measures to ensure that the public is adequately informed about environmental risks, including health risks, posed by specific activities. In addition to the right to information, the public is also given broad rights of participation in decision-making and access to remedies for environmental harm.
- The protections afforded have increased in scope and number since the adoption of Principle 10 of the Rio Declaration on Environment and Development.

Substantive Rights

- Proponents for a substantive right to environment argue that such a right would provide more effective protection. A substantive right can provide more effective protection, and may play a role in defining and mobilizing support for environmental issues.
- Advocates of substantive rights see procedural rights as lacking, in the sense that they cannot guard against a participatory and accountable polity that may opt for short-term affluence rather than long-term environmental protection. As such, procedures alone cannot guarantee environmental protection.
-

Principle 10 of the Rio Declaration on Environment and Development reflects this notion:

- *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

✓ The Right to Information

Access to environmental information is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities. It also can assist enterprises in planning for and utilizing the best available techniques and technology.

- The right to information is recognized as a right in most domestic jurisdictions either by constitutional provision or by freedom of information legislation that covers most information held by public authorities, including environmental information. Laws requiring Environmental Impact Assessment have this feature by implication, since E.I.A. generally must be made available to the public for comment. Laws recognizing citizens' suits also have provisions enabling citizens to obtain necessary information.

- The right to information is included in the Human rights instruments like
- Universal Declaration of Human Rights (Art. 19),
- the International Covenant on Civil and Political Rights (Art. 19(2)),
- the Inter-American Declaration of the Rights and Duties of Man (Art. 10),
- the American Convention on Human Rights (Art. 13), and
- the African Charter on the Rights and Duties of Peoples (Art. 9).

Furthermore, Broad guarantees of public information are found in regional agreements,

- ✓ incIuding the 1992 Helsinki Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes (Art. 16),
- ✓ the 1992 Espoo Convention on Environmental Impact Assessment in a Trans-boundary Context (Art. 3[8]), and
- ✓ the 1992 Paris Convention on the North-East Atlantic (Art. 9).

- The provisions of the Rotterdam *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Sept. 11, 1998) encourages parties to ensure that information on chemical and pesticide hazards is made available to the public. Art. 15(2) on implementation requires each state party to ensure, “to the extent practicable” that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment .

- Similarly, Article 10(1) of the *Convention on Persistent Organic Pollutants* (Stockholm, May 22, 2001) specifies that each Party shall, within its capabilities, promote and facilitate provision to the public of all available information on persistent organic pollutants

✓ **Public Participation**

Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future. Depending on the jurisdiction, this may include foreign citizens and residents. In the EIA context, the public typically incorporates all stakeholders including communities, women, children, indigenous people, non-governmental organizations, other state and non-state institutions.

- The EIA report is made available to the public for comment for a specified period and the public is usually allowed to submit written comments.
- Non-governmental organizations (NGOs) and groups such as trade unions or manufacturers' associations are an organized means of public participation in environmental decision-making.

The 1992 *Rio Declaration on Environment and Development,* principle 10, recognizes the need for public participation. Agenda 21, the plan of action adopted at the Rio Conference, calls it "one of the fundamental prerequisites for the achievement of sustainable development."

- It calls for public participation in environmental impact assessment procedures and participation in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. It encourages governments to create policies that facilitate a direct exchange of information between the government and the public in environmental issues.
- The *Climate Change Convention,* The *Desertification Convention* recognize, The Biodiversity Convention provides for public participation in environmental impact assessment procedures
- The right to public participation is also widely expressed in human rights instruments.

- ✓ **Access to Justice**
- The right to an effective remedy, meaning access to justice and redress, can be found in both human rights law and in environmental law. The ICCPR calls for states to provide a remedy whenever rights protected under national or international law have been violated.
- In the ECHR, Article 13 guarantees a remedy whenever there is a violation of the rights and freedoms contained in the Convention, thus encompassing violations of the right to information.
- The Inter-American and African regional human rights systems contain a similar guarantee.
- Environmental instruments frequently proclaim the need for effective remedies. Principle 10 of the Rio Declaration provides that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
- Agenda 21 calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organizations with a recognized legal interest.

- The right to a remedy is not necessarily limited to nationals of a state. Some international agreements contain obligations to grant any injured person a right of access to any administrative or judicial procedures equal to that of nationals or residents. Equal access to national remedies has been considered one way of implementing the polluter pays principle because it tends to expand the scope of polluter accountability.

- ✓ **Environmental Quality**
- Almost every constitution adopted or revised since 1970, either states the principle that an environment of a specified quality constitutes a human right or imposes environmental duties upon the state. State practice is divided over the issue of the justiciability of the right to a safe and healthy environment. Some courts have allowed lawsuits to enforce the right, while others have not.
- At present, no global human rights treaty proclaims a right to environmental quality, although the *Universal Declaration of Human Rights* and other human rights instruments contain a right to an adequate quality of life and a right to health. It is unclear the extent to which these generally stated rights will ultimately be viewed as including an enforceable right to clean and healthy environment. Among non-binding instruments, a significant number have included references to environmental rights or a right to an environment of a specified quality.

