THE PROMOTION OF SUSTAINABLE DEVELOPMENT THROUGH THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES IN SOUTH AFRICA

By

CHANTELL HOLMWOOD

(LLB)

THE PROMOTION OF SUSTAINABLE DEVELOPMENT THROUGH THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES IN SOUTH AFRICA

By

CHANTELL HOLMWOOD

(LLB)

STUDENT NUMBER: 12314005

Dissertation submitted in fulfilment of the requirements for the degree Magister Legum (LLM) at the North West University (Potchefstroom Campus)

Study Leader: Professor Werner Scholtz

(Associate Professor, NWU, Potchefstroom Campus)

November 2006

INDEX

CHAPTER 1
INTRODUCTION

1.1 *Introduction and Problem Statement* 1
1.2 *Aim of This Study* 6

CHAPTER 2
THE CONCEPT OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW

2.1 *Introduction* 8

2.2 *The History of Sustainable Development* 9
2.2.1 The 1972 United Nations Conference on the Human Environment (*UNCHE*) - Stockholm Conference and Stockholm Declaration 11
2.2.2 Post Stockholm Period: The 1987 Brundtland Report 14
2.2.3 The United Nations Conference on Environment and Human Development (UNCED) – Rio Conference and Declaration 16
2.2.4 The Rio Declaration 17
2.2.5 Agenda 21 19
2.2.6 Rio + 5 21
2.2.7 Rio + 10: Johannesburg World Summit on Sustainable Development – (WSSD) 22

2.3 *Defining Sustainable Development* 24

2.4 *Sustainable Development: Principle or Ideal?* 26
2.4.1 The Relationship between Principles and Ideals 28

2.5 The Principles Characteristic of Sustainable Development 31
2.5.1 Intergenerational equity 32
2.5.2 Intragenerational equity 35
2.5.3 Sustainable Use/Utilisation of Natural Resources 36
2.5.4 The Integration Principle 37

2.6 *Conclusion* 38

CHAPTER 3

THE PRINCIPLES UNDERLYING SUSTAINABLE DEVELOPMENT

3.1 *Introduction* 40
3.2 *Principles versus Rules?* 42
3.3 *The Principles Relevant to Environmental Law* 45

3.4 *The Precautionary Principle* 46
3.4.1 History of the Precautionary Principle 46
3.4.2 Defining the Precautionary Principle 48
3.4.3 Precautionary Principle: Customary International Law or not? 53
3.4.3.1 State Practice (*usus*) 54
3.4.3.2 Opinio Juris 57
3.4.3.3 Treaties and Custom 58
3.4.3.4 Case Law 59

3.5 *The Preventive Principle* 62
3.5.1 History of the Preventive Principle 62
3.5.2 Defining the Preventive Principle 64
3.5.3 Preventive Principle: Customary International Law or Not? 66

3.6 *The Polluter Pays Principle* 67
3.6.1 History of the Polluter Pays Principle 67
3.6.2 Defining the Polluter Pays Principle 69
3.6.3 Polluter Pays Principle: Customary International Law of Not? 71

3.7 *Conclusion* 72

CHAPTER 4
THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND THE UNDERLYING PRINCIPLES IN SOUTH AFRICAN LAW

4.1 *Introduction* 75

4.2 Recognition of International Law and the Influence it has on National Legislation 78
4.2.1 Introduction 78
4.2.2 Treaties and International Agreements 79
4.2.3 Customary International Law 82
4.2.4 Interpretation 83

4.3 *The Incorporation of Sustainable Development through Section 24 of the Constitution* 87
4.3.1 Introduction 87
4.3.2 Wording of Section 24 89
4.3.3 Sustainable Development and the Rule of Law 91

4.4 *Conclusion* 95

CHAPTER 5

ENVIRONMENTAL LAW PRINCIPLES IN SOUTH AFRICAN ENVIRONMENTAL LEGISLATION AND CASE LAW

5.1 *Introduction* 97

5.2 *South African Legislation* 98

5.2.1 The Principles or "Relevant Factors" as contained in *NEMA* 100

5.3 *The Precautionary Principle* 103

5.4 *The Preventive Principle* 105

5.5 *The Polluter Pays Principle* 108

5.6 *The Inclusion of the Principles in Other Environmental Legislation* 113

5.7 *Environmental Principles in National Case Law* 115

5.8 *Conclusion* 123

CHAPTER 6

CONCLUSION AND PROPOSALS

6.1 *Introduction* 126

BIBLIOGRAPHY 132

CHAPTER 1

INTRODUCTION

1.1 Introduction and Problem Statement

The alleviation of poverty, the depletion of renewable and non-renewable natural resources and the increasing effects of pollution are challenges, which countries are facing in the international community.[1] New threats emerge constantly, which may further aggravate the global situation impacting seriously, on more than just the environmental and economic sectors.[2] Mankind uses natural resources to sustain a living but the 'environment'[3] must be protected for future generations and use. Environmental law therefore derives from the common interest of mankind as well as the recognition of rights and freedoms. Principle 1 of the *Stockholm Declaration* establishes this link.[4]

Prior to 1970's, international law largely excluded environmental laws on the premise that all countries had 'sovereignty' over their resources and all other entities and activities within their territory.[5] The environment became increasingly vulnerable to human induced changes in the years, but it was not until the 1970's when shocking statistics were released that led to serious scientific, public and political attention

---

1 Glazewski *Environmental Law in South Africa* (2nd ed) 1.

2 Van Jaarsveld *et al A Global Security Approach to Implementing Sustainable Development in Southern Africa* 2.

3 The term environment will be briefly discussed in Chapter 2 of this study.

4 Principle 1 of the *Stockholm Declaration on the Human Environment*, U.N. Doc. A/Conf. 48/14/Rev.1 states that:

> Mankind has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Furthermore Principle 2 also states that:

> The natural resources of the earth, including the air, water, land, *flora and fauna* and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

5 Nanda and Pring *International Environmental Law* 6.

being focused on the world's environmental activities and the negative effects it has already had and was currently having on various aspects of the environment.[6]

It was this, which has subsequently led to the protection of the environment, which is a fundamental goal to be achieved and has thus introduced the concept of 'sustainable development' in international law under a new field of international environmental law.[7] Evidence of this is seen in the numerous international conferences, which have been held, and further treaties which have been concluded, all emphasizing the importance and need for sustainable development of resources and setting out principles in achieving this.[8]

The concept of sustainable development and its underlying principles have become and are still playing an ever-increasing role in international and national environmental law and policy.[9] Internationally, many treaties, declarations and policy documents embodies the concept of sustainable development as the ultimate goal, which needs to be promoted and achieved. Although many are considered as 'soft-law',[10] documents such as the *Stockholm Declaration*, *Rio Declaration on*

---

6 One of the most prominent negative effects which environmental degradation has had on the environment is the growing concern regarding the hole in the ozone layer. Furthermore, in the strive for human success the world is now victim to land degradation, marine pollution, a dramatic increase in air pollution, global climate change which has in turn led to the issue of an environmental human right awarding a person the right to an environment which is not harmful or detrimental to their health and well-being.

7 The term 'International Environmental Law' has been rejected by many scholars because they are of the opinion that no distinct 'environmental' body of law exists with its own sources and methods of lawmaking deriving principles peculiar or exclusive to environmental concerns. However 'International Environmental Law' is at a very early stage of development and is busy evolving with time. Birnie and Boyle *International Law and the Environment* (2nd ed) 8. Sands defines 'International Environmental Law' as comprising those substantive, procedural and institutional rule of international law which have as their primary objective the protection of the environment. Sands *Principles of International Environmental Law* (2nd ed) 15.

8 The first of the Conferences, which was convened in reaction to the need for environmental protection and development, was the *United Nations Conference on the Human Environment* of 1972 (hereafter the *Stockholm Conference*), which has subsequently been followed by the *United Nations Conference on Environment and Development* of 1992 (hereafter the *Rio Conference*) and the *World Summit on Sustainable Development* in 2002 (hereafter the *WSSD*).

9 Sands *Principles of International Environmental Law* (2nd ed) 231.

10 There is no accepted definition of 'soft-law' but it refers to any international instrument, other than a treaty containing norms, principles, standards or other statements of expected behaviour. Shelton *International Law and Relative Normativity* 166. Lawyers are accustomed to drawing a distinction between 'law' and 'non-law' however it is suggested that some laws are to be classified as 'soft-law'. These types of laws are imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but it lacks the status of 'law' and are therefore these laws are non binding in nature. International Environmental Law, the development of

*Environment and Development (*hereafter the *Rio Declaration)*[11] and *Agenda 21*[12] contain principles,[13] which must be promoted in order to attain sustainable development.[14]

Much debate has arisen regarding the classification and status of the concept of sustainable development. It is a very vague concept with no clear definition as what the ultimate goal is that has to be achieved or to be aimed at. This has prompted arguments made by Verschuuren.

However, the principles underlying sustainable development must be clearly identified as there are those which are clearly accepted as 'hard-law' and those which are still emerging or are in progressive development to the merely aspirational or futuristic values.[15] Sustainable development contains both substantive and procedural elements and the substantive elements of the concept include the principles of inter-generational equity, intra-generational equity, the principle of sustainable use and the integration principle.[16]

Other principles contained in the *Rio Declaration* are procedural in nature and are important in order to promote sustainable development and are *inter alia* the preventive principle, precautionary principle, polluter-pays principle, co-operation principle, principle of differentiated but common responsibility and the principle of

---

environmental law and the conclusion of treaties is heavily dependent on 'soft-law'. The difficulty in securing the consent of parties to multilateral treaties governing environmental matters, on which there is a need for urgent action has prompted this recourse to non-binding standards but the passage of time and state practice that passes in support of such 'soft-law' standard may convert it to become customary international law but until then it may serve as a very useful guide to conducts of states. Dugard *International Law: A South African Perspective* (2nd ed) 36. In this instance, 'soft-law' declarations can become supportive evidence of both the practice and *opinio juris,* which are elements of customary law. Nanda and Pring *International Environmental Law* 12.

11 *United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/5/Rev. 1 (1992).

12 *United Nations Conference on Environment and Development, Agenda 21*, U.N. Doc. A/Conf.151/PC/100/Add.1 (1992).

13 The most important principles are the preventive principle, precautionary principle (principle 15 of the *Rio Declaration*), the 'polluter-pays' principle (principle 16 of the *Rio Declaration*) and the integration principle. Glazewski *Environmental Law in South Africa* (2nd ed)169.

14 Birnie and Boyle *International Law and the Environment* (2nd ed) 25.

15 Nanda and Pring *International Environmental Law* 17. These principles are still in progressive development as they are accepted by many but still lack thorough consensus.

16 Boyle and Freestone (ed) *International Law and Sustainable Development* 8. Nanda and Pring *International Environment Law* 17. The substantive principles focus on outcomes while the procedural principles are focused on means.

public participation.[17] All these principles are relevant to the framework of the concept of sustainable development.[18]

These principles are incorporated in many international 'soft-law' documents and are therefore non-binding in nature, but they have received widespread international recognition and some of these principles are debatable in that they may now be classified as customary international law.[19] These principles are detailed and complex and should provide limitless potential for decision makers and the courts to develop a cohesive body of generally acceptable environmental management practices.[20]

Sustainable development is not only a concept around which many international environmental agreements are fashioned but its inclusion in section 24 of the *Constitution* has awarded it recognition at a national level. International law is of importance in South Africa as there is a constitutional obligation on South Africa to take note of international environmental law provisions as contained in the *Constitution*[21] *of the Republic of South Africa*, 1996.

Section 39 of the *Constitution* makes provision that when any court or tribunal interprets the *Bill of Rights* they must consider international law and may consider foreign law.[22] It was further emphasised by the Constitutional Court in *S v Makwanyane*[23] that it is not only binding international law, but also non-binding international law or 'soft-law' that must be considered by the courts.[24]

Sustainable development and its principles are also present within current South African environmental legislation. Section 24 of the *Constitution* embodies the notion of sustainable development in that 'everyone has the right to have the environment protected for the benefit of present and future generations through reasonable and

---

17 Boyle and Freestone (ed) *International Law and Sustainable Development* 9.

18 Nanda and Pring *International Environmental Law* 26.

19 The evolvement of principles into customary international law is a much debated issue but is important for the consideration thereof by courts as set out in sections 232, section 233 and section 39 of the *Constitution* when interpreting current environmental legal principles.

20 Glazewski *Environmental Law in South Africa* (2nd ed) 169.

21 The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

22 Chapter 2 of the *Constitution*.

23 *S v Makwanyane* 1995 (3) SA 391 (CC).

24 Dugard *International Law- A South African Perspective* (2nd ed) 61.

other legislative measures which will prevent pollution and ecological degradation, promote conservation and secure ecological sustainable development and the use of natural resources while promoting justifiable economic and social development'.[25] This is a clear indication of sustainable development as coined in the *Brundtland Report*[26] as it makes provision for a process of taking regulatory steps in the exploitation of resources to enhance both the current and future potential to meet human needs and aspirations.[27]

Further, sustainable development is present in section 2 of the *National Environmental Management Act* (*NEMA*)[28], which was promulgated within the framework of the *Constitution*. *NEMA* stresses sustainable development as one of its aims, not only in the preamble, but also in section 2(3), which reads that 'development must be socially, environmental and economically sustainable'.[29] Therefore section 2(3) and section 2(4) of *NEMA* are important as both sections refer to the notion of sustainable development but subsection (4) elaborates on relevant factors,[30] which need to be taken into account as a requirement to promote sustainable development.[31]

It is not exactly clear what the principles of section 2(4) of *NEMA* entail or what their exact content is but the importance of the environmental principles is acknowledged in South African environmental law. Section 2(4) establishes national environmental principles, which should guide the exercise of functions affecting the environment, and therefore from the wording of section 2 these principles play a pivotal role in South African environmental law.

---

25 Section 24(b) of the *Constitution*.

26 *United Nations World Commission on Environment and Development, Our Common Future* (1987).

27 The definition as coined in the *Brundtland Report* is given in Chapter 2.

28 *National Environmental Management Act* 107 of 1998.

29 Section 2(3) of the *NEMA*.

30 Scholtz is of the opinion that sustainable development is an ideal and that the factors referred to in subsection 4 of *NEMA* are actually acknowledged principles as they appear in international treaties. The wording of these sections is not very clear and does not expressly include these principles Scholtz 2005 *TSAR* 78.

31 Scholtz 2005 *TSAR* 69. It will be discussed in later chapters the reference to sustainable development as an ideal and the relevant principles and how it will aid South African legislation.

1.2 Aim of this Study

Sustainable development implies that developmental activities be undertaken in which natural resources are not exploited in a way that it does not cater for the needs of future generations. Therefore it is of great importance for South African citizens to ensure sustainable development so that we are able to provide for the needs of future generations.

In order to achieve sustainable development one has to investigate the definition and legal status of the concept. It is a very vague concept as no international agreement gives any clear meaning or ultimate goal, which is to be achieved. However it has received international support and has become the primary objective of many of the agreements concluded. Furthermore the principles, which underlie and influence sustainable development must also be examined in detail to determine their legal status and the effects which they have had on developing international law to-date.

Chapter 2 of this study investigates the content, importance and legal status of sustainable development, as it is important to try and define it clearer. Chapter 3 investigates and discusses the most important principles such as the preventive principle, polluter-pays principle and precautionary principle in greater detail and the legal status in international law. These principles are important as they provide guidance in relation to the promotion of sustainable development, which serves as the main concept around which many international environmental treaties, declarations and other policy documents are founded.

Although the principles have been included in numerous sections of environmental legislation on a national basis, the concept of sustainable development and the principles still remain vague and unclear in South African Law. Chapter 4 concentrates on the presence of sustainable development in South African law and the 'factors', as set out in section 2 of *NEMA*. Courts have had instances in which they have had to address the call for interpretation of the concept of sustainable development and the underlying principles. It is therefore vital that a proper understanding of the principles in international law is sought in order to interpret the principles in terms of section 39 and other legislation and policy documents and the

affect it will have on current environmental legislation and development within South Africa.

CHAPTER 2

THE CONCEPT OF SUSTAINBLE DEVELOPMENT IN INTERNATIONAL LAW

2.1 Introduction

It was during the 1960's and 1970's that facts regarding global degradation and the devastating effect it has on human beings and the environment were released. This shocked the world to the extent that it prompted international organisations and governments to co-operate and to improve the state of the global environment.[1]

Over the last quarter of a century, two new, complementary themes have had considerable impact on the development of contemporary international law – environmental protection and sustainable development.[2] Thus the concept of sustainable development reconciles within it two main themes being the concept of needs and the idea of limitations imposed by the state on the environments ability to meet present and future needs.[3]

Much research has been conducted over the years by many international organisations to establish and develop the relationships between man and the environment and to attain harmony between economic development and environmental protection.[4]

Most scholars will find the definition of sustainable development in either the *Brundtland Report, Rio Declaration* or in *Agenda 21*, all which have a mutually consistent definition as to the core of sustainable development.[5] Sustainable

---

1 Birnie and Boyle *International Law and the Environment* (2nd ed) 4 and 39.

2 Boyle and Freestone (ed) *International Law and Sustainable Development* 1.

3 Sands *Principles of International Environmental Law* (2nd ed) 10 and 253. See also Glazewski *Environmental Law in South Africa* (2nd ed) 15.

4 Bray 1998 *SAJELP* 1. See also Kiss and Shelton *International Environmental Law* (3rd ed) 39 where the efforts to eradicate pollution is discussed as well as International Law before the *Stockholm Conference*. However for the purposes of this study development of environmental law from the *Stockholm Conference* will be discussed.

5 Silveria 1995 *Willamette Law Review* 243. However it has been said that the concept of sustainable development may be found implicitly or explicitly in many other environmental

development is described as 'development meeting the needs of the present while not compromising the needs of future generations'.[6] It not only relates to sustainable use and exploitation of natural resources, but also to the enhancement of the quality of peoples' lives.

The *World Commission on Environmental Development* (hereafter *WCED*) stated that 'man is responsible for the future of the earth and today's generation may not fulfil its needs while endangering the possibility for future generations to fulfil theirs.' Further environmental problems relating to developed countries must not hamper the possibilities of developing countries to strive for development.[7]

This study is prompted by the vague and undefined concept of sustainable development. Therefore the concept of sustainable development will firstly be dissected from a historical view, furthermore the nature and status of the concept will also be investigated.

2.2 The History of Sustainable Development

The most significant change that has occurred within international law over the recent years with the emergence of the concept of sustainable development is the new international paradigm for balancing society's often conflicting environmental, economic and social aspirations.[8] It may be said that it is something of a mystery to policy makers, economists, lawyers and academics, who tend to be separated from their international colleagues by a lack of common language, knowledge and experience.[9]

The concept of sustainable development can be found in many environmental treaties and other instruments in the period prior to the publication of the

---

treaties and other instruments in the period prior to the publication of the *Brundtland Report* in 1987. Also see Sands *Principles of International Environmental Law* (2nd ed) 10.

6 It was in this *Brundtland Report* that the concept and definition of sustainable development was coined.

7 Verschuuren *Principles of Environmental Law* 21.

8 Nanda and Pring *International Environmental Law* 22.

9 Dernbach 1998 *Case Western Reserve Law Review* 4.

Brundtland Report but it was with the publication of the *Brundtland Report* by the *WCED* that led to sustainable development becoming an international environmental law concept and causing much debate.[10] It was further with the publication of the *Brundtland Report* that the concept of sustainable development was put high on the international agenda.[11]

It was in this report that the term sustainable development was coined and it was defined as:

> a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations

The aim of the concept of sustainable development is to create harmony between man and nature and to balance economic development with environmental protection.[12] However the main problem with the concept of sustainable development is the lack of clear meaning and what ultimately is to be achieved.