- the 1981 *African Charter on Human and Peoples Rights* was the first international human rights instrument to contain an explicit guarantee of environmental quality. Subsequently, the *Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights* included the right of everyone to live in a healthy environment (Art. 11)

Links between human rights and environmental protection

- The 1972 Stockholm Declaration on the Human Environment recognized the link between human rights and environmental protection stating that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".
- The Stockholm Declaration "does not actually proclaim a right to the environment, but implies that the exercise of other human rights indispensably requires basic environmental health".

Are environmental rights the same as human rights? Or put another way, are all environmental rights part of the corpus of human rights law?
Plainly, insofar we are talking about a greening of rights found in avowedly human rights treaties – the ICCPR, the ICESCR, the EHCHR, the IACHR and the ACHPR – then we are necessarily talking about human rights law. That includes the right to life, right to private life, right to health, right to water, and right to property.

- ✓ But not all environmental rights are found in mainstream human rights treaties. The most obvious example is the Arhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UNECE. Its preamble not only recalls Principle 1 of the Stockholm Declaration and recognizes that

'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself' but also asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.'

- As Kofi Annan, formerly Secretary-General of the UN, observed: 'Although regional in scope, the significance of the Aarhus Convention is global. [I]t is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.' In his view the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.

The Aarhus Convention represents an important extension of environmental rights, but also of the corpus of human rights law. However, its focus is strictly procedural in content, limited to public participation in environmental decision-making and access to justice and information. As a conception of environmental rights it owes little to Stockholm Principle 1 and everything to

Principle 10 of the 1992 Rio Declaration, which gives explicit support in mandatory language to the same category of procedural rights. The Aarhus Convention is widely ratified in Europe and has had significant influence on the jurisprudence of the European Court of Human Rights, whose decisions in effect incorporate its main elements.

Conceptual Aspects of the Link Between Environmental Protection and Human Rights

- ✓ International environmental law and human rights law have intertwined objectives and ultimately strive to produce better conditions of life on earth. They both seek to tackle universal challenges that must often be solved at the same time at the individual and global level.
- ✓ The necessity to link both fields stems from the different, complementary and partial approaches each has attempted to follow. Environmental law seeks to protect both nature for itself, and for the benefit of humankind on a local and global scale. It has broadly been confined to regulating inter-state relations and, of late, the behavior of some economic actors.
- ✓ Human rights have centred on fundamental aspirations of human beings with much more developed compliance mechanisms allowing individuals and groups to claim their rights. The inclusion of an environmental dimension in the human rights debate has become necessary in view of the recognition of the pervasive influence of local and global environmental conditions upon the realization of human rights.
- ✓ In legal terms, the new linkages will come to enhance the protection in both fields as the protection of the environment will benefit from the established machinery whereas the human rights system will be enhanced by the inclusion of new interpretative elements until recently ignored.

Different avenues for the integration of environmental concerns in the realization of human rights can be envisaged.

- Firstly, a reinterpretation of human rights included in international instruments can be attempted. Environmental conservation is hereby included as a further interpretative element widening the scope of the rights.
- Second, some procedural rights developed separately in human rights and environmental law instruments could be used in conjunction to form a body of very effective technical rights.
- Finally, a right to environment may be formally added to the catalogue of internationally guaranteed human rights. While each approach can be to some extent pursued separately, they all tend towards the same goal.

However, if the inclusion of a new right requires an analysis of the substantive issues at stake, the reinterpretation of recognized rights and procedural rights only intervene at the level of the implementation of the claim

- The linkage between environmental and human rights concerns has so far been envisaged mostly in terms of the protection or conservation of a clean or healthy environment for the benefit of individuals whose conditions of life are threatened, e.g. by noise disturbances or air pollution arising from airports or motorways and industrial pollution.
- To arrive at a truly universal formulation, a right to environment should also encompass other issues of concern to a majority of the world's population, including access to fresh water and food supplies.

- it has already become apparent that preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of, inter alia, the rights to health, to food and to life including a decent quality of life.'
- The close link with these rights clearly shows that a right to environment can easily be incorporated into the core of the human rights protection whose ultimate purpose is the blooming of the personality of all human beings in dignity.

- It is clear that environmental protection is intrinsically related to a number of other human rights and comes out as both a precondition and an outcome of the enjoyment of many rights.' A right to environment should nevertheless not be classified as a synthesis right,' because it embodies specific characteristics that can be distinguished from other rights, and does not constitute a 'shell-right' aimed at enhancing the realization of the other ones."
- In fact, the widespread criticism of this right stems mainly from the incapacity we have to mold it into one of the old categories of human rights. However, we cannot and should not attempt to categorize this new right as, either a civil and political right, or an economic, social and cultural right, or a solidarity right because it transcends the distinctions and embodies elements found in each of the three categories."