The history of sustainable development finds it roots in the *Stockholm Conference*, as a result of the United Nations resolution calling for the protection of the environment. [13] This Conference was followed by the *United Nations Conference on Environment and Development* (*UNCED*), held in Rio de Janerio, (hereafter the *Rio Conference*). Representatives from participating countries agreed that sustainable development became a concept which could not be ignored and in all documents signed by states at *UNCED* it was stated that everything which had been agreed upon was necessary in order to achieve sustainable development.[14]

---

10 Sands *Principles of International Environmental Law* (2nd ed) 10.

11 Schrijver *Die Verankering en Betekenis van Duurzame Ontwikkeling in het Internationale Recht* 5.

12 Bray 1998 *SAJELP* 6.

13 Boer 1995 *Willamette Law Review* 307.

14 Verschuuren *Principles of Environmental Law* 20. These documents are all worded differently but the goal is still the same.

It is four main events, which has led to the history of the concept of sustainable development being awarded such international recognition, and therefore the four events and their outcomes will now be discussed.

2.2.1 *The 1972 United Nations Conference on the Human Environment (UNCHE) - Stockholm Conference and Stockholm Declaration*

In 1972, 113 countries representatives convened in Stockholm as a result of the United Nations resolution calling for the protection of the world's environment.[15] It was at *UNCHE*[16] that global environmental issues were put on the agenda for the first time. This Conference gave birth to international environmental law but almost fell apart as a result of the 'North-South' Dilemma.[17] But it was the emergence of the *Stockholm Declaration* that while still weighted toward environmental protection, started the shift toward the compromise and seeking of harmony between both the environment and development.[18]

From the *Stockholm Conference*, the *United Nations Environmental Programme* (*UNEP*) was established and two documents were also drawn up namely: The *Declaration on the Human Environment (hereafter the Stockholm Declaration)* and the *Action Plan for the Human Environment*.[19] Both these documents have had an ever-increasing influential role in the development of environmental law internationally as well as nationally within the last two decades.[20]

---

15 Boer 1995 *Willamette Law Review* 307. The *Stockholm Conference* took place between 5 June and 16 June in Sweden, brining together more than 6000 people including representatives from the 113 states, representatives of every major intergovernmental organisation, 700 observers sent by 400 non-governmental organisations, individuals who were invited and approximately 1500 journalists.

16 For a further more detailed history see Pallemaerts 1998 *Journal of Law and Commerce* 3 to 24 and Timoshenko *From Stockholm to Rio: The Institutionalisation of Sustainable Development* 143.

17 Nanda and Pring *International Environmental Law* 24. The southern countries are termed as developing countries while northern countries are termed developed countries. With regard to the Stockholm Conference the developing countries served notice that the environmental standards of the developed countries could not be imposed so as to block or defeat the South's economic betterment.

18 Nanda and Pring *International Environmental Law* 24.

19 *United Nations Conference on the Human Environment; Action Plan for the Human Environment.*

20 Boer 1995 *Willamette Law Review* 307.

The *Stockholm Conference* is deemed the most successful international meeting regarding environmental issues as nations who were present at the Conference, agreed that international action by all countries was needed in order to meet the environmental challenges facing the world.[21] It was the *Stockholm Conference* and the preparatory meeting leading up to it, which put environmental issues at the forefront of the global community.

The most important aspect of the *Stockholm Conference* was the adoption of the *Stockholm Declaration*. Although not a legally binding document,[22] the *Stockholm Declaration* contained 26 principles which was a reflection of the general consensus between all nations which were present that global action is required in order to preserve and enhance the human environment.[23]

Even though from the drafting of the *Stockholm Declaration* it was known that it was not to be a legally binding document it served as a basis for the development of international environmental law. The 26 principles, which originated in the *Stockholm Declaration*, have been elaborated on in other legal documents and some, such as principle 21 have evolved where they are now considered as part of customary international law.[24]

The Declaration starts with the statement that man is both creature and moulder of his environment and further that the natural and man-made elements are essential to the well being and to the enjoyment of basic human rights even to the right to life itself. The Preamble of the *Stockholm Declaration* recognises the risk that humans can do irreversible harm to the environment on which life and well-being depend on.[25] The Declaration recognised the relationship between development and the environment by stating in Principle 8 that:

---

21 Nanda and Pring *International Environmental Law* 80.

22 A distinction between 'hard-law' and 'soft law' is made and the *Stockholm Declaration* is classified as 'soft-law' in the international environmental law arena.

23 Nanda and Pring *International Environmental Law* 80. Also See Dernbach 1998 *Case Western Reserve Law Review* 17 in which it is stated that the principles in the *Stockholm Declaration* are to be used as guiding principles in a way that would enable the preservation and enhancement of human environment.

24 Pallemaerts 1995 *Journal of Law and Commerce* 626.

25 *Stockholm Declaration*, Preamble, point 6.

> Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life

Principles 9 and 12 re-iterate the different positions that faced developed and developing countries and are important to take into account. Principle 9 recognises and emphasizes the need for developing countries to continue to develop while still acknowledging that the environment should be protected and conserved.[26]

Principle 12 took into account the financial position of countries, the circumstances and particular requirements of the developing countries and that there is a need to provide the developing countries with the necessary financial assistance and technology so as to incorporate environmental safeguards into their development planning.[27]

Further the principles set out that man has a fundamental right to an environment and that all states have an obligation to protect this environment. Principles 2 – 7 provide foundations in which the notion of sustainable development is reflected as the principles call for the safeguarding of natural resources for the benefit of present and future generations through careful planning or management.[28] One of the most important principles of the *Stockholm Declaration* was undoubtedly principle 21. Principle 21 is generally recognised as expressing a basic norm of customary international environmental law and states:

> 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

---

26 Principle 9 further states that environmental problems were the by-product of underdevelopment and poverty and provided for the transfer of technology and funds to the developing countries in an effort to stimulate economic development. Nanda and Pring *International Environmental Law* 82.

27 Nanda and Pring *International Environmental Law* 82.

28 Nanda and Pring *International Environmental Law* 81.

The *Stockholm Declaration* is deemed the most ambitious environmental undertaking of the international community and contains a collection of forward-looking principles accepted by many diverse international actors with competing agendas. Although it is not a formally binding treaty on states, the *Stockholm Declaration* represents and continues to represent an unprecedented international consensus on environmental issues and a strong international legal authority for a number of principles, which have evolved and are busy evolving into customary international law.[29]

In 1983, after the *Stockholm Conference*, concern for the environment continued, and with this the United Nations established numerous bodies to implement the Conference goals being the independent body, the *UNEP* to address global environmental issues.[30]

2.2.2 Post Stockholm Period: The 1987 Brundtland Report

WCED consisted of representatives from twenty-one nations and from both developed and developing countries and promising developments were expected from this body.[31] Two important environmental documents once again appeared in 1987 the one being the *Environmental Perspective to the Year 2000 and Beyond*

---

29 Nanda and Pring *International Environmental Law* 81.

30 Boer 1995 *Willamette Law Review* 310. See also Nanda and Pring *International Environmental Law* 83. UNEP consisting of a Governing Council comprising of representatives of 58 governments to serve as a legislative body; the Environmental Fund, financed by voluntary contributions and used to support the cost of new environmental issues undertaken within the UN system; and the Environmental Secretariat which would serve as a focal point for environmental action and coordination within the UN system as well as a catalyst for environmental action.

31 Nanda and Pring *International Environmental Law* 84. Although the international community was aware of environmental issues, it was only after the environmental disasters in the 1980's with the discovery of the hole in the ozone layer over Antarctic in 1987 that the extent of the environmental challenges facing the international community became apparent.

and the other being the report of the *WCED*[32], titled *Our Common Future* also known as the *Brundtland Report*.[33]

The *Brundtland Report* is a document, which examines the extent of global environmental degradation. It highlights global environmental risks caused by increased industrialisation and the interrelationship between the environment and the economy. It further emphasises the importance of international cooperation in developing sustainable human life and reversing the damage already done.[34]

It also includes the integration programme of the governments and the private sectors environmental concerns at an international, national and local level. Further an international group of legal experts were appointed to formulate principles as a legal framework for international agreements on matters such as these. The group formulated 22 principles and 13 proposals for strengthening the legal and institutional framework.

The *WCED* experts further suggested that a global conference be held to address the world's environmental problems. This would lead to the *UNCED* held in Rio de Janerio where the concept of sustainable development will become the new international environmental legal paradigm and would further be elaborated on. The *WCED* recognised that man is responsible for the future of the earth. This means present generations may not fulfil its needs while endangering the possibility for future generations to fulfil their needs.[35]

---

32 The *WCED* was specifically convened to address the growing conflict between the developed countries of the North and the developing countries of the South. The North has been focused on environmental protection while the South has been focused on economic development and feared that environmental standards would impede their interest in bettering the economy. See Nanda and Pring *International Environmental Law* 85.

33 This document examines the extent of global environmental degradation. It further highlights global environmental risks caused by the increased industrialisation and the interrelationship between the environment and the economy. It emphasises the importance of international co-operation in developing sustainable human live styles and reversing humanities damage to the biosphere.

34 Boer 1995 *Willamette Law Review* 310.

35 This concept of intergenerational equity will be discussed further below. *Our Common Future* at 43.

2.2.3 *The United Nations Conference on Environment and Human Development (UNCED) – Rio Conference and Rio Declaration*

It was the suggestions from *WCED*, which led to the 1992 *Rio Conference*. It was the largest Conference raising environmental and economic concerns among world leaders and marked the 20th anniversary of the *Stockholm Conference*.[36] During the 20 years between the *Stockholm and Rio Conferences* the environmental situations received much attention as many states had entered into a large number of environmental agreements that contained binding legal obligations of which are still in force. Also of importance was the development of soft law, which resulted in the emergence of general legal principles on the international environment.[37]

UNCED was given the task to formulate activities and programs through which sustainable development could be realised. A number of documents began to emerge after this forming the basis for decision-making, regarding environmental issues both internationally and nationally.[38] The documents which emerged from this conference are namely; The *Rio Declaration*, *Agenda 21*, the *Convention on Biological Diversity*,[39] the *Framework Convention on Climate Change*,[40] and the *Statement of Principles for a Global Consensus on the Management, Conservation and the Sustainable Development of all types of Forests (the Statement of Forest Principles).*[41] The most important ones are the *Rio Declaration and Agenda 21.*

During the Rio Conference, parties not only adopted the Rio Declaration but also another 'soft-law' instrument referred to as Agenda 21 which has been described as 'an action plan and blueprint for sustainable development, the consensus to guide

---

36 About 20 000 people and over 100 heads of states from 178 countries attended *UNCED* in Brazil from 3 June to 14 June. Sands *Transnational Environmental Law: Lessons in Global Change* 61. See also Timoshenko *From Stockholm to Rio: The Institutionalisation of Sustainable Development* 150.

37 Nanda and Pring *International Environmental law* 90 and 91.

38 Boer 1995 *Willamette Law Review* 312.

39 *United Nations Conference on Environment and Development, Convention on Biological Diversity*, U.N. Doc. DPI/1307 (1992).

40 *United Nations Conference on Environment and Development, Framework Convention of Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992).

41 *United Nations Conference on Environment and Development, Statement of Principles for a Global Consensus on the Management, Conservation and the Sustainable Development of all types of Forests* (the Statement of Forest Principles) U.N. Doc. A/CONF.151/6/REF.1 (1992).

our multifaceted endeavours throughout the world'[42] which is also designed to provide a framework action plan to guide countries into the 21st century.

2.2.4 *The Rio Declaration*

Controversy arose regarding many aspects, such as the focus, precision, wording and even the length[43] of the *Rio Declaration* as it was initially envisioned as the 'Earth Charter'.[44] Eventually the *Rio Declaration* was adopted by consensus by representatives of 175 states. The *Rio Declaration*, holds that its underlying goal is that economic development must be accompanied by careful preservation of the environment.[45]

Three factors give the *Rio Declaration* significant authority and influence in the development of law relating to international environment and sustainable development. Firstly is the wording of the Declaration, which is obligatory.[46] Secondly are the twenty-seven principles encompassed in the text and thirdly is the reflection of a real consensus of development and developing states on the need for generally agreed norms of international environmental protection.[47] However these aspects did not make the *Rio Declaration* binding in nature.

---

42 Robinson (ed) *Agenda 21: Earths Action Plan* iii.

43 Nanda and Pring *International Environmental Law* 92 and 93. Furthermore controversies also arose as to where the conference was to be held, who should or should not attend, whether it was to be postponed or even cancelled altogether. Sands *Transnational Environment Law: Lessons in Global Change* 62.

44 The 'Earth Charter' is defined as a document encompassing a set of principles containing general environmental obligations of states. It is a declaration of fundamental principles for building a just, sustainable and peaceful global society for the 21st century. Created by the largest global consultation process ever associated with an international declaration endorsed by thousands of organisations representing millions of individuals, the Earth Charter seeks to inspire in all peoples a sense of global interdependence and shared responsibility for the well-being of the human family and the larger living world. The Earth Charter is an expression of hope and a call to help create a global partnership at a critical juncture in history. HYPERLINK http://www.earthcharter.org 2 Jul.

45 It is this preservation as contained in first principle putting human beings and their needs as the centre of concerns for sustainable development, which gives sustainable development an anthropocentric value.

46 The *Stockholm Declaration* uses the wording such as 'States should….' while the *Rio Declaration* uses 'States shall…' clearly showing that there is now an obligation to adhere to the principles in promoting sustainable development and further to show that the wording is intended to potentially be a norm-creating developmental process for environmental law. Boyle and Freestone (ed) *International Law and Sustainable Development* 3.

47 Boyle and Freestone (ed) *International Law and Sustainable Development* 3.

This Declaration contains a statement, being almost identical to Principle 21 of the *Stockholm Declaration*[48] stating that 'the right to development and that the eradication of poverty is essential to the achievement of sustainable development'.[49] The *Rio Declaration* re-affirms the *Stockholm Declaration* on which it seeks to build, but its philosophy and approach is very different. The central concept is sustainable development as defined in the *Brundtland Report*, which integrates development and environmental protection. The *Rio Declaration* contains several principles of an unambiguous, general, legal nature. It reinforces some existing principles and proclaims new ones.[50]

The twenty-seven principles contained in the *Rio Declaration* are designed to establish a new and equitable global partnership through the cooperation of states, key sectors of society, and individuals in interacting with the environment. It builds on the *Stockholm Declaration* introducing the mandate for sustainable development as the basis for global, national and local action. It further adopts the precautionary principle, recognises intergenerational equity and recognises the financial and technological responsibilities, the important roles of women, youth, indigenous and other local communities, the private sector and NGOs, all in achieving sustainable development.[51]

The *Rio Declaration* recommends strategies in order to achieve these goals which are named as the eradication of unsustainable patterns of production and consumption, special recognition of the situation of developing countries, recognition of the differentiated responsibilities of not only developed but also developing countries and encouragement of citizen participation.[52] Finally, Principle 25 expresses that peace, development and the environment are all interdependent.

---

48 Principle 21 states that: 'States have....the sovereign right to exploit their natural resources....and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states...'

49 Principle 5 of the *Rio Declaration* states that: 'All states and people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development...' Also see Strachan *et al Language Guide* 4.

50 Kiss and Shelton *International Environmental Law* (3rd ed) 55 and 56.

51 Boer 1995 *Willamette Law Review* 313. See also Nanda and Pring *International Environmental Law* 95 and 96.

52 Hoelting 1994 *Georgia Journal of International and Comparative Law* 128 - 129.

2.2.5 *Agenda 21*

Agenda 21 is an unanimously adopted action programme for sustainable development and is intended as an environmental agenda to promote global action into the 21st century. It contains four different sections with 40 chapters and one hundred and twenty action programmes. Each chapter sets out a basis for action ad then provides objectives and finally specific activities. The 40 chapters cover social and economic issues such as poverty, population, consumption, housing and health, environmentally sound management of biotechnology, global ocean observation systems and others.[53]

The four main parts of Agenda 21 are socio-economic dimensions (i.e. habitats, health, demography, consumption and production patters); Conservation and resource management (i.e. atmosphere, forest, water, waste, chemical products); Strengthening the role of non-governmental organisations and other social groups such as trade unions, women and youth; and Measures of implementation (i.e. financing, institutions).

Policies, plans, programmes and guidelines for national governments to implement the *Rio Declaration* principles are contained in *Agenda 21* and during its negotiation it was described as 'a high-level political commitment rather than a legally binding text'.[54]

Agenda 21 may be used as a yardstick and this is a way to ascertain whether a government is doing all it can to promote and achieve sustainable development.[55] Further it is more detailed and specific than the *Stockholm Declaration*, and provides a more insightful approach to the reconciliation of development and environmental goals. It further provides a context specific meaning of sustainable development by identifying what sustainable development means to different

---

53 Glazewski *Environmental Law in South Africa* (2nd ed) 46. See also Nanda and Pring *International Environmental Law* 102; Silveria *The Rio Process: Marriage of Environment and Development* 13.

54 Glazewski *Environmental Law in South Africa* (2nd ed) 46. See also Nanda and Pring *International Environmental Law* 102.

55 Dernbach 1998 *Case Western Reserve Law Review* 22. See also Thornberg 2001 *New York Law School Journal on Human Rights* 957.

economic sectors.[56] In addition it also recommended that a comprehensive review by the UN General Assembly be held in 1997.

Agenda 21 pays particular attention to national legislation by making frequent reference to national law, measures, plans, programs and standards. Chapter 8, titled 'Integrating Environment and Development in Decision-making', in this regard is of importance as it recognises the importance of laws and regulations suited to country specific conditions for transforming environmental and development policies into action. It states that not only are 'command and control' methods to be used but also normative framework for economic planning and market instruments as such methods can also be useful for the implementation of obligations resulting from international treaties.[57]

It further proposes that governments should regularly assess the laws and regulations enacted with a view of rendering them effective. Therefore the Rio documents join environmental protection and economic development in the concept of sustainable development. The *Rio and Stockholm Conferences and Declarations* are both milestones in the development of international environmental law and some of the principles such as the public participation principle, the prior assessment of environmental impacts, precautionary principle, notification of emergencies and prior information and consultation on projects potentially affecting the environment of other states have been included in numerous binding and non binding international instruments.[58]

The *Commission on Sustainable Development* (hereafter the *CSD*) was established and met in 1997 to assist and to guide UN member nations toward sustainable development and environmental action and further acts as a central forum to review progress make in the implementation of Agenda 21. This set out a recommended programme of work for the *CSD* for the period 1998-2002 with the overriding issues being poverty, consumption and production management.[59]

---

56 Nanda and Pring *International Environmental Law* 102. Also Dernbach 1998 *Case Western Reserve Law Review* 22, 23.

57 Kiss and Shelton *International Environmental Law* (3rd ed) 57.

58 Kiss and Shelton *International Environmental Law* (3rd ed) 58.

59 Nanda and Pring *International Environmental Law* 106.

2.2.6 *Rio + 5*

In June 1997 the UN General Assembly convened a Special Session in New York to review progress made since the *Rio Conference* and found that considerable work had been done by independent bodies to promote sustainable development.[60] Although progress had been made, much remained regarding the implementation as set out in *Agenda 21*. The Special Session targeted the areas requiring urgent action for implementing *Agenda 21* and the means of implementation.