- The right to environment requires States to refrain from activities harmful to the environment, and to adopt and enforce policies promoting conservation and improvement of the quality of the environment.' Secondly, it appears on several counts that the right is not purely an individual right: one may single out the rights of future generations whose interests must be taken into account but whose individual members cannot be identified," or focus on more precise claims relating in particular to displaced indigenous peoples facing the total loss of their cultural, social and physical environment.
- The right to environment thus reminds us of the inanity of a tight separation between positive and negative rights, individual and collective rights or political and economic problems, distinctions that were promoted primarily as political or ideological weapons during the Cold War rather than grounded in the nature of the rights themselves.

Formulation of the Right to environment

Most of the instruments embodying this right have either qualified the word environment," or focused the attention on some particular elements. In most instances, the right recognized is a right to a healthy or clean environment or an environment conducive to well-being and higher standards of living, all of which center on the quality of life of the better-off throughout the world." Some bolder formulations speak of a right to a decent environment encompassing social and cultural aspects that take,

e.g. into account the suitability of a given environment to an individual or a people according to its social and cultural needs and thus acknowledge the interdependence of all elements of the human environment." Finally, a number of instruments recognize the link between the protection of the environment and development. This was first envisaged in a binding instrument in the African Charter.

Two different trends can be identified in the history of these provisions.

First, at the UN

level, the references to a right to environment have become over the last 20 years less and less clear even though a great number of instruments do acknowledge the relationship between human rights and environmental protection.

- Second, conservation of the environment has become over the years intrinsically enmeshed with development. If people may have been able to speak of environmental protection for itself at the 1972 Stockholm Conference on the Human Environment, everything tends to be put today under the heading of sustainable development that supposedly reflects the integration of developmental and environmental concerns.2

- in the Rio Declaration, what is at stake is the relationship between economic growth and environmental protection rather than development, human rights and the environment. The problem is then that economic growth is seen as the first element in the relationship between development and environment and that the human rights dimension

Chapter 4 COMMON LEGAL MECHANISMS OF ENVIRONMENTAL PROTECTION

- There are two regulatory systems w/c aim to prevent environmental harm.
- ✓ The first is a system that attempts to establish individualized pollution controls and mitigation measures through environmental impact assessment.
- ✓ The second system relies on a permit or licensing regime that requires adherence to pre-established norms (quotas, bans on the use of certain substances).

- International environmental agreements today usually require states parties to adopt environmental impact or risk assessment procedures, licensing requirement and monitoring protocols. Environmental auditing, product labeling, use of best available techniques and practices and prior informed consent also commonly appear in global and

1. **Prohibiting and Restricting Activities and Substances**

- If an activity, product or process presents a substantial risk of environmental harm, strict measures can be imposed in an effort to reduce or eliminate the harm. When the likelihood of risk is too great, a complete prohibition can be enacted. Environmental laws often call for restricting or banning hazardous products, processes or activities.
- Criteria such as toxicity, persistence, and bioaccumulation may serve to determine which substances should be banned or severely restricted.
- International instruments commonly provide that states should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects.

2. Environmental Impact Assessment and Monitoring

- ✓ Environmental impact assessment (EIA) is ‘a procedure for evaluating the likely impact of a proposed activity on the environment.’
- ✓ provide decision-makers with information about possible environmental effects when deciding whether to authorize the activity to proceed.
- ✓ seeks to ensure that adequate and early information is obtained on likely environmental consequences of development projects, on possible alternatives, and on measures to mitigate harm.
- ✓ It is generally a prerequisite to decisions to undertake or to authorize designated construction, processes or activities.

- EIA require that a developer or business owner submit a written document to a designated agency or decision-making body, describing the probable or possible future environmental impact of the intended action. An adequate and rigorous consideration of alternatives is at the heart of the EIA decision-making process.

- Monitoring is a process whereby states ‘observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects’ of pollution or environmental harm. Unlike prior EIA, monitoring is generally undertaken after the project has begun; its purpose is to check initial EIA predictions and determine whether further measures are needed in order to abate or avoid pollution or environmental harm.

- At present, environmental impact assessment is singularly important in both domestic and international environmental law. International instruments today commonly provide that states should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects.
- Environmental impact assessment is so well established in national practice that it might be regarded as a general principle of law or even a requirement of customary law for states to conduct an EIA in accordance with the consensus expressed in the 1992 Rio Declaration on Environment and Development. Principle 17 It is formulated in the broadest of terms:

  Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority.