Once again a recommended programme of work for the *CSD*[61] for the period up to 2002 was set out with overriding issues being poverty and consumption production patterns.[62] The *CSD* acted as the preparatory committee for the 2002 Johannesburg Summit and was therefore responsible for the 'Plan of Implementation for the Summit'.[63]

---

60 Nanda and Pring *International Environmental Law* 105.

61 The *CSD* was established by the *United Nations General Assembly as a functional commission of the Economic and Social Council (ECOSOC)* following *UNCED*, which is composed out of 53 UN member states, but one third of the members are elected on a yearly basis. Each serves a three year term. It was created to ensure effective follow-up of the *UNCED*. The *CSD* meets annually for a period of two to three weeks in two-year cycles, with each cycle focusing on clusters of specific thematic and cross-sectoral issues. The *CSD's* core function is to review progress in the implementation of *Agenda 21* and the *Rio Declaration* as well as providing policy guidance to follow up the 'Johannesburg Plan of Implementation' (*JPOI*) at a international, national and regional and local levels as guided by the principles in the *Rio Declaration*. It further monitors the integration of environmental and developmental goals throughout the UN systems, coordinates inter-governmental decision-making on environment and development and makes recommendations on any new arrangements needed to advance sustainable development. It receives reports from organs, organisations, programs and institutions as well as information provided by non-governmental organisations. It specifically reviews progress in state implementation of the financial commitments contained in *Agenda 21*. The role of the CSD is threefold in that it reviewed progress in the implementation of recommendations and commitments arising out of *UNCED*, namely *Agenda 21*, the *Rio Declaration* and the *Statement of Principles on Forests*, to elaborate policy guidance ad options for activities in pursuance of the goals of *Agenda 21* and to promote dialogue and build partnerships among governments, the international community and groups who have a significant role to play in brining about sustainable development – including indigenous peoples, women, youth, nongovernmental organisations, scientist, labour, farmers, industry and business and local authorities. Nanda and Pring *International Environmental Law* 104. HYPERLINK http://www.un.org/esa/sustdev/csd/aboutCsd.htm 2 Jul. See also Thornberg 2001 *New York Law School Journal on Human Rights* 957 and 958; Silveira *The Rio Process: Marriage of Environment and Development* 13; Chasek *The UN Commission on Sustainable Development: The First Five Years* 380.

62 Nanda and Pring *International Environmental Law* 106.

63 Nanda and Pring *International Environmental Law* 107.

In 1997, the UN held a Special Session (Rio + 5) in order to review progress since certain principles or goals were set out in 1992 and Chapter 28 of *Agenda 21* is entitled 'Local Agenda 21' which is a programme aimed at implementing sustainable development at the local level. In terms of legal implementation of sustainable development Chapter 8 of *Agenda 21* is important as it addresses the practicalities of integration of the environment and development in decision-making.[64]

It recognises that all governments must implement changes to their processes in order to put the environment and development at the centre of economic and political decision-making urging countries to;[65]

a) integrate environment and development at policy, planning and management levels;
b) providing an effective legal and regulatory framework;
c) making effective use of economic instruments and market other incentives; and
d) establishing systems for integrated environmental and economic accounting.[66]

2.2.7 Rio + 10: Johannesburg World Summit on Sustainable Development – (WSSD)

The *Rio Conference* produced important results both in political and legal terms.[67] The *Johannesburg World Summit on Sustainable Development (hereafter the WSSD)* is marred by much negativity.[68] Rather than being termed as 'Rio + 10'

---

64 Boer 1995 *Willamette Law Review* 321.

65 Robinson (ed) *Agenda 21: Earth's Action Plan* 115.

66 See further Robinson (ed) *Agenda 21: Earth's Action Plan* 115 – 136 (Chapter 8) in which a discussion for the basis for the above mentioned actions, what the objectives should be, the activities and the means of implementation are mentioned.

67 Pallemaerts 2003 *RECIEL* 1.

68 The *WSSD* was held between 26th August to 4th September 2002 in Sandton Johannesburg and was attended by 64 000 representatives from more than 190 countries in order to reaffirm commitment to the *Rio Principles*, the full implementation of *Agenda 21* and the Programme for the Further Implementation of *Agenda 21*. Kiss and Shelton *International Environmental Law* (3rd ed) 64. Words such as 'betrayal', 'disaster', 'shameful', 'disgraceful', and 'an

many termed it 'Rio minus 10'.[69] But the WSSD provided a unique opportunity to review the achievements since the *Rio Conference*.[70] It was specifically created to reinvigorate the process of implementing *Agenda 21* and the *Rio Declaration*.

The objective of developed countries was to shift the focus from environmental issues to developmental issues. From the Johannesburg summit only two documents were produced namely the '*Political Declaration*' and the '*Plan of Implementation*'. The '*Plan of Implementation'* is only 54 pages long, compared to the detailed document of Agenda 21.[71] The *Implementation Plan* reaffirms the need for development with specific need for sustainable development including the principles set out in the *Rio Declaration and Agenda 21*. The progress regarding the implementation of the *Rio Declaration and Agenda 21* was addressed and a concrete relationship regarding the implementation thereof had to be established.

At the end of the conference the participating governments adopted a Declaration of Sustainable Development affirming their will to assume mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection all at a local, regional, national and international levels.[72] The '*Plan of Implementation'* provides concrete suggestions of measures to implement the Declaration. The instruments adopted at the *WSSD* had no effect of the validity on *Agenda 21*, which constitutes to govern the environmental program of international institutions and remains a general guideline for governments, regional and local authorities as well as for non-state actors.[73]

The *WSSD* reaffirms the texts adopted at Rio and calls for priority attention to two matters: the implementation of and compliance with international environmental agreements by contracting states and the coordination among the secretariats of

---

embarrassment' are used to describe it. Nanda and Pring *International Environmental Law* 110. Manning 2002 *Without Prejudice* 12.

69 Bosselmann 2002 *New Zealand Journal of Environmental Law* 315. The little progress made by the Johannesburg summit may be the most positive outcome and lasting legacy for many years of the summit.

70 Bosselmann 2002 *New Zealand Journal of Environmental Law* 297. A summary or analysis of the *WSSD* can be found online at HYPERLINK http://www.iisd.ca/linkages/2002/wssd/ 2 Jul.

71 Nanda and Pring *International Environmental Law* 115.

72 Kiss and Shelton *International Environmental Law* (3rd ed) 64.

73 Kiss and Shelton *International Environmental Law* (3rd ed) 66.

multilateral environmental agreement.[74] As an implementation-focused summit, Johannesburg did not produce dramatic outcomes as there were no agreements that will lead to new treaties.[75]

2.3 Defining Sustainable Development

Sustainable development and the underlying Rio Principles have had an ever-increasing role in international and national law and policy.[76] The international agreements are important because they have focused international attention on sustainable development, have started to shape the concept and will continue to shape the meaning, and have also begun to make it relevant to national and international decision making.[77]

Sustainable development contains within it two key concepts:

- The concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given and
- The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[78]

The satisfaction of human needs and aspirations is the major objective of development and the essential needs of many people living in developing countries are not being met. Therefore sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.[79] Further it is also aimed at alleviating poverty which is important for a developing country such as South Africa.

---

74 Kiss and Shelton *International Environmental Law* (3rd ed) 66.

75 Nanda and Pring *International Environmental Law* 119.

76 Sands *Principles of International Environmental Law* (2nd ed) 231.

77 Dernbach 1998 *Case Western Reserve Law Review* 6. These international documents do not define sustainable development in one single sentence but rather as a bundle of related concepts.

78 Sands *Principles of International Environmental Law* (2nd ed) 10 and 253. See also Glazewski *Environmental Law in South Africa* (2nd ed) 15.

79 Hunter, Salzman and Zaelke *International Environmental Law and Policy* (2nd ed) 181.

The only definition of sustainable development is found in the *Brundtland Report* as the *Rio Declaration* contains no explicit definition of the concept. It has been said that one is reduced to assuming the definition of the concept of sustainable development through the gathering of information spread throughout the twenty-seven principles in the text of the *Rio Declaration*.[80]

The definition in the *Brundtland Report* is a definition, which combines the advantages of simplicity and of a value at once symbolic and undeniably inspiring, remained sufficiently ambiguous to avoid directly threatening vested interests.[81] The closest definition of sustainable development found in the *Rio Declaration* to that of the *Stockholm Declaration* is Principle 3 of the *Rio Declaration* stating that 'the right to development must be fulfilled so as to meet equitably developmental and environmental needs of present and future generations'.[82] This is the principle of intergenerational equity. The *Rio Declaration* does however affirm the premise of development that every human being is entitled to a healthy and productive life in harmony with nature.[83]

At the *Rio Conference* the link between the environment and human rights was re-iterated but a distinct change of emphasis was evident in that the link between environmental concerns and the need for development was prioritised. The *Rio Declaration* proclaimed in its first principle that 'human beings are at the centre of concerns for sustainable development.' Principle 4 of the *Rio Declaration* provides that: '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.'[84]

Therefore the *Brundtland Report* definition is the most universally accepted definition of the term. Sustainable development is something, which modifies the

---

80 Pallermaerts 1995 *Journal of Law and Commerce* 630.

81 Pallermaerts 1995 *Journal of Law and Commerce* 631.

82 Pallermaerts 1995 *Journal of Law and Commerce* 631 and 632. But a problem with this principle is the fact that the wording of right to development is used and not the right to sustainable development. This is due to the fact that no right to sustainable development exists and the right to development is not without its problems.

83 Principle 1 of the *Rio Declaration*.

84 Glazewski *Environmental Law in South Africa* (2nd ed) 81.

purposes of conventional development by adding a wide range of environmental protection goals, by incorporating the environment into social goals and by insisting that economic goals be compatible with environmental protection. Further it modifies the purposes of development by recognising the responsibility that present generations have toward future generations.[85]

2.4 Sustainable Development: Principle or Ideal?

As mentioned above the lack of a clear-cut definition and classification of the concept of sustainable development is one aspect, which attracts scholars to this concept.[86] Many have raised the question whether it should be classified as an 'ideal' or 'principle' but as Bray points out, a classification of this sort causes its own problems.[87]

Verschuuren is of the opinion that although sustainable development is termed a 'principle' it is safe to call it an 'ideal'.[88] He puts the argument forward that it is not a 'principle' as referred to by Principle 1 of the *Rio Declaration* but should be termed an 'ideal'. He focuses on Fullers distinction between the 'morality of duty' and the 'morality of aspiration' to draw this conclusion.[89]

Fuller distinguishes between the 'morality of duty' and 'morality of aspiration' by stating that the morality of duty simply lays down basic rules without which an

---

85 Dernbach 1998 *Case Western Reserve Law Review* 25.

86 Handl *Sustainable Development: General Rules versus Specific Obligations* 37.

87 Bray 1998 *SAJELP* 6 – 8.

88 Verschuuren states that he reserves the use of the word principle for legal principles and not as ideals as in the sense of the principles of morality of aspiration for the purposes of his argument.

89 Not all agree with the opinion made by Verschuuren. Sands calls sustainable development a legal principle but acknowledges the 'underlying principles' of sustainable development merely showing that sustainable development is more than a legal principle. See Sands *Principles of International Environmental Law* (2nd ed) 57 and 58 for this particular wording. The relevance of the concept sustainable development was argued in the Gabcíkovo-Nagymaros-case between Hungary and Slovakia. The dissenting opinion of vice-president Weermantry is of significance as he considers the principle of sustainable development as a principle with normative value that is crucial to the determination of the case. According to Weermantry sustainable development is a principle of international law. Lammers 1998 *Leiden Journal of International Law* 287-320

ordered society is impossible or without which an ordered society directed toward certain specific goals must fail of its mark.[90]

The principles of the 'morality of aspiration' are loose vague and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than to afford us any certain and infallible directions acquiring it.[91] In modern terms such values could be described as the ideals of society or of a more specific community.

In terms of this distinction sustainable development may fall under the 'morality of aspiration', as it does not lay down basic rules as defined in the 'morality of duty' but it is rather a general idea of the perfection that ought to be aimed at.[92] If by referring to the definition of the morality of aspiration, then the concept of sustainable development will fall under the morality of aspiration as it is a concept, which lacks clear meaning, and has no clear, distinct outcome as to what is the ultimate goal which is to be achieved. Therefore it is merely a general 'idea' of the perfection, which ought to be aimed at.[93]

Van den Burg has defined ideals as "values that are implicit or latent in the law, or the public and moral culture of a society or a group that usually cannot be fully realised, and that partly transcend contingent, historical foundations and implementations in terms of rules and principles and policies".[94] This definition of an ideal is not very different from the definition of the morality of aspiration as formulated by Fuller.[95] Therefore ideals are expressions of the morality of

---

90 Verschuuren *Principles of Environmental Law* 19.

91 Verschuuren *Principles of Environmental Law* 19.

92 Verschuuren *Principles of Environmental Law* 24. Also see Scholtz 2005 *TSAR* 77.

93 Scholtz 2005 *TSAR* 77. Although it is only a general idea, which we ought to aim at, it is still a concept, which has been awarded international recognition by its presence in many international instruments. Despite this it is still difficult to conceptualise and implement the concept.

94 Verschuuren *Principles of Environmental Law* 20. This definition of an ideal contains three elements firstly being that an ideal is a value and not a direct guide of action. Secondly an ideal is future orientated but also grounded in reality. Thirdly an ideal is vague in its meaning and cannot always be fully realised. Verschuuren points out the problem with this definition by referring to the fact that sustainable development has been explicitly referred to in many international documents. Verschuuren *Principles of Environmental Law* 25. Although it has been referred to as an ideal but this does not imply that it may not be seen as an ideal. Scholtz 2005 *TSAR* 77.

95 Verschuuren *Principles of Environmental Law* 20.

aspiration which cannot directly be applied in legal practice, but are vague ideas about what is morally the best thing to do.[96]

Van den Burg focuses on the fact that ideals are values which implies that unlike norms they are not direct action guides. The fact that these values are referred to explicitly in law does not change the fact that they function as values and not as norms.[97]

Therefore one may support Verschuuren's argument that although sustainable development has been referred to as a 'principle' it must be termed an 'ideal', and despite the formulations it has received in many international legal documents it remains a loose, vague and indeterminate, general idea of the perfection we ought to aim at. It does not lay down any basic rules without which an ordered society is impossible or without which an ordered society directed toward certain specific goals must fail of is mark.[98]

2.4.1 The Relationship Between Principles and Ideals

Following Fullers argument, based on the morality of aspiration one now proves that sustainable development is a vague goal at which society aims to achieve. For proper promotion of this goal a call upon the morality of duty[99] is made meaning

---

96 Verschuuren thus points out that ideals are vague ideas since man does not know what is morally the best thing or what is to be termed perfectly good human conduct. Within the formulation of an ideal, all that must be shown is the ultimate goal of society which should be aimed at. Fuller states that one of the greatest responsibilities of the morality of aspiration is to preserve and enrich social inheritance. Verschuuren *Principles of Environmental Law* 20.

97 Scholtz 2005 *TSAR* 77. The reference to sustainable development in various documents serves as an affirmation of the importance of this ideal in environmental law but does not diminish the recognition of the concept as an ideal. Sands refers to sustainable development as a general principle of law but states that it to be perceived as more important that other principles as it has entered the corpus of international customary law. Sands *Principles of International Environmental Law* (2nd ed) 254 and 290.

98 Verschuuren *Principles of Environmental Law* 24. See also Scholtz 2005 *TSAR* 77 who also supports this argument and takes it further to shed light on the effect this classification has on Section 2 of the *NEMA,* which will be discussed in Chapter 4 of this study.

99 The morality of duty lays down basic rules without which an ordered society is impossible or without which an ordered society directed toward certain specific goals must fail of its mark.

that more concrete instruments must be activated in order to promote the goal of sustainable development effectively.[100]

Principles are seen as the link between ideals and duties, between the morality of aspiration and morality of duty, between values and rules. They are a necessary medium for ideals to find their way into concrete rules and can be used to bridge the gap between morality of aspiration and morality of duty. The first step to make an ideal more concrete is that legal principles must be formulated and may subsequently result in further development of rules in order to apply these principles.[101]

Principles can be part of written or formal law, or they can be part of legislation and treaties, and together with, or in combination with, more concrete rules, they have the ability to impose duties on the state or individuals.[102] Because of their basis in law and their possible influence on legal rules concerning activities that may harm the environment, they must be placed within the morality of duty: a bridgehead within the morality of duty reaching out for the morality of aspiration.

Legal principles are part of written, statutory and treaty law and they can be invoked in a court of law and thus form a part of the morality of duty. They have played an ever-increasing important role within law.[103] Although principles do possess a more normative and abstract nature than legal rules they can only be applied in combination with more concrete rules. Behind the principles is the ideal of sustainable development which means that these principles form the morality of aspiration.[104]

---

100 Scholtz 2005 *TSAR* 79. See also Verschuuren *Principles of Environmental Law* 25.

101 Scholtz 2005 *TSAR* 79.

102 Principles do not comprise enforceable legal duties. Principles shed more light on the moral target of legislative rules and thus form the link and bridge the gap between the morality of duty and morality of aspiration and are therefore a necessary medium for ideals to find their way into concrete rules. Verschuuren *Principles of Environmental Law* 25 and 26.

103 Three main functions of legal principles have been pointed out namely:

1. Principles define open or unclear rules and can be used in the process of interpreting rules in concrete cases by administrative authorities as well as by the courts;
2. principles form the basis for new legislation or treaties; and
3. principles form the basis or negotiations between various actors in society such as NGOs, governments and businesses and otherwise help to determine how private parties should behave in the social order.

104 Verschuuren *Principles of Environmental Law* 26.

A fundamental difference exists between ideals and legal principles as the former are important norms that, although different in nature form legal rules, can be applied in day-to-day legal practice together with rules and thus form a part of the morality of duty. It is legal principles, which form a first attempt to make ideals more concrete.[105] Ideals are however more comparable to legal principles but principles go beyond concrete rules or policy goals. They say something about a group of rules or policy goals indicating the common goal, which a collection of rules has.[106]

Therefore at an international level many treaties, declarations and other policy documents contain the ideal of sustainable development which is put forward as the ultimate goal of that specific document and more general documents contain a set of principles which must be realised in order to reach a sustainable society.[107] Very often it can be said that the principles of environmental law are hidden within more concrete rules.[108]

In conclusion there is an importance to ascertain the true nature of the concept of sustainable development and classify it as an ideal of international environmental law which will serve as the basis for certain principles having an influence on rules.

---

105 Handl *Sustainable Development: General Rules versus Specific Obligations* 43.

106 Verschuuren *Principles of Environmental Law* 26.

107 Reference is hereby made to the *Brundtland Report*, the *Rio Declaration* and *Agenda 21* which are non-binding documents in environmental law but state the goal of sustainable development which must be achieved and contain a set of numerous principles which must be realised in order to promote sustainable development. Examples of such principles are the integration principle, the co-operation principle, the principle of prevention, the precautionary principle, the polluter-pays principle but to name a few. These principles are discussed in Chapter 3 of this study. Not only are these principles found in non-binding documents but they can also be found in more specific binding treaties such as the *Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes or the Convention for the Protection of the Marine Environment of the North East Atlantic or the Kyoto Protocol* of 1992.

108 Verschuuren *Principles of Environmental Law* 29.

2.5 *The Principles Characteristic of Sustainable Development*

Sustainable development requires both a long and broad view as it is future orientated.[109] The *Stockholm Declaration*[110] as well as the *Rio Declaration* has acknowledged the responsibility to protect and improve the environment for both present and future generations. Past generations, present generations and future generations hold the natural environment of our planet in common with all members of our species.

However as we develop and use the earths resources we face important problems between present and future generations.[111] As all human species are integrally linked with other parts of the natural system we both affect and are affected by what happens in the natural system.[112] It is our actions, which affect the natural system whereby we can use it on a sustainable basis or we can degrade the environmental quality and resource base. All generations are also inherently linked to one another, past and present, in using the common patrimony of earth.[113]

Sustainable development is therefore dependent on the principle of intergenerational equity as well as that of intragenerational equity and requires a long and broad view.[114] In the long term it requires the consideration of environmental needs of future generations bringing about the principle of intergenerational equity. In the broad sense one has to look and consider how equitably the needs of the present generation is being met bringing about the

---

109 Weiss *In Fairness to Future Generations* 5.

110 Principle 1 of the *Stockholm Declaration* contains the principle of intergenerational equity by stating:

> 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, and he bears a solemn responsibility to protect an improve the environment for present and future generations…

111 Problems of intergenerational equity may be classified as:

1. Depletion of resources for future generations,
2. degradation in quality of resources for future generations, and
3. access to the use and benefits of the resources received from prior generations.

Weiss 1987 *Am. Soc'y Int'l L. Proc.* 127. See also Weiss 1990 *American Journal of International Law* 200. Weiss *In Fairness to Future Generations* 5. See also Tladi 2002 *SAJELP* 181.

112 Weiss 1990 *American Journal of International Law* 199.

113 Weiss *In Fairness to Future Generations* 7.

114 Nanda and Pring *International Environmental Law* 29.

principle of intragenerational equity.[115] Collectively these two principles are often called environmental justice and many countries have started adopting national laws to advance these goals. Internationally the Rio Declaration can be seen to endorse both intergenerational and intragenerational equity.

Intergenerational equity contains two distinct components regarding the utilisation of resources. The first component is the fairness in the utilization of resources between past and present human generations being referred to as intergenerational equity. The second component is referred to as intragenerational equity, which is the fairness in utilisation of resources among present generations both domestically and globally.[116]

Furthermore the earth's resources may also be shared by one or more states and therefore the activities of states and individuals must be controlled in order to ensure the future utilization of resources.

2.5.1 Intergenerational equity

Sustainable development also focuses on poverty, which is an extension of intergenerational concern, and it is argued that families endure over intergenerational time.[117] It is inherent in sustainable development and is one of its most basic distinctions.[118] Intergenerational equity refers to the principle that present generations should consider the impact of our actions on future generations, so that our development policies achieve objectives, which can be sustained over the long run.[119]

The *Brundtland Reports* definition of sustainable development includes this idea as it states that present development must not compromise the ability of future

---

115 Nanda and Pring *International Environmental Law* 29 and 30.
116 Maggio 1997 *Buffalo Environmental Law Journal* 163 and 164.
117 Turner *Sustainable Environmental Economics and Management* 6. See also Weiss *Environmental Equity: The Imperative for the Twenty-First Century* 21.
118 Dernbach 1998 *Case Western Reserve Law Review* 29.
119 Bosselman 2001 *University of Florida Journal of Law and Public Policy* 311.

generations to meet their own needs.[120] Further principle 3 of the *Rio Declaration* formulates the principle more broadly by stating that that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Agenda 21 also recommends that governments ensure socially responsible economic development while protecting resource base and the environment for the benefit of future generations.

The ethical argument is that future generations have the right to expect an inheritance sufficient to allow them the capacity to generate for themselves, a level of welfare no less than that enjoyed by the current generation.[121] It is therefore required that some sort of intergenerational social contract be entered into.[122] Weiss states, that in order to define intergenerational equity, it is useful to view the human community as a partnership among all generations.[123] It is collective rather than individual action, which is required in order to affect these socially desirable intra- and intergenerational transfers.

A generation would want to inherit the earth in at least as good condition as it has been in for any previous generation and to have as good access to it as the previous generation. Therefore it is required that each generation has to pass the planet on in no worse condition that it received it in and to provide equitable access to its resources and benefits. Each generation is then classified as either custodian or trustee with obligations to care for it and a beneficiary with rights to use it.[124]

---

120 Maggio 1997 *Buffalo Environmental Law Journal* 185. See also Dernbach 1998 *Case Western Reserve Law Review* 29.

121 Bosselman 2001 *University of Florida Journal of Law and Public Policy* 312.

122 Turner *Sustainable Environmental Economics and Management* 7.

123 In this partnership no generation could possibly foresee when it will be the living generation, how many members there will be, or even how many generations there will be. Weiss 1990 *American Journal of International Law* 200.

124 Weiss 1990 *American Journal of International Law* 200. The *Brundtland Commission* has discussed the establishment of an 'international ombudsman' position under the United Nations to oversee the protection of the interests of future generations but no convention or other enforceable international instrument can provide any guidance for reconciling the needs of future generations with the needs of present generations. The major obstacles in realising future generation needs is the uncertainty regarding the quality, quantity and variety of resources required by future generations in the light of current demands especially in a third world country. See also Maggio 1997 *Buffalo Environmental Law Journal* 188; Tladi 2002 *SAJELP* 180.

As beneficiaries of the legacy of past generations we inherit certain rights to enjoy the fruits of this legacy, as do future generations. These are viewed as intergenerational planetary obligations and planetary rights.[125] It is this equity among the generations, which provide a basis for all generations ensuring that each generation has at least the level of planetary resource base as its ancestors.[126]

Weiss proposes three basic principles of intergenerational equity, namely, the principle of conservation of options,[127] the conservation of quality;[128] the third is that of conservation of access.[129] The proposed principles put constraint on the actions of the present generations in development and use of the planet, but within these constraints, it does not dictate how each generation should manage its resources.

These proposed principles form the basis of a set of intergenerational obligations and rights, or planetary rights and obligations that are held by each generation. These rights and obligations derive from each generation's position as part of the intertemporal entity of human society. These rights and obligations are integrally linked, as the rights are always associated with obligations.

However it is not enough to apply the theory of intergenerational equity only among the present and future generations as it also carries an intragenerational component, which is essential to sustainable development and must also be examined. The planetary rights and obligations co-exist in each generation and in the intragenerational context they exist between members of present generations.[130]

---

125 Weiss *In Fairness to Future Generations* 21.

126 At the highest level of generality, every generation has two intergenerational duties the first is a duty to pass on the earth to the nest generation in as good a condition as it was when that generation first received it and the second is a duty to repair any damage caused by any failure of previous generations to do the same.

127 This principle entails that each generation should be required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values and should also be entitled to diversity comparable to that enjoyed by previous generations. Weiss 1990 *American Journal of International Law* 202.

128 This means that each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition that that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations.

129 This entails that each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations.

130 Weiss 1990 *American Journal of International Law* 203.

2.5.2 *Intragenerational equity*

Intragenerational equity is described as the fairness in utilization and enjoyment of resources as well as in enduring the costs for degradation, disposal and rehabilitation of resources, among all present persons and groups both domestically and internationally.[131] The *Brundtland Report* made recommendations for the development of international law and expressly recognises that by realising intragenerational concerns may present adverse implications for intergenerational concerns.

This point is highlighted in the *Brundtland Report* characterisation of sustainable development in terms of meeting present needs without compromising the ability of future generations to meet their needs. Therefore it can be said that limitations are set on present generations in meeting their needs in order to allow future generations with sufficient resources in fulfilment of their needs.[132]Intragenerational equity is endorsed by the *Rio Declaration.*[133]

The intragenerational aspect is directed at the serious socio-economic asymmetry in resource access and use within and between societies and nations that have exacerbated environmental degradation and the inability of a large part of humanity to meet adequately even its basic needs.[134]

As shown above planetary rights and obligations are integrally linked and therefore the rights of future generations are linked to the obligations of present generations.[135] The intragenerational rights and obligations of present generations are derived from the existence of the intergenerational relationship between generations and are therefore important in order to attain the concept of sustainable development.

---

131 Maggio 1997 *Buffalo Environmental Law Journal* 193.
132 Barresi 1998 *Tulane Environmental Law Journal* 77.
133 Intragenerational equity is said to be further endorsed by principle 3 and 5, which calls for the eradication of poverty, and to decrease the disparities in standards of living. Nanda and Pring *International Environmental Law* 31.
134 Maggio 1997 *Buffalo Environmental Law Journal* 164.
135 Weiss 1990 *American Journal of International Law* 202.

2.5.3 *Sustainable Use/Utilisation of Natural Resources*

Another important aspect which one cannot ignore is the sustainable use or utilisation of natural resources. Principle 8 of the *Rio Declaration* only refers to the 'need to reduce and eliminate unsustainable patterns of production and consumption'. A concern has developed to ensure a more rational use and conservation of natural resources and a desire to strengthen existing conservation laws.[136]

Inter and intragenerational equity requires consideration for present and future needs and it is therefore linked to the sustainable use of resources in order to ensure that future generations may meet their needs. The sustainable use of natural resources is reflected in treaties, adopting a 'sustainable approach', which focuses on the adoption of standards governing the rate of use or exploitation of specific natural resources rather than on the preservation for future generations.[137] It is not only applicable to marine living resources but is also applicable to non-marine resources.

The precautionary principle, endorsed by principle 15 of the *Rio Declaration*, is an important element of the evolving concept of sustainable use or utilisation.[138] It dictates that precautionary measures be taken to prevent the unsustainable use of resources or actions which will negatively affect the environment and cause irreversible damage and depletion of non-renewable resources.

Another approach adopted is that of equitable use of natural resources. This implies that when one state uses natural resource, that state must take into account the needs of all other states.[139] In many respects *UNCED* was a conference about equity, how to allocate future responsibilities for environmental protection among states that are at different levels of economic development, have contributed

---

136 Boyle and Freestone (ed) *International Law and Sustainable Development* 9.

137 Sands *Principles of International Environmental Law* (2nd ed) 257.

138 Boyle and Freestone (ed) *International Law and Sustainable Development* 9.

139 This is reflective of the principle of intragenerational equity in that when using natural resources one must consider the needs of others in the present generation.

different degrees to particular problems and have different environmental and developmental needs.[140]

The sustainable utilisation and preservation of the environment is inter-related with the concepts of inter and intra-generational equity in order to provide for the future. All three are important aspects which cannot be viewed in isolation from each other as man is inseparable from nature and need natural resources for survival but at the same time must ensure that the needs of future generations are met.

2.5.4 The Integration Principle

For environmental protection to work, environmental considerations must be made an integral part of government and development decision-making.[141] The further element of sustainable development is the integration of environmental considerations into economic and other development and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations.[142] Principle 13 of the *Stockholm Declaration* called upon states to "adopt and integrated and coordinated approach to their development planning" to ensure it was compatible with environmental protection.

The integration principle gained greater endorsement in principle 4 of the *Rio Declaration,* which stated that "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". An integrated approach to environment and development has significant practical consequences but most notably that environmental considerations will increasingly be a feature of international economic policy and law.

---

140 Sands *International Law in the Field of Sustainable Development: Emerging Legal Principles* 60.

141 Nanda and Pring *International Environmental Law* 62.

142 Sands *Principles of International Environmental Law* (2nd ed) 263.

The integration of environment and development began prior to the *Stockholm Conference* and linkage between conservation and development was made at the first *UN Conference on Conservation and Utilisation of Resources* in 1949. Many states may be reluctant to introduce the term but the integration principle is growing in importance. For the purposes of this study the above three principles are the most important but it is necessary to make a brief mention of the integration principle.

2.6 Conclusion

Sustainable development is a concept, which is given international recognition in environmental law regardless of the fact that it is lacking in clear meaning. It is a very vague concept of which concrete results are expected. Many international as well as national documents have included sustainable development as a goal, which is to be achieved. In terms of 'soft-law' instruments, there is to be a relationship between the protection of the environment for future generations of man by present generations without depleting the natural resources of the earth. Therefore man is an inseparable part of nature and is dependant on a balanced and intact ecosystem.

International agreements have lead to the monitoring, assessing and ensuring the processes for the promotion and implementation of sustainable development. Thus academics have tried to identify new issues which are to be addressed in trying to promote sustainable development and further in an attempt to give the concept a clearer definition.

Four main elements appear to comprise the concept of sustainable development namely: 1) the principle of inter-generational equity, 2) the principle of sustainable use; 3) the principle of equitable use or intra-generational equity and 4) the principle of integration. The focus of the outcome of sustainable development is the long-term protection of the environment through the proper implementation thereof. This can be achieved by properly implementing the underlying principles of sustainable development in striving to better the standard of living of man and

integrating environmental protection with the developmental needs of a growing society.

Sustainable development has procedural implications. Legislation must be promulgated by taking into account environmental principles in the light of specific circumstances to achieve sustainable development. Despite the fact that uncertainty looms regarding the meaning of sustainable development, it can be stated that sustainable development is to be classified as an ideal in international law. Therefore as an ideal, sustainable development does not lay down any basic rules but rather guides society and the interpretation of legislation to specific goals which must be achieved. As an ideal it impacts and effects the way in which much legislation is interpreted.

Sustainable development rests on a commitment to equity with future generations. In order to successfully achieve an ideal such as sustainable development, it means that principles must be made concrete to enforce actions to satisfy the needs of the present not to detrimentally affect the needs of the future. Since the *Stockholm* and *Rio Declaration* many principles underlying sustainable development have become more concrete within legislation.

CHAPTER 3

THE PRINCIPLES UNDERLYING SUSTAINABLE DEVELOPMENT

3.1 Introduction

An ounce of prevention is worth a pound of cure, the saying tells us.[1]

Preventing damage to the environment and human health at an early stage is much better than trying to deal with it after it has occurred. As mentioned in Chapter 2 there are twenty-seven principles mentioned in the *Rio Declaration*, which underlies the concept of sustainable development in trying to protect the degradation of the environment.[2] However a distinction must be made between the principles that are characteristic of sustainable development and those, which underlie sustainable development.[3] The important principles, which need to be implemented in order to promote and achieve sustainable development, are the polluter-pays principles, prevention principle and precautionary principle.

To preserve the environment, the general principles of international environmental law, become applicable on an international basis. Governments should use these principles as a guideline for any actions or activities, which are authorised or carried out in respect to the protection of the environment.[4] These principles are detailed and complex and provide unlimited potential for decision-makers and the courts to develop a body of generally acceptable environmental management practices.

Ideals will find their way into concrete rules by the formulation of legal principles.[5] Some of these legal principles or rules may reflect customary law, others may reflect

---

1 Douma 2000 *RECIEL* 132.

2 These are the twenty-seven (27) principles formulated and found their presence in the *Rio Declaration*. For the purposes of this study only certain principles will be discussed.

3 Sustainable development is comprised out of four principles namely: 1) the principle of inter-generational equity, 2) intra-generational equity, 3) principle of sustainable use and 4) integration principle. The others are the international environmental law principles, which have relevance to sustainable development through their inclusion in many international documents.

4 Sands *Principles of International Environmental Law* (2nd ed) 231.

5 Verschuuren *Principles of Environmental Law* 25.

emerging obligations and other have a slightly less developed legal status as they may still be evolving and have not yet been implemented or recognised on an international level.[6] However these emerging international environmental law principles may have functioned in an effective way to prevent or mitigate environmental harm and have further provided relief through damages.[7] Reference can be made to the *Rio Declaration*, particularly Principles 15, Principle 16 and Principle 14.[8]

These principles have clearly been formulated in a way to prevent damage to the environment in the best possible way. Principle 21 of the *Stockholm Declaration* and principle 14 of the *Rio Declaration* is aimed at reducing; limiting or otherwise controlling of the activities, which may cause environmental damage while Principle 15, provides guidance in the development and application of international environmental law where there is scientific uncertainty. Principle 16 may be a reflection of the relief, which one may seek by stating that it is requirement that the person who is responsible for causing the pollution must carry the costs of cleaning or rectifying the effects of the pollution.

The first step therefore to make an ideal more concrete is the formulation of legal principles and to apply these principles more concrete rules have to be developed. Legal principles have their basis in written or unwritten law and their possible direct and intense influence on legal rules concerning activities harming the environment, they must be classified as part of the morality of duty. But the questions arises as to what exactly is a legal principle and how they further the ideal of sustainable development?

---

6 Sands *Principles of International Environmental Law* (2nd ed) 232.

7 Iwama *Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm* 107.

8 Principle 16 of the *Rio Declaration* is the polluter pays principle, principle 15 is the precautionary principle and principle 14 is the principle of preventive action or preventive principle. The principles will be discussed in more detail below. Principle 21 of the Stockholm Declaration is said to be reflective of the preventive principle.

3.2 *Principles and Rules?*

International environmental law has developed a core of fundamental, guiding legal principles. These principles range form the clearly accepted 'hard law' one to those said to be emerging and to the ones that are merely aspirational or futuristic values.[9] Principles are widely used in international environmental law, perhaps more than in any other field of international law.[10] Reference has been made to principles in the preambles of many international documents. Principles can be part of written, formal law, of treaties or legislation and together with more concrete rules impose duties on states or individuals.[11]

The nature of principles may be clarified in relation to the distinction between rules and principles. It is Dworking who provided the following distinction between rules and principles. The main distinction between rules and principles lie in the fact that rules apply in an all-or-nothing fashion while that is not the case with principles. Principles have a certain 'weight' and conflicting principles must be weighed and balanced against one another. Conflicting principles could accordingly have legal validity as some may have more weight than others. Rules on the other hand differ as where one may find conflicting rules only one of these rules can prevail. Although various authors have criticized the distinction of Dworkin, it seems to provide a basic and clear distinction between rules and principles.[12]

Many different consequences may follow from the classification of something as a legal principle or as a legal rule.[13] Principles do differ from rules as principles give a more generalised direction for a decision while rules can be directly applied in individual cases.[14] Principles are seen as the link between the ideals and duties, between the morality of aspiration and the morality of duty. Although they are of a more normative and abstract nature than legal rules they can only be applied in

---

9 Nanda and Pring *International Environmental Law* 17. See also Verschuuren *Principles of Environmental law* 34 whereby he points out that the precautionary principle and polluter-pays principle are mot substantive in nature as procedural principles are less abstract and look more like rules.

10 Kiss and Shelton *International Environmental Law* (3rd ed) 203 and 204.

11 Verschuuren *Principles of Environmental Law* 25.

12 Scholtz 2006 *TSAR* to be published

13 Sands *Principles of International Environmental Law* (2nd ed) 232.

14 Verschuuren *Principles of Environmental Law* 38. See also Evans (ed) *International Law* 130.

combination with concrete rules.[15] Because principles go beyond concrete rules of policy goals they say something about a group of rules or policy goals, indicating what the common goal of the collection is. Therefore they contain a high moral and legal value.[16]

Verschuuren therefore distinguishes nine distinct functions of principles namely:

1) principles help to define open or unclear statutory rules;
2) principles enhance the normative power of statutory rules;
3) principles increase legal certainty and enhance the legitimacy of decision-making;
4) principles form the basis of new statutory rules;
5) principles give guidance to self-regulation and negotiation processes between various actors in society, such as NGO's (non- governmental organisations), authorities and businesses or otherwise help to determine how private parties should behave in the social order;
6) principles create flexibility in the law;
7) principles have to play an important role in the national legal systems and in the EU (European Union) because they help to implement international obligations;
8) principles stimulate integration of environmental considerations into other policy fields; and
9) principles are necessary to pursue an ideal.[17]

By following Sands' argument he is of the opinion that the legal meaning of principles can only emerge through their application to a particular case.[18] Because rules and principles become almost one in their application process, Verschuuren supports the above view of Sands. A rule is applied in the light of a principle, the

---

15 Evans (ed) *International Law* 131.

16 Verschuuren *Principles of Environmental Law* 26. See also Kiss and Shelton *International Environmental Law* (3rd ed) 203.