Environmental impact assessment proclamation

- The Proclamation has made EA to be a mandatory legal prerequisite for the implementation of major development projects, programs and plans. This proclamation is a proactive tool and a backbone to harmonizing and integrating environmental, economic, cultural, and social considerations into a decision making process in a manner that promotes sustainable development.

According to Environmental Impact Assessment Proclamation No. 299/2002, Art. 2(3)

> *Environmental Impact Assessment means the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument.*

- An environmental impact assessment (EIA) in Ethiopia is the duty and responsibility of both the federal and the regional environmental agencies, which are mandated by both EIA proclamation (Proc. no 299/2002) and the Environmental Protection Organs Establishment (EPOE) Act (Act no.295/2002).

Federal Environmental Protection Authority

- All the roles and responsibilities related to the EIA issues in Ethiopia emanate from the Environmental Impact Assessment Proclamation (Proc. No. 299/2002). The EPA has the following roles and responsibilities

i. administrates the main environmental issues such as environmental pollution control and

- environmental impact assessment

- the Environmental Protection Authority (EPA) has taken major action and prepared a draft EIA system, including Procedural Guidelines, which is used for all types of development projects in any sector (e.g. Agriculture, Industry, Transport).
- The main purpose of this procedure is that it is to be used as a tool for both planning and decision making, with the objective of ensuring that potential problems with projects and other development activities are foreseen and addressed at an early stage in the project cycle or other planning process.

- The most important step in setting up the legal framework for the
- environment in Ethiopia has been the establishment of the Environmental
- Protection Authority (EPA) by proclamation No. 9/1995. According to this
- proclamation the Environmental Protection Authority (EPA) has amongst its
- 'powers and duties':
- • To prepare environmental protection policy and laws; and, upon
- approval, follow up their implementation.
- • To prepare directives and systems necessary for evaluating the impact of
- social and economic development projects on the environment; follow
- up and supervise their implementation.

The significance of EIA

- ✓ EIA is a procedure to identify and evaluate the effects of activities (mainly human) on the environment natural and social. It is not a single specific analytical method or technique, but uses many approaches as appropriate to the problem.
- ✓ EIA is not a science but uses many sciences in an integrated inter-disciplinary manner.
- ✓ EIA should be treated as an integral part of project planning.
- ✓ EIA does not give decisions but its findings should be considered in policy and decision-making and should be reflected in final choices. Thus it should be part of the decision making process.

2. Risk Assessment (RA)

- ✓ Risk concerns the probabilities in between the two extremes of certainty and impossibility and requires knowledge of the entire range of potential impacts of substances and actions.
- ✓ All human actions, including human interaction with nature, involve some risk of causing harm. Managing and reducing risk is the basic objective of many environmental policies, legislation, and regulation.
- ✓ Risk assessment may be considered part of the precautionary principle, because it attempts to evaluate the probabilities of various harms resulting from a proposed activity on the basis of which a decision can be taken.
- ✓ From a legal perspective, once a prima facie case is made that a risk exists, the burden may be placed on the polluter to minimize or eliminate the risk.

- Risk assessment thus addresses the issue of scientific uncertainty in a procedural manner, documenting each part of a process that is accessible or transparent to all key parties.

3. Product and Process Standards

National and international laws sometimes establish standards for products and processes that impact the environment. Standards are prescriptive norms that govern products or processes or set limits on the amount of pollutants or emissions produced. Standards may be set for production processes, emission levels, product characteristics and ambient quality standards for a given environmental milieu.

i. Process Standards

- Process standards specify design requirements or operating procedures applicable to fixed installations such as factories or may designate permissible means and methods of activities like hunting or fishing.
- Sometimes, a particular production process or techniques is imposed on operations, such as the installation of purification or filtration systems in production facilities.
- Process standards often are used to regulate the operations of hazardous activities posing a risk of accidents or other dangers.
- Process standards frequently establish norms for an entire industry or class of operation, driving similar types of operations to achieve comparable levels of pollution control.

- In international environmental law, process standards specify design requirements or operating procedures applicable to fixed installations, such as factories, or designate permissible means and methods of activities like hunting or fishing. Sometimes, a particular process or technique is imposed on operations, such as the installation of purification or filtration systems in production facilities. Process standards often are used to regulate the operations of particularly hazardous activities or substances.