17 Verschuuren *Principles of Environmental Law* 26 and 38 – 40. From these functions Verschuuren states that a close relationship exists between principles and rules. Chapter 4 and Chapter 5 elaborates on the functions and further discusses the advantages and disadvantages of the codification of principles in legislation.

18 Sands *Principles of International Environmental Law* (2nd ed) 232 – 234.

principle will influence the meaning of the rule. But at the same time, the application of the rule gives the principle a clearer meaning than what the principle would have on its own.

Kiss and Shelton point out that principles indicate the essential characteristics of legal institutions, designating fundamental legal norm or fill gaps in positive law by assigning a value to rules considered important although they are not formally set into legal instruments.[19] Further principles provide a general orientation and direction to which positive law must conform, the rationale for the law without itself constituting a binding form.[20]

Legal principles are therefore important norms, which can be applied in day-to-day legal practice together with rules and forming part of the morality of duty. It is the ideals behind the principles that form part of the morality of aspiration with sustainable development being the most prominent example. Principles can be directly applied to the law, but ideals cannot be directly applied, due to their vague nature. Principles are formulated and applied in an attempt to clarify the ideal.[21]

In using principles by no means implies that we are not using rules but that the influence of a principle on rules might even become so strong that it becomes a rule with a clear and unconditional meaning.[22] Verschuuren, however opines that environmental legal principles are derived from the ideal of sustainable development and cannot go on functioning in a legal system independently from the ideal.

Both the ideal and principles are constantly influencing each other and cannot be regarded as individual norms that have to justify each and every rule or court decision.[23] Some principles had already been in existence before the ideal of sustainable development founded international recognition and others only when this recognition had been awarded. Some of these principles can be found in many

---

19 Kiss and Shelton *International Environmental Law* (3rd ed) 203.

20 Kiss and Shelton *International Environmental Law* (3rd ed) 204.

21 Verschuuren *Principles of Environmental Law* 26 – 27. The legislator and other actors in the legal processes formulate and apply the principles in an attempt to clarify an ideal.

22 Verschuuren *Principles of Environmental Law* 41. See also Kiss and Shelton *International Environmental Law* (3rd ed) 204.

23 Verschuuren *Principles of Environmental Law* 27.

international texts before the *Rio Declaration* while others have emerged since the *Rio Declaration*.[24]

3.3 The Principles Relevant to Environmental Law

Principles can fall under a variety of different sources in international law and play various roles depending on their legal nature.[25] Article 38(1)(c) of the *Statute of the International Court of Justice* (hereafter the *ICJ Statute*)[26] refers to the 'general principles of law recognised by civilised nations'. This is not the only source where principles can be found in international law, but can also be written down in treaties between states or between states and international organisations, they can become customary law or can be written down in the UN General Assembly Resolutions and Declarations.[27]

Norms and principles have emerged to become widely accepted and repeated in treaties and national laws concerned with environmental protection.[28] General principles can also be found in 'soft-law' instruments such as the *Stockholm and Rio Declarations*. 'Soft-law' documents may give states the opportunity to agree upon obligations they would not have agreed upon in a binding form. Other advantages of using 'soft-law' instruments, is that these do not require formal implementation and can become effective immediately.[29]

---

24 Examples of these principles are the preventive and polluter pays principle and the newer principle being the precautionary principle.

25 Verschuuren *Principles of Environmental Law* 51.

26 The *International Court of Justice* (*ICJ*) is sometimes referred to as the World Court or The Hague Court. The ICJ is the UN's principle judicial organ and was established as a successor to the *Permanent Court of International Justice* (*PCIJ*) in 1945. The *ICJ* has established a seven member Chamber for Environmental Matters in light of the developments of International Environmental Law in recent years. HYPERLINK http://www.icj-cij.org 5 June. See Sands *Principles of International Environmental Law* (2nd ed) 214 – 218 and also refer to Brownlie *Principles of Public International Law* (6th ed) 677 – 694 for a further and more in-depth discussion of the ICJ.

27 Verschuuren *Principles of Environmental Law* 51. See also Birnie and Boyle *International Law and the Environment* (2nd ed) 21 and Brownlie *Principles of Public International Law* (6th ed) 15. Evans (ed) *International Law* 130.

28 Kiss and Shelton *International Environmental Law* (3rd ed) 175.

29 Verschuuren *Principles of Environmental Law* 52.

'Soft-law' documents play a very important role in international as well as national law as they help establish a new legal order in a fast growing and unsettled field of international environmental law.[30] The principles in the 'soft law' documents can be written into binding treaties and become hard law.

The *Rio Declaration* contained many, now well-known principles, that are to be used to influence environmental law in the protection of the environment and to be promoted in order to achieve sustainable development. Although it is non-binding it is still regarded as an important 'soft-law' instrument used in the process of codification and development of international law.

3.4 The Precautionary Principle

3.4.1 History of the Precautionary Principle

In some European languages, the precautionary principle is referred to as the *principle de precaution, principio de precaucion, Vorsorgeprinzip, voorsorg(s)beginsel* but in English it is know as the 'principle of precautionary action' or the precautionary principle or precautionary approach.[31] Because of its wide spread acceptance in international law it has resulted in the precautionary principle frequently been referred to as one of the general principles of international environmental law.[32]

The precautionary principle began to appear in 'soft-law' international legal instruments in the mid 1980's, and became the single most important environmental legal principle in the field of international environmental law after its inclusion in the *Rio Declaration*.[33] Prior to this it has featured as a principle in domestic legal systems most notably that of West German.[34] It appears in different modalities, but in the least

---

30 Birnie and Boyle *International Law and the Environment* (2nd ed) 26 – 27.

31 Trouwborst *Evolution and Status of the Precautionary Principle in International Law* 3. The Americans are in favour of calling it the precautionary approach.

32 Trouwborst *Evolution and Status of the Precautionary Principle in International Law* 34.

33 Sands *Principles of International Environmental Law* (2nd ed) 280. See also Verschuuren *Principles of Environmental Law* 56 and Kiss and Shelton *International Environmental Law* (3rd ed) 206.

34 Traces of the precautionary principle within German law is the reference to the *Vorsorgeprinzip*. See Boutillion 2002 *Michigan Journal of International Law* 430; Verschuuren *Principles of Environmental Law* 55 and Sands *Principles of International Environmental Law* (2nd ed) 267.

progressive version of the principle, measures are required if full scientific certainty about the consequences for the environment of a particular activity is lacking but all other conditions for taking measures are fulfilled.[35]

The principle finds it roots in the more traditional environmental agreements calling on parties and institutions to such agreements to create, act and adopt decisions based on scientific findings or methods.[36] Further it was developments in the 1980's regarding ozone depletion, which reflected the growing support for the precautionary principle. The precautionary principle has been included in at least 12 hard law documents to-date.[37] Further it has been adopted in many international environmental treaties to date and although it is not worded the same in each treaty, Principle 15 of the *Rio Declaration* is the most commonly cited version.[38]

The precautionary principle played a considerable role in the debate on the appropriate protection policy for the North Sea. It was thus at the *Conferences of the North Sea* in 1987 that this principle began to appear in texts and started to receive much recognition.[39] In the EU no trace of the precautionary principle was found until the late 1990's when the precautionary principles was seen as a principle of growing importance but was not as important as other principles already entrenched in EU Law.

---

35 Verschuuren *Principles of Environmental Law* 56.

36 Sands *Principles of International Environmental Law* (2nd ed) 268. Further evidence of this is seen in the Preamble of the *World Heritage Convention* of 1972.

37 See article 4(3)(f) of the *Bamako Convention on the Ban of Import into Africa and the Control of Transboundry Movement and Management of Hazardous Waste within Africa* of 1991, Article 3(3) of the *UN Framework Convention on Climate Change* of 1992, the Preamble of the *Convention on Biological Diversity*, Article 2(2)(a) of the *Paris Convention for the Protection of the Marine Environment of the North-East Atlantic* of 1992, article 3(2) of the *Helsinki Convention for the Protection of the Baltic Sea Area* of 1992, article 6(2) of the *Straddling Fish Stocks Agreement implementing the UN Convention on the Law of the Sea* of 1995 and in article 1 of the *Cartagena Biosafety Protocol to the Convention of Biological Diversity* (hereafter the *Cartagena Protocol*) of 2000. In Article 1 of the *Catagena Protocol* states in Article 1 that 'In accordance with the precautionary approach contained in Principle 15 of the *Rio Declaration*, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the filed of the safe transfer, handling and use of living modified organisms resulting from modern biological diversity, taking into account risks to human health and specifically focussing on transboundary movements.

38 Sands *Principles of International Environmental Law* (2nd ed) 269.

39 Gundling 1990 *International Journal of Estuarine and Coastal Law* 23. Kiss and Shelton *International Environmental Law* (3rd ed) 207.

It was thus with the entrenchment of the precautionary principle in the *Maastricht Treaty* that it became important in EU Law. Four Principles were introduced into the EC Treaty and the precautionary principle was included as a fifth principle. The precautionary principle also formed the basis of the European Unions Environmental Policy according to the *Maastricht Treaty* of 1992 although the term is not clearly defined in the treaty itself.[40]

The existence of *usus* can be found in a variety of materials such as treaties, the decisions of national and international courts, national legislation, diplomatic correspondence, policy statements by government officers, opinions of national law advisers, comments by states on draft reports of the International Law Commission, and the resolutions of the political organs of the United Nations.[41]

Further the precautionary principle has also been brought before the *ICJ* in several instances in relation to environmental litigation. The court has however refused to incorporate the principle in its legal discussions of the cases. The parties to the cases relied upon the precautionary principle but the majority opinions declined to address the precautionary principle and bases their decisions on other grounds.[42]

3.4.2 Defining the Precautionary Principle

States have long recognised as a matter of domestic and international law that it is generally preferable to prevent pollution than to deal with it after it has occurred.[43] The precautionary principle has become very prominent in environmental law and although it is still busy evolving, has subsequently been incorporated into various international treaties since 1989.[44] Therefore the precautionary principle enjoys

---

40 Kiss and Shelton *International Environmental Law* (3rd ed) 207. Davies *European Union Environmental Law* 45 - 49. For a further in-depth discussion on the precautionary principle in EC Law see Verschuuren *Principles of Environmental Law* 86-92. See also Cruz Vilaca 2004 *European Public Law* 369 and Boutillon 2002 *Michigan Journal of International Law* 464 – 468.

41 Scholtz 2002 *SAJELP* 169.

42 Boutillon 2002 *Michigan Journal of International Law* 451-452.

43 Hickey and Walker 1995 *Virginia Environmental Law Journal* 423.

44 Boutillon 2002 *Michigan Journal of International Law* 430 and 433. It has been pointed out that defining the precautionary principle is problematic but the definition provided by the *Rio Declaration* is the most commonly stated definition. See also Sands *Principles of International*

widespread international support.[45] Although the principle was not present in the *Stockholm Declaration* it was included in the *Rio Declaration*, which started the international support, it enjoys today.[46] In terms of Principle 15 of the *Rio Declaration* the precautionary principle is defined as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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 the environmental degradation.

The reason for the formulation of the precautionary principle is due to the effect of human activities on the environment and the relation with future generations although the needs of future generations are not known.[47] The definition of the precautionary principle however indicates that science is not yet capable of addressing the increasing global threats and therefore it is intended to take into account the limits of science in addressing irreversible or grave risks, which are affecting or may affect the environment.[48]

Science can estimate a risk level within a certain range of error but cannot be conclusive as to what level of risk is socially acceptable. The danger is to envoke the precautionary principle as a ready made justification when this scientific evidence is not conclusive and decision makers want to make a decision about carefully weighing the interests at stake.

Most importantly it addresses the temptation for decision-makers to rely on scientific expertise in order to avoid taking responsibility for their policies, requiring experts to recognise the imperfections of their science and placing the burden on policy makers to decide what level of risk is acceptable.

Environmental Law (2nd ed) 268. The wording in each of the international documents is not the same but regardless it has now started to receive international support since its inclusion in the *Rio Declaration*. See also Nanda and Pring *International Environmental Law* 58.

45 McIntyre and Mosedale 1997 *Journal of Environmental Law* 221 and 234. See also Trouwborst *Evolution and Status of the Precautionary Principle in International Law* 1.

46 Verschuuren *Principles of Environmental Law* 65-66.

47 Scholtz *Milieuconvenanten* 48. Nanda and Pring *International Environmental Law* 59.

48 Boutillon 2002 *Michigan Journal of International Law* 431. See also Palmer *Environmental Ethics* 60, Davies *European Union Environmental Law* 47. The scientific evaluation of risk should however be as complete as possible in all circumstances.

The precautionary principle is said to propose a course of action to be followed in instances where the impact of a given substance or activity and harm cannot be identified with certainty but does not indicate to decision-makers or individual actors what to do or when something should be done. It further does not reverse the burden of proof requiring the proponent of a particular activity to prove that it is free of risks and it does not place environmental concerns ahead of social and economic ones.[49]

Ellis and FitzGerald point out that the definition as given in principle 15 of the *Rio Declaration* contains two elements that are not ever-present features of definitions of precaution and very controversial namely the reference to serious or irreversible damage as a trigger for the application of precaution and the reference to the cost-effectiveness of measures taken pursuant to the principle. They further state that the use of negative terms implies that the principle does not give rise to an obligation to take environmental protection measures.[50]

Under the precautionary principle it is the environment and not the actions of those that may impact the environment, which is given the benefit of the doubt. The onus of proof though has shifted to those whose actions may cause change or damage. They are then required to provide a convincing argument that their actions will not have a serious or irreversible impact on the environment exceeding long-term benefits.[51]

According to Boutillon it is sometimes referred to as the reversed burden of proof. Instead of putting the burden on those who seek to regulate an activity to show its potential dangers, it is on those who want to carry out the activity to prove that it is safe. The first group would advance scientific theories supporting their claim of harmfulness while the second group will attempt to show that there is no valid technical ground for regulating their activities. Claiming of contradictory evidence is not enough to substantiate a claim. However, Boutillon points out that shifting the burden of proof is not necessarily of the essence of the precautionary principle.[52]

---

49 Ellis and FitzGerald 2004 *McGill Law Journal* 782.

50 Ellis and FitzGerald 2004 *McGill Law Journal* 782 -783.

51 Deville and Harding *Applying the Precautionary Principle* 14; Boutillon 2002 *Michigan Journal of International Law* 450 – 451; Cameron and Abourchar 1991 *Boston College International and Comparative Law Review* 22 and Nanda and Pring *International Environmental Law* 59.

52 Boutillon 2002 *Michigan Journal of International Law* 431-432.

The precautionary principle applies when:

1. A situation regarding the use of a substance or behaviour exists,
2. Which may threaten the environment or human health in a grave or irreversible way, and
3. There is a serious risk that the threat will materialise.[53]

Implicit in this is the scientific uncertainty about the nature and extent of the threat or uncertainty as to the realisation of the risk into a major harm. Science can estimate a risk level within a certain range of error but cannot tell us what level of risk is socially acceptable and the danger is to invoke the precautionary principle when scientific evidence is not conclusive and decision makers want to make a decision without carefully weighing the interests at stake. The lack of scientific uncertainty is one of the biggest impediments for environmental regulators at all governmental levels as it is generally impossible to determine beforehand what level of pollution will or will not affect the environment.[54]

The precautionary principle aims to provide guidance in the development and application of international environmental law where there is scientific uncertainty. It continues to generate disagreement as to its meaning and effect as reflected in particular in the view of states and international judicial practice. On the one hand, some consider that it provides the basis for early international legal action to address highly threatening environmental issues, such as ozone depletion and climate change. On the other hand, its opponents have decried the potential, which the principle has for over-regulating and limiting human activity.[55]

This principle finds its roots in the more traditional environmental agreements, which call on parties to such agreements and the institutions they create, to act and to adopt decisions, which are based upon scientific findings in the light of such knowledge available at the time.[56] These standards suggest that action shall be taken where there

---

53 Boutillon 2002 *Michigan Journal of International Law* 431.

54 Nanda and Pring *International Environmental Law* 58.

55 Sands *Principles of International Environmental Law* (2nd ed) 269.

56 Sands *Principles of International Environmental Law* (2nd ed) 269. See also Nanda and Pring *International Environmental Law* 59.

is scientific evidence that significant environmental damage is occurring, and that in the absence of such scientific evidence no action would be required.

Any formulation of the precautionary principle is 'a tool for decision-making in a situation of scientific uncertainty' which effectively 'changes the role of scientific data'.[57] It is also put in another way as being described as a 'policy making strategy', which 'addresses the manner in which policy makers, for the purposes of protecting the environment, apply science, technology and economics'.[58]

Many of the objections that are raised regarding the precautionary principle reflect the assumption about the role of principles and legal norms. Much criticism levelled at the precautionary principle seems to flow from a belief that legal norms must contain a precise definition of the circumstances in which they will apply and must give precise instructions to their addressees. If the norm leaves too much decision-making responsibility in the hands of authorities, it is suggested, there is a risk of confusion and of arbitrariness. The precautionary principle is extremely frustrating when looked at in this light because the only instruction that it contains is not to use uncertainty as an excuse for postponing environmental measures.[59]

The concept of risk is a predominant factor of modern environmental law and it means the possibility or likelihood of adverse consequences from a given action. All human actions involve some risk and interaction with nature itself features risks. Managing and reducing risk is a basic objective of many governmental policies, legislation and regulation. Risk assessment is thus a direct application of the precautionary principle because it attempts to evaluate the probabilities of various harms resulting from a proposed activity.[60]

---

57 McIntyre and Mosedale 1997 *Journal of Environmental Law* 222.
58 McIntyre and Mosedale 1997 *Journal of Environmental Law* 222.
59 Ellis and FitzGerald 2004 *McGill Law Journal* 784.
60 Kiss and Shelton *International Environmental Law* (3rd ed) 249.

3.4.3 *Precautionary Principle: Customary International Law or Not?*

In terms of Article 38(1) of the *Statute of the International Court of Justice* the sources of international law are described as: international conventions (treaties), whether general of particular; international custom, as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations and judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law. The inclusion of the precautionary principle in many treaties has lead to authors arguing that the principle is emerging as a customary rule.[61] Customary law rules have played a secondary role in international environmental law, although they can establish binding obligations for states.[62]

States may be bound by a rule when entering a treaty by giving their express consent, however the consent regarding customary rules can be inferred from their conduct. However questions arise regarding consent by conduct and proof thereof. It is thus that courts have identified two main requirements for the existence of a customary rule.[63]

In order for a rule to be recognised as customary rule it must meet two requirements namely: settled/state practice (*usus*) and the acceptance of an obligation to be bound (*opinio juris sive necessitatis*).[64] Customary norms of international law arise when a practice among nations is extensive and virtually uniform and accompanied by a conviction that its actions are obligatory under international law. [65] Customary law is by nature dynamic meaning it may evolve rapidly or slowly become inducted and eventually codified. In new areas of international law state practice as evidence of *opinio juris* can quickly establish customary law.[66]

---

61 Boutillon 2002 *Michigan Journal of International Law* 441. If this was the case then all states would be bound by this customary obligation and violation of it would then trigger their responsibility at an international level.