- Product standards, in contrast, are used for items that are created or manufactured for sale or distribution. Such standards may regulate:
- • The physical or chemical composition of items, such as pharmaceuticals or detergents. Examples include regulations that control the sulphur content of fuels or list substances whose presence is forbidden in certain products, for instance, mercury in pesticides.
- • The technical performance of products, such as maximum levels of pollutant or noise emissions from motor vehicles or specifications of required product components, such as catalytic converters.
- • The handling, presentation, and packaging of products, particularly those that are toxic. Packaging regulations may focus on waste minimization and safety

ii. Product Standards

- Product standards are used for items that are created or manufactured for sale or distribution. Such standards may regulate: The physical or chemical composition of items such as pharmaceuticals or detergents. list substances whose presence is forbidden in certain products, for instance, mercury in pesticides.
- The handling, presentation and packaging of products, particularly those that are toxic. Packaging regulations may focus on waste minimization and safety.
- Labeling requirements are used to ensure that consumers are aware of the contents and the permissible uses of products. Labeling requirements often aim to avoid accidental environmental harm through misuse, spills or improper disposal of the product.

iii. Emission Standards

- Emission standards specify the quantity or concentration of pollutants that can be emitted in discharges from a specific source. As a general rule, emission standards apply to fixed installations, such as factories or homes; mobile sources of pollution are more often regulated by product standards.
- Emission standards are the type of standards most commonly required by international agreements and are mandated by several important agreements

Emission standards are based on the assumption that:

- ✓ Certain levels of some contaminants will not produce any undesirable effect:
- ✓ There is a finite capacity of each environment to accommodate substances without unacceptable consequences (the assimilative capacity) and ;
- ✓ The assimilative capacity can be quantified, apportioned to each actor and utilized.

Pollution occurs whenever the effects of the contamination on biological systems can be measured.

iv. Ambient Quality Standards

- Ambient quality standards fix the maximum allowable level of pollution in an environmental sector during normal periods.
- A quality standard may set the level of mercury permissible in rivers, the level of sulfur dioxide in the air or noise level of airplanes in the proximity of residential areas.
- Quality standards often vary according to the particular use made of the environmental resource. For example, different water quality standards may be set for drinking water and waters used for bathing and fishing.
- Quality standard also can vary in geographic scope, covering national or regional zones, or a particular resource, such as a river or lake, but each quality standard establishes base norms against which compliance or deviance are measured.

- **Restrictions and Prohibitions**
- If an activity, product, or process threatens environmental harm, strict measures can be imposed in an effort to reduce or eliminate the harm. When the likelihood of harm is too great, the measure may call for a total product or process ban. The numbers and types of restrictions are almost unlimited, but certain ones are commonly used.
- Environmental treaties often call for restricting or banning hazardous products, processes, or activities. Lists have been widely employed in protocols to environmental treaties, beginning with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Nov. 13, 1972). This Agreement has two lists, the first containing those substances absolutely prohibited (the black list) and the second list setting forth those substances that must be licensed for disposal (the grey list). The model of black and grey lists it established was subsequently employed in UNEP regional seas agreements for controlling land-based sources of pollution. Substances are classified and limits established on the basis of their toxicity, persistence, and bioaccumulation.

4. Prior Licensing and Permits

- Environmental laws frequently mandate government officials to authorize, certify or issue permits or licenses to activities or establishments or that poses threats to the environment or that use natural resources.
- Norms that regulate environmental milieu, such as air pollution, drinking water, noise, chemicals, and taking of wildlife often call for licensing as part of their regulatory framework.
- As a result, hazardous installations such as nuclear plants, mines, natural gas or petroleum works are likely to have more stringent licensing requirements than other operations.
- Where environmentally hazardous products are present, such as industrial

chemicals, pesticides or pharmaceuticals, authorizations may be required for the manufacture, marketing importation, exportation or use of the product.

- Most licensing controls are not designed to eliminate all pollution or risk of resource depletion, but rather to control serious pollution and to conserve resources as much as possible

- Judges often face appeals from grants or denials of licenses. In such instances, an initial question is the scope of review to be conducted. Some courts conduct a full review or de novo hearing while others afford considerable deference to administrative agency decisions.

- **National Law**

The decision- making process for granting a license may be exercised by central authorities, regional or local bodies. The decision is typically based on information supplied by the applicant, including a description of the planned activities a study of accident risks, and a disproportion of possible anti-pollution or anti-nuisance measures. An essential condition for initial and continuing authorization in most licensing regimes is compliance with certain environmental standards, which are typically written into or incorporated by reference in licenses. These conditions are reviewed periodically and may require, for example, the use of the best available techniques; compliance with obligations under international and law relating to environmental protection; compliance with the limits or requirements and achievement of quality standards or objectives prescribed by legislation; imposition of emission limits; and a requirement of advance notification of any proposed change in the operations of the activity or process.

- Once a license is granted, it creates legal rights and obligations and typically can only be cancelled after an investigation, a fair hearing and a decision based on relevant data, evidence and facts.
- When we closely scrutinize the Ethiopian Legal System, Article 3 of the Environmental Assessment Proclamation No 299/2002 clearly stipulates that:
- *Without authorization from the Authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment.*

- Furthermore, it clearly depicts that:
- *Any licensing agency shall, prior to issuing an investment permit or a trade or an operating license for any project, ensure that the Authority or the relevant regional environmental agency has authorized its implementation.*
- Finally to realize continuous follow up Article 11 of the same Proclamation provides that:
- *If an unforeseen fact of serious implication is realized after the submission of an environmental impact study report, the Authority or the relevant regional environmental agency may, as may be appropriate, order the environmental impact assessment to be revised or to be redone in order to address the implication.*
- In a nutshell, from the very reading of the above provisions we can infer the very fact that to realize friendly environment the concerned authorities are expected to take both proactive and reactive measures.

International Law

Numerous international treaties oblige their states parties to license potentially harmful activities,

- ✓ e.g. Oslo Convention for the Prevention of Marine Pollution by dumping from Ships and Aircraft;
- ✓ Paris Convention for the Prevention of Marine Pollution from Land- Based Sources;
- ✓ CITES; Basel Convention on Hazardous Waste;
- ✓ Bamako Convention on Hazardous Waste in Africa;
- ✓ London Dumping Convention;
- ✓ MARPOL;
- ✓ UNCLOS and the various regional seas agreements;
- ✓ Whaling Convention;
- ✓ African Convention on the Conservation of Nature and Natural Resources;
- ✓ and the ASEAN on the Conservation of Nature and Natural Resources.

- In international trade, the delivery of export licenses and permits is often subject to the prior authorization of the importing state. Such consent is required by the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes (1989). The 1998 Convention on Prior Informed Consent, derived from non-binding principles established by UNEP and FAO, extends the system of double authorization to hazardous substances and products other than wastes

- **Prior Informed Consent**
- Prior informed consent (PIC) is a procedural mechanism utilized in advance of activities in order to avoid potential conflict and reduce the risks of environmental or social harm. Internationally, prior informed consent requires obtaining and disseminating the decisions of importing countries on whether they wish to receive shipments of restricted or banned products after they have been fully informed about the hazards posed by the products. In most instances, the products to which the procedure applies are those that are posed by the products.
- In national law, judicially enforceable PIC procedures may apply to foreign products seeking entry into the country or mediate access to a state‟s biological resources, in order to obtain disclosure of potential benefits arising from the entry or access.

- Three global environmental agreements rely on a form of prior informed consent: the *Convention on Trans-boundary Movements of Hazardous Wastes (Basel, March 22, 1989), the 1998 Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, Sept. 10, 1998) and the Bio-safety Protocol (Montreal, Jan. 29, 2000) to the 1992 Convention on Biological Diversity (CBD).*

CHAPTER 5 THE LEGAL FRAMEWORK OF ENVIRONMENTAL PROCEEDING

- The implementation of constitutional Environmental Rights that we have discussed so far is impossible, without the promulgation and practical enforcement of procedural litigation in relation to Environmental matters. It is through litigation that courts enjoy their unique role in upholding the environmental justice.

Legal Personality and Standing; the Environment as a Legal Entity in Itself

- whether legal personality should be bestowed to the environment as a separate legal entity or not depends on the type of theory which orient the legal system of a country, so much so that, before we embark on the concept of legal standing in relation to environmental proceeding in Ethiopia, at this juncture, it is important to have a clear picture on the environmental theories that could shape or orient a legal system in favor of one or the other.

- Legal personality in relation to environmental proceeding is one of the fundamental controversial areas of discourse. There is no universal view in this regard. That is, whether legal personality should be bestowed to the environment as a separate legal entity, eco-centric or whether they focus on human beings, anthropocentrism.

- **the Anthropocentric Theory**, it refers the relationship between human beings and the environment, as a relationship in which environment is valuable only to the extent to which they can be used and exploited by human beings. This view considers nature as an instrument [as merely a means] instead of having any intrinsic values in its own self [an end in itself].
- From the above points, we can inter the fact that anthropocentric view considers humans and nature as separate, and human beings placed in the center; such that, the environment being instrumental to the interest of man, legal personality can be bestowed only to human beings
- where and when their interest is at stake. In other words, they deny legal personality to the environment because they consider it as contingent/ accessory to the human element.

Ecocentric theory

- According to this theory the well-being and flourishing of all life forms on earth have value in themselves. Man has no right to reduce the diversity and richness of nature which has an intrinsic value. This theory fundamentally rejects separation of human beings from nature. It considers man as intimately connected and as such part of the natural environment128. Thus, proponents of the ecocentric view seek a fundamental shift in consciousness from human domination of nature to a perception of human and non-human life as of having equal intrinsic value. For the above very reasons, this theory acknowledges the conferring of legal personality to each distinct part of the environment to exercise their own right at their own behest.