62 Sands *Principles of International Environmental Law* (2nd ed) 144.

63 Dugard *International Law: A South African Perspective* (2nd ed) 28.

64 Dugard *International Law: A South African Perspective* (2nd ed) 27. See also Sands *Principles of Environmental Law* (2nd ed) 143; Evans (ed) *International Law* 125 and Brownlie *Principles of Public International Law* (6th ed) 6.

65 Cameron and Abouchar 1991 *Boston College International and Comparative Law Review* 19.

66 Cameron and Abouchar 1991 *Boston College International and Comparative Law Review* 19.

The inclusion of the precautionary principle in the *Rio Declaration* is significant as it could be argued to mark the elevation of the principle to the status of a core principle of international environmental law making.[67] According to Freestone, 'perhaps the most significant way in which the Rio process may have contributed to the development of international environmental law is through the crystallisation of legal principles'.[68]

However it must be borne in mind that the existence of a customary rule is very difficult to prove as the process of developing rules of customary law cannot be considered as part of a formal legislative process. To prove customary international law requires evidence of consistent state practice, which practice will only rarely provide clear guidance as to the precise context or scope of any particular rule. Customary law can be shaped and directed because the practices of states can be consciously affected by various international actions including the non-binding act of international organisations and the intergovernmental statements and declarations.

3.4.3.1 State Practice (*usus*)

State practice is difficult to prove and little research has been carried out on state practice relating to international environmental obligations. State practice can be found in a number of sources. If states actively demonstrate their support of a particular rule, no problem of proof will arise but in many instances no clear evidence of this nature will be present and an inference must then be drawn from the conduct of the particular state's conduct or silent acceptance in a rule.[69]

However it is important to bear in mind that a particular state may fail to act in a certain way also providing evidence of state practice.[70] For state practice to contribute

---

67 McIntyre and Mosedale 1997 *Journal of Environmental Law* 230. See also Cameron and Abouchar 1991 *Boston College International and Comparative Law Review* 20.

68 McIntyre and Mosedale 1997 *Journal of Environmental Law* 230.

69 Dugard *International Law: A South African Perspective* (2nd ed) 28. Dixon *International Law* (5th ed) 28.

70 Sands *Principles of International Environmental Law* (2nd ed) 145. Mutual toleration of certain levels of pollution or of activities, which cause environmental degradation, can provide evidence that states accept such levels and activities as being compatible with international law. Dugard

to the development of a rule of law, the practice must be general, although this does not mean that it requires the participation of all states across the globe or in a particular region.[71]

In the *Asylum Case* the *ICJ* stated that in order for a practice to constitute a custom it must be 'constant and enjoy uniform usage'.[72] The *ICJ* held in this particular case that no evidence was brought to show any constant and uniform usage regarding cases of asylum and that the current case could not constitute a customary rule as it was shown that many states rejected many of the conventions regarding the granting of asylum.[73]

However a different approach was seen in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* where the court stated that a custom did not require absolute conformity but it was sufficient that consistency was present and any inconsistency should be treated as a breach of that rule and not as indication of the recognition of a new rule.[74] In both cases the *ICJ* was concerned with customary law arising in the context of treaty rules.

In some cases a certain passage of time is required to state practice to evolve into customary law. However sometimes very little practice is needed to establish a rule and it can therefore come into existence rapidly.[75] Brownlie points out that provided the consistency and generality of a practice is approved, no particular duration of time is required but it may form part of the evidence for consistency and generality.[76] In the *North Sea Continental Shelf Cases*[77] the *ICJ* has stated that it might be that:

---

distinguishes that a state may fail to protest against a certain rule when it is still in its formative states. Dugard *International Law: A South African Perspective* (2nd ed) 28.

71 Sands *Principles of International Environmental Law* (2nd ed) 145. See also Dixon *International Law* (5th ed) 29.

72 *Asylum Case (Colombia v Peru)* 1950 ICJ Reports 266. This case concerned the granting of asylum to political refugees in embassies in Latin American Countries. The question arose whether this type of practice amounted a customary international rule.

73 Dixon *International Law* (5th ed) 31-32.

74 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v America)* 1986 ICJ Reports 14, 98.

75 Dugard *International Law: A South African Perspective* (2nd ed) 29.

76 Brownlie *Principles of Public International Law* (6th ed) 7.

77 *North Sea Continental Shelf Cases* (1969) ICJ Reports 3.

> Even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included states whose interests were specifically affected[78]

Therefore a long practice is not necessary as rules relating to the *Continental Shelf* cases emerged at a fairly quick rate evolving into customary rules.[79]

The relationship between treaty and custom is also close, often based upon elements of mutual interdependence. The conclusion and implementation of a treaty may reflect the existence of a rule as customary law.[80] The frequent reference to Principle 21 of the *Stockholm Declaration* and the further incorporation thereof in many treaties shows the importance of treaties contributing to the development of something as a custom.[81]

The *ICJ* has confirmed the customary status of Principle 21 but has remained silent on the extent of uniformity of state practice. Sands states that in the field of environmental law the *ICJ* may well be aware that it may have to deduct rules of customary international law directly from state practice.[82]

Therefore the adoption of many treaties which include the precautionary principle and the elaboration in many more recent international instruments, especially its presence in the *Rio Declaration* as a general guiding principle for taking action to protect the environment, adds weight to the argument that it has crystallised into a principle of customary international law.[83]

---

78 Para 73.

79 Brownlie *Principles of Public International Law* (6th ed) 7.

80 Sands *Principles of International Environmental Law* (2nd ed) 145.

81 Sands *Principles of International Environmental Law* (2nd ed) 145. Dixon *International Law* (5th ed) 35-36.

82 Sands *Principles of International Environmental Law* (2nd ed) 146.

83 McIntyre and Mosedale 1997 *Journal of Environmental Law* 222. See also in this regard Sands *Principles of International Environmental Law* (2nd ed) 148.

3.4.3.2 *Opinio Juris*

Settled practice on its own is not sufficient to create a customary rule.[84] The second element of customary law, *opinio juris sive necessitatis*, requires evidence that a state has acted in a particular way because it believes that it is required to do so by law.[85] According to Dugard there must be a sense of obligation, a feeling by states that they are bound by a particular rule. In terms of article 38(1)(b) the general practice is that the rule is accepted as law.

Further in the *North Sea Continental Shelf Cases* the *ICJ* stated in its finding: 'Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.'[86] The sense of legal obligation as opposed to motives of courtesy, fairness or morality, is real enough, and the practice of states recognises a distinction between obligation and usage.[87]

It is difficult to prove the existence of *opinio juris*, since it requires consideration of the motives underlying state activity.[88] The *ICJ* may recognise two approaches regarding the proof of *opinio juris.*[89] The *North Sea Continental Shelf Case* was strict regarding the proof of *opinio juris* and did not merely assume the existence thereof and called for a stricter approach in regard to proving *opinio juris*.[90] Such an approach which shifts the burden of proof, but which is not universally shared, would make the

---

84 Dugard *International Law: A South African Perspective* (2nd ed) 31 and Dixon *International Law* (5th ed) 32.

85 Sands *Principles of International Environmental Law* (2nd ed) 146. See also Brownlie *Principles of Public International Law* (6th ed) 8 and Dixon *International Law* (5th ed) 33.

86 Dugard *International Law: A South African Perspective* (2nd ed) 31.

87 Brownlie *Principles of Public International Law* (6th ed) 8.

88 Sands *Principles of International Environmental Law* (2nd ed) 146. See also Dugard *International Law: A South African Perspective* (2nd ed) 32; Evans (ed) *International Law* 125 and also Dixon *International Law* (5th ed) 32.

89 Brownlie *Principles of Public International Law* (6th ed) 8. On of the approaches taken by Courts regarding *opinio juris* is the assumption of the existence thereof on the basis of evidence of a general practice or a consensus of literature, or the previous determinations of the court or other international tribunals. This approach was not followed in the *North Sea Continental Shelf Case* and the *Nicaragua Case*.

90 Brownlie *Principles of Public International Law* (6th ed) 9-10.

acceptance of principles and rules set out in treaties more likely to contribute to the development of custom.[91]

Dugard is of the opinion that the generation of customary rules by political organs of the UN is a feature of contemporary international law.[92] The *ICJ* also held that: 'the effect of consent to the text of such resolutions may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution'.[93]

3.4.3.3 Treaties and Custom

Custom and treaty are two major sources of international law and are necessary components of the international order. Treaty and custom serve different purposes and are many times complementary but where the treaty and customary law stipulate contradictory obligations difficulties may arise.[94]

Where a treaty and the customary law stipulate similar obligations few problems arise and all the parties who have signed a treaty will be bound by the terms and conditions of the treaty while non-parties will be bound by the custom.[95] However, no assumption should be made that a customary norm has been created for all because a larger number of states are a party to a specific treaty.[96]

The state practice, which is necessary for the establishment of a rule of a customary law, has to take the form of an action by a state on an international level. An action by a state, which does not impact a state outside its territory, is irrelevant to state practice.[97] One of the most common acts between states is the conclusion of a treaty, and may therefore serve as acts of practice forming custom. However the treaty itself creates obligations which may not be of a customary nature but should a number of

---

91 Sands *Principles of International Environmental Law* (2nd ed) 147.

92 Dugard *International Law: A South African Perspective* (2nd ed) 32.

93 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* 1986 ICJ Reports 14.

94 Dixon *International Law* (5th ed) 35. Treaty and custom do serve different purposes and are quite complementary and a treaty may codify custom or lead to the development of new customary law through the inputes it gives to state practice.

95 Dixon *International Law* (5th ed) 35.

96 Sands *Principles of International Environmental Law* (2nd ed) 148.

97 Evans (ed) *International Law* 134.

states make a habit of concluding treaties containing certain provisions and principles it may be taken to show that they recognise the existence of a custom requiring them to do so.[98]

State practice in treaty making and in accordance with obligations under treaties can contribute to the development of customary law.[99] Should there be a conflict between custom and treaty it has an effect on the legal relationship of the parties to the treaty.[100]

Guiding principles which may, through treaty practice, reflect existing or emerging norms of customary law might include the polluter pays principle, the principle of precautionary action, and the principle of common but differentiated responsibilities. Procedural obligations, which may be binding under customary law, at least within certain regions, include the obligation to consultation, the provision of information on the environment and the obligation to carry out an environmental impact assessment for activities likely to cause significant environmental damage.[101]

3.4.3.4 Case Law

It must however be mentioned that international courts and tribunals have been reluctant to accept, explicitly that the principle has a customary international law status, notwithstanding the preponderance of support in favour of that view and diminishing opposition to it. The reluctance may be understandable in view of its inherently rational approach, even if the practical consequences of its application fall to be determined on a case-by-case basis.[102]

---

98 Evans (ed) *International Law* 134

99 Sands *Principles of International Environmental Law* (2nd ed) 147.

100 See Dixon *International Law* (5th ed) 36-37. Dixon identifies three situations.

101 Sands *Principles of International Environmental Law* (2nd ed) 148. See Sands *Principles of International Environmental Law* (2nd ed) 149 -150 for a further discussion on aspects such as persistent objector and regional custom.

102 Sands *Principles of International Environmental Law* (2nd ed) 279.

The precautionary principle was first raised in the second of the *Nuclear Tests*[103] cases by New Zealands 1995 request concerning French nuclear testing. This principle was relied on extensively by New Zealand claiming that the principle was recognised in international law and therefore making it an obligation evaluate the impact on the environment before undertaking a potentially dangerous activity.[104] France however responded by saying that the principle was not as established in international law but regardless of this it had been complied with and that the evidentiary burdens were no different in environmental law that any other field of international law.[105] Although they did not agree that they had the burden of proof, France adduced evidence of the harmless nature the tests would have on the environment.

Of the *ICJ's* Judges it was only in the dissenting opinion of Judge Weeramantry who noted the precautionary principle stating that it was in fact gaining international support as part of international environmental law. Further he stated that to guarantee effective protection of the environment it was an essential element of the precautionary principle to reverse the element of burden of proof. He gave an opinion in favour of reversing the burden of proof as he stated that it was the party who was considering carrying out potentially damaging activities and hold important information and therefore is to prove it is safe. To further substantiate his argument that the precautionary principle is an internationally recognised principle he presented and listed international and regional agreements which endorsed the precautionary principle all to which France was a party.

Another important case brought before the *ICJ* where the issue of the precautionary principle was addressed is the *Gabcikovo-Nagymaros* case[106] where Hungry and Slovakia invoked the precautionary principle.[107] Both parties were favourable

---

103 *Nuclear Tests (New Zealand v France) (Interim Protection)* 1973 ICJ Reports.

104 Paragraph 35.

105 Paragraph 38.

106 *Gabcikovo – Nagymaros (Hungary/Slovakia)* 1997 ICJ Reports.

107 In 1977 Hungary and Czechoslovakia entered into a treaty, *Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks* of 1997, for the construction of a system of locks on the Danube River of which one of the locks was to be built in Czechoslovakian territory and the other two locks built in Hungarian territory. In 1989 Hungary temporarily stopped construction on the Gabcikovo-Nagymaros Dam alleging that substantial environmental damage could occur affecting the ecosystems of the Danube, reduce water supply and lower the

regarding the precautionary principle but the court failed to use it in any means to determine the case. Hungry linked the precautionary principle to the principle of prevention and the court merely acknowledged that prevention is a fundamental feature of environmental protection.[108] It was once again the dissenting opinion of Judge Weeramantry that touched on the precautionary principle referring back to his previous opinion in the *Nuclear Test* case.

Scholtz also argues the classification of the precautionary principle as customary international law by referring to the *Hormones*[109] decision.[110] The issue in this case was in respect to the application of the precautionary principle as included in Article 5(7) of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (hereafter the *SPS Agreement*).[111] Article 5(7) states that:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within reasonable period of time.

The European Communities choose not to invoke the exemption in article 5(7) but used the precautionary principle as justification for their failure to adhere to article 5(1) of the *SPS Agreement*. The argument of the European Communities was that the precautionary principle formed a part of customary international law, however the *World Trade Organisation* (hereafter the *WTO*) Panel decided that even if the precautionary principle was customary international law, the principle had been incorporated into article 5(7).

---

quality of the water. Slovakia however proceeded with construction saying that the claims were not true despite the fact that in May 1992 Hungary gave notice of their intention and terminated the 1977 Treaty.

108 Paragraph 140.

109 *EC Measures Concerning Meat and Meat Products (Hereafter Hormones)* AB 1997-4. WT/DS26/AB/R. In this case the European Communities banned the importation of meat that had been produced from cattle that had been injected by growth hormones. They applied this ban to promote food safety and argued that the hormones might be carcinogenic. The United States and Canada complained about this ban in 1998.

110 Scholtz 2002 *SAJELP* 167 – 169.

111 *Agreement on the Application of Sanitary and Phytosanitary Measures of April 15 1994, Marrakesh Agreement Establishing the World Trade Organisation*, Annex 1A, Legal Instruments – Result of the Uruguay Round (1994).

The Appellate Body confirmed this decision and further expressed their uncertainty as to whether the precautionary principle is in fact customary international law.[112] It concluded that the precautionary principle awaits more authoritative formulation outside the field of environmental law.[113]

The precautionary principle has not been accepted as part of customary international law although it is present in various international environmental law treaties. A problem which remains is that no single definition is applied in various international treaties.[114] This is the basis on which Boutillon formulates her argument and states that although this principle is found in many treaties the precautionary principle is not generally accepted as a binding rule. Boutillon is of the opinion that due to imprecise formulations of the precautionary principle it has led to the exclusion thereof as a binding rule.[115]

3.5 The Preventive Principle

3.5.1 History of the Preventive Principle

Although it has not often been formulated as a principle it can be traced back in almost all environmental treaties starting in the 1930's.[116] Furthermore it has also been very prominent and gained much support in the European Union. It has become the central feature of many of the EU environmental programmes.[117]

Verschuuren has noted that the preventive principle has remained important after the *Rio Conference* even though the Rio principles do not expressly mention the

---

112 Para 123 – 125.

113 Therefore the general decision was that this principle did not form part of customary international law in the area of health law.

114 Boutillon 2002 *Michigan Journal of International Law* 442 – 443.

115 Boutillon 2002 *Michigan Journal of International Law* 442.

116 Verschuuren *Principles of Environmental Law* 54. Traces of the preventive principle can be seen in Article V(1) of the *African Convention on the Conservation of Nature and Natural Resources* of 1968, Article 2 of the *Convention on Long-Range Transboundary Air Pollution* of 1979, Article 12(2) of the *London Convention* of 1933 and Article 2 of the *Climate Change Convention* of 1992. Refer to Sands *Principles of International Environmental Law* (2nd ed) 248 for reference to specific treaties regarding the inclusion of the preventive principle for a specific area of pollution or degradation.

117 Davies *European Union Environmental Law* 49 to 52.

preventive principle.[118] Yet he states that Principle 11 of the *Rio Declaration* is a reflection of the principle of prevention and abatement, which states that, 'States shall prevent or abate any transboundary environmental interference which could cause or causes significant harm'.[119]

Sands states that the preventive approach has been endorsed whether it be directly or indirectly by the *Stockholm Declaration* in principles 6,[120] 7,[121] 15,[122] 18[123] and 24.[124] Further it is has found specific incorporation into treaties of more general application.[125] However Verschuuren is of the opinion that although the prevention principle is present in many treaties it has not explicitly being mentioned in all because the precautionary principle is already considered to bring the element of

---

118 Verschuuren *Principles of Environmental Law* 65. He does not agree with the opinion of Sands that Principle 11 of the *Rio Declaration* reflects the preventive principle. He states that the wording of Principle 11 states that 'States shall enact effective environmental legislation, environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries in particular developing countries.' Because nothing is mention of a preventive action, Verschuuren is of the opinion that this principle does not necessarily reflect the preventive principle.

119 Verschuuren *Principles of Environmental Law* 28.

120 Principle 6 states that the discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported.

121 Principle 7 states that States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate use of the sea.

122 Principle 15 states that planning must be applied to human settlements and urbanisation with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned.

123 Principle 18 of the *Stockholm Declaration* states that science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.

124 Principle 24 states that international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Co-operation trough multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, n such a way that due account is taken of the sovereignty and interest of all States.

125 It can be found in Article 2(2) of the *Convention on the Protection and Use of Transboundary Watercourses* of 1992, Article 2(4) of the *Convention for the Protection of the Marine Environment of the North-East Atlantic* of 1992 and Principle 1 of the *UNEP Draft Principles* of 1978.

prevention under its scope.[126] The preventive principle is a well-grounded principle in some national laws, well represented in international soft law but it is now only beginning to be a standard to which states will expressly commit themselves to in treaties.[127]

3.5.2 Defining the preventive principle

It has long been established that early action, which seeks to prevent environmental damage is preferable to measures, which counteract the impact of pollution once it has taken place. It is therefore that the preventive principle has been a central feature in many international agreements.[128] It is in this way that environmental harm can be minimised in a cost-effective manner. It can be said that this principle encompasses the rule that 'prevention is better than cure'. This rule that 'prevention is better than cure' is important for both ecological and economic reasons. All the authors concur that it is better to prevent the pollution altogether, being less costly, than incurring the cost to clean it up.[129]

Once environmental degradation has occurred it is very often irreparable as in the case of species extinction, wasting of non-renewable sources, erosion, ocean and other pollution.[130] Even if environmental harms are reparable, waiting until the stage of trying to rectify the damage already caused is uneconomical compared to the cost of preventing the damage in the first place.[131]

---

126 Regarding this Verschuuren mentions that in the wording or definitions of the precautionary principle or approach, mention is made of prevention pollution. Verschuuren *Principles of Environmental Law* 65.