- **When we come back to the legal orientation of the Ethiopian environmental law**, it sounds haphazard and thus ambiguous; while the right to live in a clean and healthy environment under Art.44 of the constitution is entrenched under chapter three, part two of the constitution which provides for group rights as a fundamental rights and freedoms, thereby bringing into the forefront the anthropocentric approach, the environmental policy recognizes that the species and their variants have the right to continue existing, and are, or may be, useful now and/or for generations to come.
- In this respect even in the policy stipulation there is confusion in that, the first line clearly shows that the approach is ecocentric; whereas the second refers to anthropocentric approach for it refers to utility aspect of the environment

- To uphold the right of the environment, the Draft Bio-safety proclamation may also show the trend of the law in that it entitles any person, group of persons, or any private or state organization to bring a claim in the name or on behalf of the environment.
- Thus, the Ethiopian environmental law to a degree falls in line with the above declared international norm whereas part of the same law holds the contrary position, that is, that of anthropocentric approach. As a result, it is creating confusion between the law and the policy.

- Here, the recognition of the right to a clean and healthy environment to human beings does not necessarily imply the exclusion of recognition of right to the environment per se as a legal entity in itself. In fact, it should be taken as a corollary position which would have a paramount importance.
- On the basis of the above logic, the writers favor striking the balance between the interests of human beings on the one hand, and that of the environment on the other. To this effect, the researcher favors bestowing legal personality to the environment so long as it does not go against the rights of human beings whose interests are maintained by the exercise of personal and citizen standing.

- **General overview of Standing**
- The first aspect that determines the enforcement of constitutionally-entrenched Environmental rights through courts and other judicial bodies is the locus standi (standing) of the applicant.
- Standing determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a tribunal authorized to grant the redress sought.
- Standing is a preliminary issue, the lack of which precludes any form of determination over the merits of the case.

- The traditional *Locus standi rules require a party bringing suit to have a sufficient interest or personal stake in the outcome of a case to distinguish the individual from other persons or the public at large.*
- *The plaintiff must have experienced a distinct injury traceable to the alleged conduct of the defendant. Individuals and groups have generally been able to meet the requirement if they show an injury to their aesthetic, conservational or recreational interests.*
- The obvious impact of this interest requirement is that the law regards it preferable that an illegality should continue than the person excluded should have access to courts.
- These exclusionary rules are justified by, among others, the idea that judicial action is only necessary to prevent or compensate for a real injury.

- This traditional approach is considered an impediment to access to justice. Accordingly, it is argued that, the traditional rule of standing is highly individualistic, concerned with an atomistic justice, incapable of responding to the claims and demands of the collectivity, and resistant to change.
- The traditional approach may also exclude the majority, particularly the poor and the ignorant, who are often the helpless victims of violations, from accessing judicial bodies.
- This calls for more robust and inclusive standing rules. Strict standing rules threaten to exclude individuals and groups who might not be aware of their rights, or who might not be able to vindicate their rights for a myriad of reasons.

- Where numerous individuals are harmed, with environmental damage, many jurisdictions allow class actions to be filed by one or more members of the group or class of persons who have suffered a similar injury or have a similar cause of action.
- The class action is essentially a procedural device to quickly and efficiently dispose of cases where there are a large number of aggrieved persons.
- Petitioners file on behalf of themselves and others of their class, representing the others and subsequently others are asked to join in.

Public Interest Litigation in Environmental Proceeding

- Public interest litigation differs from conventional litigation where the parties seek to resolve a dispute that is peculiar to them and there is no impact on the general public except in so far as it clarifies the law on that point.

Public Interest Litigation: Meaning, Definition and Concept

- Public interest litigation is a “legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected’’. It is a form of legal proceeding in whichredress is sought in respect of injury to the public in general

Aspects of Public Interest Litigation

i. Liberalization of standing

- ✓Locus Standi (or standing) is a Latin term, which means legal standing before a court. It determines whether hearings should be held and who should be heard. It can determine the issues that are decided and the interests that are represented in those decisions.
- ✓A person with standing "is someone with the necessary legal status to trigger a hearing that would not otherwise occur, or someone with full party status in hearings that have been triggered"
- ✓Liberalized standing rule that dissociates standing from a concrete and particularized injury is the main aspect of PIL in environmental matters.

- The traditional conceptions of standing were very focused on a private individual’s enforceable legal rights.

✓ The reason w/c justify the relaxation of standing is that the decree in a case with a large number of stakeholders, such as environmental matters, has the nature of a “public good,” which would not be provided for, or is, at best, underprovided by a rational victim. Hence, the requirement of standing “becomes an impediment to the redress process”.

✓ the relaxation of standing and PIL is usually more efficient in dealing with environmental cases, because these cases are concerned with the rights of the community rather than the individual.

✓ Unlike the traditional tort approach, in liberalized standing, the environment is valued as a unity and that the protection and conservation of natural resources does not stop at the border of private property.

Public Interest Litigation and Public Interest Environnemental Litigation in ethiopia (PIEL)

- Access to justice is a right guaranteed to everyone in Ethiopia according to Art 37 (1) The Constitution also guarantees the right to any association representing the collective or individual interest of its members. embodies right to access to justice is recognized applies to any action including violations of environmental rights.
- The right has been further recognized in the major international and regional human rights instruments to which Ethiopia is a party such as: the Charter of the United Nations, (UNHR), (ICCPR),the African Charter on Human and Peoples' Rights, and (CESCR).