127 Nanda and Pring *International Environmental Law* 57.

128 Davies *European Union Environmental Law* 49.

129 Nanda and Pring *International Environmental Law* 57. See also Kiss and Shelton *International Environmental Law* (3rd ed) 204; Davies *European Union Environmental Law* 49 and Weiss (ed) *Environmental Change and International Law* 17.

130 Weiss (ed) *Environmental Change and International Law* 6. Weiss states that pollution and environmental degradation operated largely on a local level and their effects were isolated to impact. However with the increasing global scale of environmental degradation and pollution that can be seen and effects us not only on a regional level but also on a global level.

131 Kiss and Shelton *International Environmental Law* (3rd ed) 204. See also Nanda and Pring *International Environmental Law* 57, Weiss (ed) *Environmental Change and International Law* 17. Further an emphasis should be laid on pollution prevention or it could happen that costs for the pollution and environmental degradation that has already occurred will have to be borne by other states and future generations.

The principle of preventive action or the preventive principle requires that adequate measures be taken to prevent environmental damage from occurring. The principle is of great importance for the development of environment policy and law since it allows for action to be taken at an early stage before any harm has been done.[132]

According to Sands the preventive principle requires that activity, which does or will cause environmental pollution to be prohibited. The principle seeks to minimize environmental damage by requiring that action be taken at an early stage of the process and if possible before damage has actually occurred.[133] According to Nanda and Pring, prevention requires anticipatory investigation, planning and action before undertaking activities, which can cause environmental harm.[134]

The duty of prevention emerges from an international responsibility not to cause significant damage to the environment but seeks to avoid harm irrespective of whether or not transboundary impacts will occur.[135] The primary obligation that flows from the principle of prevention is prior assessment of potential harmful activities. For international agreements to be effective in environmental protection, they must have their primary focus on pollution prevention.[136]

Many ways are being developed to achieve this namely early warning systems, risk assessments and stronger monitoring provision are developing. Principles are busy emerging, strengthening the procedural requirements such as notification, consultation, access to information or environmental impact assessment which states must fulfil before any activities may be engaged which could harm the environment outside their jurisdiction. These general obligations are incorporated into almost all environmental agreements being concluded.[137]

This is reflected by Principle 17 of the *Rio Declaration* and Principle 21 of the *Stockholm Declaration*. Principle 17 of the *Rio Declaration* states:

---

132 Verschuuren *Principles of Environmental Law* 54.
133 Glazweski *Environmental Law in South Africa* (2nd ed) 20.
134 Nanda and Pring *International Environmental Law* 57.
135 Kiss and Shelton *International Environmental Law* (3rd ed) 204.
136 Weiss (ed) *Environmental Change and International Law* 18.
137 Weiss (ed) *Environmental Change and International Law* 18. See Kiss and Shelton *International Environmental Law* (3rd ed) 205, Davies *European Union Environmental Law* 50.

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

Principle 21 of the *Stockholm Declaration* states the following:

> 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

The standard of care for prevention is due diligence.[138] Failure to exercise due diligence to prevent significant transboundary harm can lead to international responsibility. It may be considered that properly done environmental impact assessments can serve as one standard for determining, whether or not due diligence has been exercised.[139]

3.5.3 Preventive Principle: Customary International Law or Not?

The preventive principle has found specific incorporation into treaties of more general application and although it is present in many treaties it has not explicitly being mentioned in all because the precautionary principle is already considered to bring the element of prevention under its scope.[140] The preventive principle is a well-grounded principle in some national laws, well represented in international soft law but it is now only beginning to be a standard to which states will expressly commit themselves to

---

138 Nanda and Pring *International Environmental Law* 58. See also Birnie and Boyle *International Law and the Environment* (2nd ed) 92 – 93. In general terms 'due diligence' requires the introduction of legislation and administrative controls applicable to public and private conduct capable of effectively protecting other states and the global environment and is expressed as the conduct to be expected of a good government. This principle does not impose an absolute duty but rather an obligation that each state should taken to act reasonably and in good faith and prohibit activities that could cause harm to the environment. Kiss and Shelton *International Environmental Law* (3rd ed) 205–206.

139 Kiss and Shelton *International Environmental Law* (3rd ed) 205.

140 Regarding this Verschuuren mentions that in the wording or definitions of the precautionary principle or approach, mention is made of prevention pollution. Verschuuren *Principles of Environmental Law* 65.

in treaties.[141] This principle has thus not received enough international recognition by countries and has very seldom been brought before an international tribunal. Therefore the preventive principle cannot be classified as customary international law as both the essential elements of *opinio* and *usus* are lacking.

3.6 The Polluter Pays Principle

3.6.1 History of the Polluter Pays Principle

The polluter pays principle was not an entirely new principle when it emerged in the *Rio Declaration*. It was very rarely included in treaties and other international instruments before *UNCED*.[142] The polluter pays principle has a fairly long history in United States and European Environmental Law. [143] The polluter pays principle was first adopted by the *OECD* in 1972[144] and then under EC law in 1973.[145] The principle was later refined by the *OECD* in 1974.[146]

The *OECD* endorses the polluter pays principle and although it is not binding on all *OECD* states, states are left free to determine how it should be implemented.[147] It has therefore significant support and represents and important strategy for controlling environmentally harmful activities by emphasizing responsibility for their true economic costs and complementing the more obvious regulatory measures adopted under regional and global treaties.[148]

---

141 Nanda and Pring *International Environmental Law* 57.

142 Verschuuren *Principles of Environmental Law* 68.

143 Nanda and Pring *International Environmental Law* 41. Nanda and Pring point out that is has been a central feature in both the US and EU environmental law being part of the US common law and statute since the 1970's and has been present in EU legislation since about the same time.

144 The first international instrument to expressly refer to the polluter pays principle was the *OECD Council Recommendation of Guiding Principles Concerning the International Economic Aspects of Environmental Policies* of 1972.

145 Sands *Principles of International Environmental Law* (2nd ed) 283; Davies *European Union Environmental Law* 53; Verschuuren *Principles of Environmental Law* 92 to 94 and Nanda and Pring *International Environmental Law* 41.

146 *OECD Council Recommendation on the Implementation of the Polluter-Pays Principle* of 1974.

147 The *Recommendation* defined the principle in a limited sense to mean that the polluter should bear the expenses of carrying out the measures deemed necessary by public authorities to protect the environment. It does not apply to the costs of environmental damage.

148 Birnie and Boyle *International Law and the Environment* (2nd ed) 111.

Prior to *UNCED* it was included in many different EC documents.[149] Since the inclusion of the principle in the *Rio Declaration*, it has been included in many more environmental treaties.[150] The increased attention being paid to the polluter pays principle results in part from the greater consideration being given to the relationship between environmental protection and economic development, as well as recent efforts to develop the use of economic instruments in environmental protection law and policy. This is likely to lead to the clarification and further developments in defining the polluter pays principle particularly in relation to two issues.[151]

For the polluter pays principle to function efficiently, a liability scheme premised upon the polluter pays principle requires that polluters actually be able to compensate society for the harms caused by their pollution.[152] In the context of controlling the social cost of hazardous waste contamination, this principle does not give landowners and others who have some control over the costs resulting from such contamination the proper incentive to engage in the socially desired discovery, reporting, or cleanup of such contamination unless they can pay for the costs of cleanups.

The financial ability of potentially liable parties to pay for the cleanup of hazardous waste contamination on their property is limited by two economic constraints. The first factor is the solvency of such parties both individually and in the aggregate. A landowner will not be able to pay for cleanups directly unless they can either afford to pay for the cleanup individually or can cede actual contributions from other parties to help defray some, or all, of the costs. Second, potentially liable parties who are not sufficiently solvent may be unable to obtain liability insurance that would spread their

---

149 *Single European Act* of 1968, Article 130R(2) of the *Maastricht Treaty,* Article 2(5) of the *Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Law* of 1992.

150 Article 2(4) of the *Convention on Cooperation for the Protection and Sustainable Use of the Danube River* of 1994, Article 3(4) of the *Convention on the Protection of the Marine Environment of the Baltic Sea Area* of 1992, Article 2(5)(b) of the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* of 1992, Article 2(2)(b) of *Convention on the Protection of the Marine Environment of the North-East Atlantic* of 1992, in the Preamble of the *Amendments to the Protocol for the Protection of the Mediterranean Sea and Pollution from Land-Based Sources* of 1996 and the *Stockholm Convention on Persistent Organic Pollutants* of 2001.

151 Sands *Principles of International Environmental Law* (2nd ed) 284-285. Two concerns is firstly the extent of pollution control costs, which the polluter should pay. The second issue concerns exceptions to the principle, particularly in relation to rules governing the granting of subsidies.

152 Gergen 1994 *New York University Law Review* 672.

risk of potential liability. Both of these constraints work to undermine the efficient operation of the polluter pays principle.[153]

3.6.2 Defining the Polluter Pays Principle

The polluter pays principle has come to mean all things to all people. In terms of Principle 16 if the *Rio Declaration* it has been defined as follows:

> National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment

This principle establishes the requirement that the costs of pollution should be borne by the person responsible for causing the pollution rather than society at large.[154] However the meaning and application of the principle remains open to interpretation as the concept of the polluter-pays principle raises certain critical questions, which have hampered its application such as questions as to what exactly is pollution? Which entity is to pay for the pollution costs? And how much should one pay?[155]

Sands is of the opinion that the meaning of the principle, it's application to particular cases and situations remains open to interpretation, particularly in relation to the nature and extent of the costs included and the circumstances in which the principle

---

153 Gergen 1994 *New York University Law Review* 673.

154 Kiss and Shelton *International Environmental Law* (3rd ed) 212. See also Sands *Principles of International Environmental Law* (2nd ed) 279 and Davies *European Union Environmental Law* 52. The costs, which should be borne by the polluter, are the costs of reduction, prevention or elimination thereof. *OECD's* defined the polluter pays principle in a limited sense to mean that the polluter should bear all expenses of carrying out the measures deemed necessary by public authorities to protect the environment. The principle states: 'In other words, the cost of these measures should be reflected in the costs of goods and services, which cause pollution in production and or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.

155 Davies *European Union Environmental Law* 53. See also Kiss and Shelton *International Environmental Law* (3rd ed) 214 and Sands *Principles of International Environmental Law* (2nd ed) 280.

will not apply.[156] Brownlie states that although the content of the polluter-pays principle remain vague it does seem to involve strict liability.[157]

The polluter pays principle was set out by *OECD* as an economic principle and as the most efficient way of allocating costs of pollution prevention and control measures introduced by the public authorities.[158] A core principle of economics is that prices for goods should reflect or internalise the full costs of their production, including the total costs of human health, environmental, natural resource, social and cultural harms.[159]

The market system often fails to make producers or their customers accountable for their costs, so many of these costs become externalities. These costs are involuntarily borne by innocent persons.[160] The polluter pays principle therefore avoids obligating the polluter to bear the costs of pollution control therefore being classified as a method for internalising externalities.[161]

This view of the polluter pays principle has how shifted toward one of liability. In 1974 a polluter was defined as 'someone who directly or indirectly damages the environment or who creates conditions leading to such damage'. Therefore the polluters should now pay for pollution control measures such as the construction and operation of anti-pollution installations, investments in anti-pollution equipment and new processes so that necessary environmental quality objectives are achieved.[162]

The polluter pays principle was not expressly mentioned in the *Stockholm Declaration* and Principle 16 of the *Rio Declaration* is regarded as an important

---

156 Sands *Principles of International Environmental Law* (2nd ed) 280.

157 Brownlie *Principles of Public International Law* (6th ed) 277.

158 Kiss and Shelton *International Environmental Law* (3rd ed) 212 and 213. See also Boyle *Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs* 368.

159 Nanda and Pring *International Environmental Law* 40.

160 Nanda and Pring *International Environmental Law* 40. See also Kiss and Shelton *International Environmental Law* (3rd ed) 213 and 214. The first example is that pollution costs can be borne by either the community, by those who pollute, or by consumers. Secondly, community assumption of costs can be illustrated by at least three examples 1. the river can remain polluted and rendered unsustainable for certain downstream activities, causing the 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. This would be opposite of the polluter pays principle making the victim pay.

161 Kiss and Shelton *International Environmental Law* (3rd ed) 214.

162 Kiss and Shelton *International Environmental Law* (3rd ed) 215.

progress for the inclusion of the principle in environmental law treaties.[163] Although the polluter pays principle has received international support it is said that it has not yet received the same amount of support as the preventive principle or the precautionary principle.[164] The view held is that the polluter-pays principle is applicable at the domestic level but does not govern relations or responsibilities between states at the international level. Therefore it is a municipal principle and the application thereof differs from all other principles.[165]

The polluter pays principle creates problems when transboundary pollution occurs. It is easy to establish who the manufacturer of a harmful drug is but it is not easy to establish the polluter in the case of environmental pollution. Difficulty arises when one tries to determine the origin of pollution when two states may conduct different activities emitting different pollutants. These pollutants combine to form another, more harmful pollutant but then to determine which pollutant was released by which body or state is problematic. This is why all states must take preventive and precaution in their action to eliminate or reduce pollution and should they pollute, they will bear the cost.[166]

3.6.3 Polluter Pays Principle: Customary International Law or Not?

The polluter pays principle has not received the same degree of support that has been awarded to the preventive principle or as to the precautionary principle although it is now being included in regional instruments.

---

163 The concept and doctrine underlying the polluter-pays principle originated during the *Stockholm Conference*. In Part I of the *Declaration* it was proclaimed that in industrialised countries environmental problems are generally related to industrialisation and technological development.

164 Sands *Principles of International Environmental Law* (2nd ed) 280.

165 Sands *Principles of International Environmental Law* (2nd ed) 281. He is states that the polluter-pays principle is greeted with much controversy in developing countries as the burden of internalising pollution control and other presently externalised environmental costs is viewed as a luxury their economies cannot afford. Furthermore the principle is applicable at the domestic level but does not govern relations or responsibilities between states at an international level. See also Kiss and Shelton *International Environmental Law* (3rd ed) 216.

166 Boyle *Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs* 363 to 379.

Although the polluter pays principle has been endorsed as a policy, by the *OECD* and the EC, it remains insufficiently grounded in State practice to represent a principle of customary international law.[167] This could be due to the strong objections by some countries to the further development of the polluter pays principle, particularly for international relations.[168]

A number of states, both developing and developed, hold the view that the polluter pays principle is applicable at a domestic level but does not govern relations or responsibilities between states on an international basis. Further state practice does not support the view that all costs of pollution should be borne by the polluter, particularly in inter-state relations.[169]

Therefore the polluter pays principle has not evolved to such a degree that it is awarded international recognition and may be classified as customary international law.

3.7 Conclusion

As seen above general obligations are emerging for all to protect and conserve the environment on a global scale. This is seen with the formulation of certain principles in certain treaties. The *Stockholm Declaration* is considered the first international document on principles of environmental law and therefore as the foundation of modern international law. The *Stockholm Declaration* was also the basis for the further development of international environmental law as the principles contained in the Declaration played an important role in environmental law.

It was these principles, which lead to the formulation of the *Rio Declaration,* also containing, these principles and others, which have gained international recognition being incorporated into many other treaties becoming a central theme in some.

---

167 Boyle *Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs* 376. See also Sands *Principles of International Environmental Law* 280.

168 Sands *Principles of International Environmental Law* (2nd ed) 280.

169 Sands *Principles of International Environmental Law* (2nd ed) 284 and 285.

Although these two treaties are non-binding in nature the principles contained in them have since appeared in binding treaties.

As they are incorporated into these treaties as central themes it can be seen that the proper implementation thereof is essential to prevent environmental damage and degradation. Because of the underlying scientific uncertainty regarding environmental change and the urgency to take action to prevent future harm it has become imperative that treaties concluded between parties contain measures, which must be taken and implemented.

These measures are the principles which are implemented in order to achieve the ideal of sustainable development and not only to preserve for the present generations but are also needed to maintain the anticipated need of future generations. These principles are to be used by all institutional organisations in guiding their activities, which they undertake to determine the harm it could cause on the environment and should it cause any harm, the consequences that could follow.

As mentioned above not all principles are mentioned in each treaty and in many treaties they are referred to differently, but nevertheless they are still incorporated into treaties. Although they have also being invoked by one of the parties in cases before the *ICJ*, the courts have avoided pronouncing on these principles and they are only referred to in dissenting opinions in certain cases. However because of their presence and recognition they have been awarded, there is not sufficient evidence that these principle have evolved into customary international law.

Although treaties do not bind states which are third parties to a treaty, they may express and intent that their benefits and obligations may do so and the states accept this provision. Certain provision may however evolve through a process where they are classified as customary international law affecting other states. However it is the evolution into customary international law with which a principle receives international application. No state has to expressly consent to the application of a certain principle, but when new customary law is formed some sort of consent may be required.

Therefore because these principles have been directly or indirectly endorsed by treaties and actions of different states they have evolved to such a level that they are applicable and an important guideline to be followed by all states. It is essential that states consider the effects of their actions before embarking on such actions and these principles serve as a guideline in enforcing states to follow such procedures. These principles should further be considered when states enact and enforce national environmental legislation and should aim and preventing further environmental harm and degradation.

CHAPTER 4

THE CONCEPT OF SUSTAINABLE DEVELOPMENT SOUTH AFRICAN LAW

4.1 Introduction

Sustainable development has remained a high priority on the UN's agenda, and this concept has been incorporated into environmental legislation on a national level. [1] As shown in previous chapters, the concept of sustainable development has been awarded international recognition and has been established in municipal environmental law in most countries.[2] A clear example of such development is South African legislation, in which, sustainable development has been awarded recognition.

International environmental law has largely influenced national environmental law, which may be attributed to the fact that certain areas of environmental degradation do not respect boundaries. Section 231, 232 and 233 of the *Constitution* reaffirm this by providing for the position and importance that international law should endure within municipal law.[3]

Sustainable development is important for the alleviation of poverty.[4] South Africa is in dire need of sustainable development as our country suffers from overcrowding in townships and squatter camps, which are overridden with poverty, due to lower income rates and unavailability of jobs. Although South Africa is a large country with many abundant resources and relatively well-developed infrastructure, compared to the rest of Africa, the country still suffers from the set backs due to the apartheid years.[5]

---

1 Bray does however note that this incorporation has been met with mixed success in different countries. Bray 1998 *SAJELP* 2-3.

2 Glazewski *Environmental Law in South Africa* (2nd ed) 3; Bray 1998 *SAJELP* 2 and Loots 1994 *SAJELP* 17.

3 Glazewski *Environmental Law in South Africa* (2nd ed) 31. Scholtz 2003 *SAYIL* 2. This will be discussed in more detail below.

4 Abrahams 2003 *Urban Forum* 192.

5 Munslow and Fitzgerald 1994 *Third World Quarterly* 227.

The environmental problems facing South Africa has been exacerbated by our past apartheid laws, and if further inflicted, a greater degree of inequity and inequality will be effected on the poorer of the country. New threats such as resource shortages, climate change and HIV/Aids are emerging which may further impede the possibilities of developing the country.[6] Massive population increases reduce land availability; which in turn reduces agricultural productions and causes water shortages and food shortages, further exacerbating the degree of poverty to which people are exposed.