- Unlike the Civil Procedure Code of Ethiopia which puts the requirement of ‘vested interest’ for one to petition any judicial or quasi-judicial body, the plain reading of Article 37(1) does not seem to embody the requirement of standing.
- There are some scholars who argue that the constitutional provision should be understood in a literal sense as relaxing or otherwise lifting the “vested interest” requirement, thereby enabling any one, including NGOs, to bring a legal action and seek relief thereof.
- Others, on the other hand, believe that sub-article makes such interpretation very difficult, and that it is very difficult to establish PIL based on Art. 37 of the Constitution.

- claim that pollution from an industry endangers the lives of the group's members and thus its existence as a group. Thus, in addition to the right that every physical person has, associations possess a special right in that they can litigate for the interest of their members under the FDRE Constitution.
- Even though allowing associations to bring a legal action representing the interest of their members is commendable, it is very difficult to establish PIEL based on Article 37((2(a)) as the requirement of *vested interest is still there.*
- According to Article 37(2(b) any group or person who represents a group with similar interest has a standing to bring justifiable matters before a court of law or any other competent body with judicial power.
- What constitutes a group with similar interest? Do residents of a certain area who are affected by emissions from a factory constitute a group with similar interest? What about those persons who have ‘a similar interest’ in protecting their right to a clean and healthy environment? The term seems to be broad enough to include these and other groups.

Q. Another important issue in this regard relates to the meaning of ‘representation’.

- ✓ Does it require the consent of victims of pollution from a factory or other activities?
- ✓ Or is it possible for an NGO or a public spirited individual to represent “a group with similar interest” without their consent or even without their knowledge?

- the Pollution Control Proclamation (PCP) which expressly introduced PIEL in the Ethiopian legal system for the first time. Yet, the above line of interpretation of the Constitutional provision is still restrictive with regard to standing, because (unlike the Pollution Control Proclamation) it does not accord personality to the environment which could have protected the environment without the need to represent any victim.

- As part of the move to realize the right, Article 11 the Pollution Control Proclamation has introduced PIEL as one of the innovative strategies in the Ethiopian legal system, and has thus opened the door for individuals and environmental rights advocacy groups to bring cases before courts.
- Sub-article one of the provision guarantees any person the right to “lodge a complaint at the Environmental Protection Authority (EPA) or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment” without the need to show any vested interest.
- A complainant is granted with the same broad right of standing before a court when the EPA or regional environmental agency fails to give a decision within thirty days or when he/she is dissatisfied with the decision.

- Similarly, Article 10 of Regulation No.159/2008 provides that any person without the need to show any vested interest can submit his complaint before the competent environmental organ (the Ministry of Environment, Forest and Climate Change or Regional Environmental Organs) concerning industrial pollution.10(1)
- The competent organ to which the complaint is submitted is duty bound to respond to the complainant within 90 days.10(2)
- Any person dissatisfied with the decision of the competent organ has 30 days to submit a complaint notice to the head of the competent organ who should issue his/her decisions within 30 days. 10(3).

Q. whether a suit can be filed against an environmental organ whose inaction causes an environmental pollution.?

In the case between *Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority (APAP v.* EPA), the plaintiff, a non-governmental organization lodged a complaint on urban pollution to the Federal First Instance Court.

It had first lodged its complaint to the EPA as per the requirement of the Article 11 of the Pollution Control Proclamation demanding the latter to take necessary measures to stop the environmental pollution

- APAP stated that Akaki and Mojo rivers are being polluted by solid and liquid waste of Addis Ababa and the untreated liquid as well as solid wastes discharged into these rivers by different factories in and around Addis Ababa and Modjo towns.
- APAP invoked the constitutional right to live in a clean and healthy environment, international human rights instruments and chemical related multilateral environmental agreements ratified by Ethiopia and national legislation, and it argued that these laws and the Pollution Control Proclamation, in particular are clearly violated.

Legal Personality and Standing vis-à-vis the Future Generations

- Before we embark on the legal personality of future generations, it is important to have a fair picture on intergenerational equity. Intergenerational equity exists only when there is sustainable development, that is, when the development in any form meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The inherent idea behind this principle is that we need to impose certain limitations on the development and use of technology as well as on the interest and capacity of consumption of the present day generation.

In intergenerational equity there are two elements. The first is, preserving natural systems for future generations so that the human species can perpetuate itself at the same quality of life and standard of living as the present generation. This objective is different from efficiency and sustainability, because it considers the quality of life in the future, not just the amount of yield that crosses to the present generation.

- The second is preserving area of national significance due to their aesthetic appeal, historic attributes, or ecological significance for the use and enjoyment of future generations.