South African citizens live far below the poverty level and rely on the natural environment to provide for their needs. The countries economy is heavily dependant on the exports of non-renewable resources and minerals.[7] South Africa needs to improve the livelihoods of the poorest and this means finding ways for people to meet their basic needs of education, health and sanitation, water, food and shelter.[8]

Mismanagement and misuse of such natural resources will have dire consequences if not properly controlled and managed. South Africa is a developing country and should strive toward sustainable development to secure the constant development of a sustainable future for our country.[9]

The challenge of sustainable development is not restrictive but it includes living within ecological limits, addressing issues of justice and equality, as well as the eradication of poverty to ensure sustainable livelihoods.[10] Since the emergence from the apartheid years our policy, process and planning structures have been reviewed.[11]

In facing the challenges posed by environmental degradation it becomes more important to use law to protect the environment in any means possible.[12] These laws must confront the economical and income disadvantages between rich and poor of countries and citizens, and the alleviation of poverty and creation of employment are

---

6 Whitman (ed) *The Sustainability Challenge for Southern Africa* 3.
7 Munslow and Fitzgerald 1994 *Third World Quarterly* 227.
8 These are also rights, which are now guaranteed in the *Constitution*.
9 Attfield, *et al* 2004 *Third World Quarterly* 405.
10 Attfield *et al* 2004 *Third World Quarterly* 405-406.
11 Patel 2000 *Local Environment* 383.
12 Loots 1994 *SAJELP* 17.

all inherently linked with the challenges causing environmental degradation. The reason for this lies behind the principle of intra-generational equity, which provides for the fairness in utilization of resources among present generations. Intra-generational equity aims at the eradication of poverty and is an indispensable requirement for sustainable development. Therefore it is essential that all states, aim at reducing and eliminating patterns of unsustainable production and consumption in order to achieve sustainable development.

The concept of sustainable development is not all that new in South Africa but has spread rapidly through our legislation pertaining to environmental law since the promulgation of the country's *Constitutions*.[13] The *Bill of Rights* in the *Constitution* is an elaboration on many of the rights contained in the *Interim Constitution*. The promulgation of this section is of much importance for the development of environmental law in South Africa.[14]

A great deal of legislation has been promulgated on the basis of section 24, with the goal of promoting sustainable development. *NEMA* is regarded as the landmark statute in all environmental affairs in South Africa, but is not the only legislation, which supports the concept of sustainable development.[15] However *NEMA* does place the environment[16] within the process of constitutional transformation and is *on par* with many internationally recognised environmental principles and practices.[17]

---

13 Glazweski *Environmental Law in South Africa* (2nd ed) 3. In previous years dating back to Van Riebeeck, nature conservation laws existed in South Africa. This was only in relation to conservation and did not relate to and environmental right with which our country has now seeing a change with the promulgation of the *Constitution of the Republic of South Africa* Act 200 of 1993 (hereafter the *Interim Constitution*) and the *Constitution of the Republic of South Africa* of 1996 (hereafter the *Constitution*).

14 Loots 1994 *SAJELP* 57 and Glazewski *Environmental Law in South Africa* (2nd ed) 15. Section 24 is described as the environmental clause within the *Constitution*.

15 Bray 1999 *SAJELP* 1.

16 The term 'environment' can be an elusive concept meaning different things depending on the context in which it is used. There are numerous laws promulgated with the aim of protecting the 'environment' but it is not exactly clear what the environment is, which is to be protected. Many debates have taken place as to how to define the term 'environment', in respect of the inclusion or exclusion of man-made objects and cultural and historical heritage. Can the environment include only the natural environment of the built up environment? Glazewski *Environmental Law in South Africa* (2nd ed) 9. Neither section 29 of the *Interim Constitution* nor section 24 of the *Constitution* makes specific reference to these aspects. In terms of section 24 no clear definition exists and if one were to follow a broader definition it would have to include almost everything which may influence human existence or quality of life, be it positive or negative. Scholtz *Milieuconvenanten* 174. Scholtz states that should this be the case, that the term environment to include everything surrounding, it implies including '*die natuurlike omgewing, die mensgemaakte*

It is accordingly important to firstly ascertain the role of international law in SA municipal law as sustainable development has received recognition in international law, where after section 24 will be dissected.

4.2 *Recognition of International Law and the Influence it has on National Legislation*

4.2.1 Introduction

International law has been awarded great importance through certain provisions of the *Constitution*. Recognition has been awarded differently in different sections such as section 39 of the *Constitution,* which awards states that a court is to consider international law when interpreting the *Bill of Rights* which differs substantially to section 233. Section 233 provides that when interpreting any legislation the courts

---

omgewing, die sosiale omgewing, die ekonomiese omgewing, beboude omgewing, politiese omgewing en werksomgewing'. Although it may be classified as a broad definition the *Environmental Conservation Act* 73 of 1989 (hereafter the *ECA*) has described the environment in section 1 as: "The aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms". This definition not only includes the natural environment but also man-made and physical environment and the interaction between them. From this definition the ensuing conflict between man and the environment becomes apparent and one of the ways to regulate conflict is by way of legislative measures. *NEMA* gives a more definitive definition of the term 'environment' with the following meaning: "The surrounding within which humans exist and that are made up of –

(i) The land, water and atmosphere of the earth:
(ii) Micro-organisms, plant and animal life:
(iii) Any part or combination of (i) and (ii) and the interrelationships among and between them: and
(iv) The physical, chemical aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being".

The term environment was also examined in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (WLD). case. The court held that the definition of the term 'environment' in terms of the *ECA* meant that the environment was a composite right, which included social and cultural considerations in order to result ultimately in a balanced environment. As no clear definition of the term environment exists and it is not defined in section 24 the broader definition of *NEMA* is applied also because it repeals a great deal of the *ECA*. From a legal perspective, the term 'environment' may be an elusive concept but with regards to the definition as contained in *NEMA* it can be accepted that it should include almost everything, which may positively or negatively influence human existence or the quality of life, and the environment which is changed by human behaviour. Scholtz *Milieuconvenanten* 174. Rabie supports this by stating that the concept is one, which is still evolving, and it will be unwise to formulate a fixed definition of this principle at this time. Rabie *Nature and Scope of Environmental Law* 92. Thus the definition as contained in *NEMA* is applied.

17 Bray 1999 *SAJELP* 2.

must consider reasonable interpretation of legislation that is consistent with international law and therefore relates to the position of international law within South Africa. Futhermore section 231 relates to recognition which are courts are to give to international agreements while section 232 relates to customary international law. Therefore these sections will be briefly discussed.

4.2.2 Treaties and International Agreements

Treaties were previously negotiated, signed, ratified and acceded to by the executive and only if they were incorporated through an Act of Parliament did they become part of municipal law.[18] Therefore the *Interim Constitution* was the first attempt at facilitating the incorporation of treaties into municipal law but the parliamentary procedures delayed ratification and incorporation.[19]

The *Constitution* distinguished between treaties to be ratified and those with self-executing clauses, which are to be regarded as municipal law immediately. Although questions could arise regarding the meaning of the precise formulation regarding the words 'technical', 'administrative' or 'executive', Dugard states that where it is the parties intention that an agreement is to come into force immediately without ratification, South African Parliament should not insist on parliamentary approval.[20]

Scholtz argues, that self-executing treaties do not exist.[21] The possibility of the existence of self-executing provisions in international agreements may lead to absurd results where an international agreement that embodies a self-executing provision has been signed, but not yet ratified in terms of section 231(2).[22] Section 231(2) links

---

18 Dugard *International Law: A South African Perspective* (2nd ed) 55-57. Scholtz 2003 *SAYIL* 5. In this respect three methods are used to adopt international law as municipal law. They are firstly that the provisions of the international agreement could be embodied in an Act of Parliament, secondly it can be included as a schedule to a statute and thirdly that an enabling Act could give the executive power to transform an international agreement by proclamation or notice in the *Government Gazette*.

19 Dugard *International Law: A South African Perspective* (2nd ed) 55.

20 Dugard *International Law: A South African Perspective* (2nd ed) 57.

21 Self-executing treaties or agreements were important from American law, which is still a complex issue and is still to be resolved.

22 Would this then mean that the provision finds direct application in municipal law, but is not binding on an international basis?

constitutional and international ratification and therefore international ratification must take place before a provision can find application in municipal law.[23]

An international agreement will create international obligations for South Africa if it is has been ratified in terms of section 231(2) of the *Constitution* but it will not have domestic application if it has not been enacted in terms of section 231(4) of the *Constitution*. But it must be borne in mind that although a treaty has not been incorporated into national legislation it does not mean that it has no effect on national legislation.

An important factor of an international agreement is that the agreement should be between states, in writing and that it be the intention that the parties are to be governed by international law. Once such requirements are met and international agreement exists whether it is called under another name such as treaty, protocol, declaration, an act, etc.[24] Therefore as Olivier has submitted the term 'international

---

[23] Scholtz 2003 *SAYIL* 11. In order to substantiate this argument it is important to take cognisance of the process of ratification of treaties. The negotiation and signature of international agreements are regarded as executive acts and are effected by way of Presidential Minute. Two types of international agreements are identified: those requiring ratification and those for which the signature of a duly authorised representative of a contracting state party is sufficient to bring it into effect. In addition to the international requirements, section 231(2) and section 231(3) lay down procedures, which must be followed for the domestic approval of international agreements. Section 231(2) states that only once an international agreement has been approved by both houses of Parliament, namely the National Assembly and the National Council of Provinces does it bind the Republic. Once ratified by Parliament, the department responsible for the agreement submits an Instrument of Ratification. The incorporation of treaties into national legislation is governed by section 231(4) and states that it becomes law once it has been enacted into law by both houses of Parliament. Once Cabinet has consented to the submission of an agreement to parliament, the relevant department must table the agreement together with an Explanatory Memorandum by notice of motion. This Memorandum must state whether incorporation into domestic law in terms of section 231(4) of the *Constitution* will be sought. It is the responsibility of the relevant department to draft legislation, which is submitted to the state law advisors of the Department of Justice to ensure compliance with domestic law. The Department of Foreign Affairs will be responsible to ensure that the legislation is consistent with international law and with the *Republic's* international relations and other obligations. It then passes through Parliament like any other Bill. The only exception to this is however the concept of the self-executing treaty which according to Scholtz does not exist.

[24] The term "international agreement" is more commonly used than the term "treaty". An international agreement is to be construed as a treaty as article 2 of the *Vienna Convention* defines a 'treaty' as: An international agreement concluded between states in written from and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever in particular designation.

agreement' used in section 231 therefore includes what would be termed a treaty or declaration.[25]

This then means that an international agreement includes non-binding documents such as those termed as soft-law. This recognition has also been stated in the *Makwanyane* case.[26] In this case it was held that:

> In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.[27]

NEMA defines an 'international environmental instrument' as any international agreement, declaration, resolution, convention or protocol which relates to the management of the environment.[28] This definition clearly incorporates forms of soft law, which have an influence on international environmental law, to be considered in its interpretation.

Section 231 of the *Interim Constitution* was the first step at regulating the circumstances in which the Republic is to be bound by international agreements and the relationship of these agreements with municipal law.[29] The *Constitution* also contained section 231 regulating international agreements within the Republic and can be viewed as an elaboration on the *Interim Constitution*.[30] Section 231 of the *Constitution* states:

---

25 Olivier 1997 *SAYIL* 65. It was argued that section 231(4) of the *Interim Constitution* contained the words 'customary law is binding on the Republic,' which is omitted from the *Constitution*, thus resulting in non-binding international law being applicable and should be considered by South African courts.

26 *S v Makwanyane* 1995 (3) SA 391 (CC).

27 At 413 - 414.

28 Section 1(1)(xviii).

29 Section 231 of the *Interim Constitution* States:

(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.

(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).

(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

30 Scholtz 2003 *SAYIL* 2.

(1) The negotiating and signing of all international agreement is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
(5) The Republic is bound by international agreements, which were binding on the Republic when this Constitution took effect.

Since the promulgation of section 231 of the *Constitution*, there has been a growing acceptance of public international law in South Africa and the government has also been more active and has ratified various agreements relating to international environmental law.[31] South Africa is now party to more than 50 international conventions, which directly or indirectly affect the environment.[32]

4.2.3 Customary International Law

Over a period of hundreds of years South African courts simply assumed that rules and principles of customary international law, might be applied by municipal courts as if they were part of national legislation. In most cases, courts applied customary law without questioning its place in the legal order. [33] As customary international law is a species of common law it was subordinate to all forms of legislation and there was a statutory presumption that the legislature did not intend to violate the international law.

---

31 Scholtz 2003 *SAYIL* 2. However it must be kept in mind that both the *Interim Constitution and Constitution* make mention of the way in which the provisions of international law are to be dealt with but under each *Constitution* a different process can be followed. Read Scholtz 2003 *SAYIL* 2–5.

32 Glazewski *Environmental Law in South Africa* (2nd ed) 43.

33 Dugard *International Law: A South African Perspective* (2nd ed) 47.

Customary international law is also no longer subject to subordinate legislation and is treated as part of municipal law as long as any provision is not inconsistent with an Act of Parliament or a provision of the *Constitution* wherein municipal law will then always prevail. This has gained endorsement through the promulgation of section 232 of the *Constitution* stating:

> Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Common law rules and judicial decisions are now subordinate to customary international law as it is only the Constitution and Acts of Parliament which enjoy greater weight. Section 232 is not complete on the subject of customary law and there still remains a necessity to turn to judicial precedent to decide which rules of customary international law are to be applied and how they are to be proved.[34]

4.2.4 Interpretation

Within the South African *Constitution* two sections relate to international law but differ substantially from each other. The first important section is section 39, which specifically relates to international law and how it should be used when interpreting the *Bill of Rights*. Section 233 on the other hand states that courts are to prefer any reasonable interpretation of international law when interpreting any legislation within South Africa.

South African common law now treats international law as part of municipal law and has gained endorsement by section 233 of the *Constitution*. This section states:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

International environmental law is embodied in a wide-ranging variety of instruments, some of which do not constitute legal binding obligations. Although

---

[34] Dugard *International Law: A South African Perspective* (2nd ed) 52.

treaties and customary international law are the most prominent sources of international law, soft law also plays a very important role. Important instruments such as the *Stockholm Declaration*, *Rio Declaration* and *Agenda 21* which have a significant affect on international environmental law may fall within the scope of section 39 of the *Constitution* meaning that our courts shall give recognition to it and consider such instrument.

Although not binding in the same respect that treaties are binding, some of the principles contained in these documents have evolved and may be awarded such recognition that they can be classified as customary international law although this position may change.[35]

In terms of section 232 of the *Constitution* these principles must be considered by national courts when promulgating, interpreting and applying municipal legislation, which affect the environment. Section 39 of the *Constitution* prescribes how international law must be interpreted in relation to the *Bill of Rights* and states as follows:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum –
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other right or freedom that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 233 holds the potential for the application of unincorporated treaties. This is on the basis that when determining whether an interpretation is consistent with international law, the interpretation accorded to treaties may possibly not form part of South African law and therefore through section 233 the courts may consider the

---

[35] See for instance chapter 3 above in regard to the discussion whether or not the precautionary principle may be classified as customary international law? This classification is still very debatable to many academics but it is a general view that it is still not customary international law.

international law interpretation.[36] This means that although a treaty has not been constitutionally ratified it may be taken into consideration by means of section 233. This is why with the fragmented environmental legislation that South Africa has, it is important that when interpreting vague provisions, international law be recognised.[37]

The municipal application of treaties under the *Constitution* is mainly dependant on the legislative incorporation of the treaty. But when the court has to consider the treaty it will be faced with the treaty itself and the promulgated legislation, which incorporated the treaty. Section 233 of the *Constitution* provides for this and forces all courts to test any municipal legislation put before them against international law.[38] In interpreting legislation the courts will be required to prefer 'any reasonable interpretation' which accords with international law and therefore the courts must determine the international law position, which governs the position of the legislation.[39]

In addition, *NEMA* also deals with the consideration of international law in municipal law. Chapter 6 of *NEMA* deals with International Obligations and Agreements. Section 25 states that where the Republic is not yet bound by an international environmental instrument the Minister may make a recommendation to Parliament regarding the accession to and ratification of such instrument dealing with certain matters.[40]

---

36 Botha 2000 *SAYIL* 95.

37 In this respect it must be kept in mind that the wording of treaties may be vague leading to a vague interpretation to the provisions contained within the treaty.

38 This would then include all courts from the Magistrates Court to the Constitutional Court. Botha 2000 *SAYIL* 94.

39 Botha 2000 *SAYIL* 94.

40 Section 25(1) of *NEMA* states the following:

> Where the Republic is not yet bound by an international environmental instrument, the Minister may make a recommendation to Cabinet and Parliament regarding accession to and ratification of an international environmental instrument, which may deal with the following:
>
> (a) available resources to ensure implementation;
> (b) views of interested and affected parties;
> (c) benefits to the Republic;
> (d) disadvantages to the Republic;
> (e) the estimated date when the instrument is to come into affect;
> (f) the estimated date when the instrument will be binding on the Republic;
> (g) the minimum number of states required to sign the instrument for it to come into effect;
> (h) the respective responsibility of all national departments involved;
> (i) the potential impact of accession on national parties;
> (j) the reservations to be made, if any; and
> (k) any other matter which in the opinion of the Minister is relevant.

Further the Minister may, if South Africa is a party to an international environmental agreement and after compliance with section 231(2) and section 231(3) of the *Constitution,* publish in the Government Gazette the provisions of such instrument, any amendments or additions.[41] Thereafter, and in terms of section 25(3) the Minister may introduce legislation or make regulations as may be necessary to give effect to the international instrument.

Section 26 of *NEMA* is also important as it forces the Minister to make reports to Parliament, at least once a year, regarding international environmental agreements for which that party is responsible. The reports made by the Minister must include details regarding the progress in implementing international environmental instruments to which South Africa is a party[42] and the legislative measures that have been taken and the time frames within which it is envisaged that their objectives are to be achieved.[43] Another important aspect of section 26 is that the Minister must initiate an Annual Performance Report on Sustainable Development to meet the government's commitment to agenda 21.[44]

The importance of proper interpretation of legislation was highlighted at the 2002 Judges Symposium. It was stated that the mere assumption that all people have a right to a healthy environment places the judiciary at the centre of sustainable development. The manner in which law will be interpreted affects the development of society and it is of great importance.[45] Courts must consider international instruments when interpreting legislation regarding the environment.

When interpreting national legislation, international provision will have a significant effect. Before a court will feel obligated to consider section 233 and apply an international interpretation, there must be evidence of an international element of the specific legislation. For a court to prefer a reasonable interpretation, which accords with international law, the courts must determine the international law position governing the specific subject matter of the relevant legislation.

---

41 Section 25(2).
42 Section 26(1)(b).
43 Section 26(1)(f).
44 Section 26(2)(a).
45 Anon HYPERLINK http://greeffprop.co.za/ancdocs/history/zuma/2002/jz0818.html 6 Sept.

As can then be argued, courts cannot interpret national environmental legislation without taking cognisance of international treaties. Since most national legislation is based on international agreements, there is clearly an international element meaning that before a court can apply or interpret national environmental legislation, they must take cognisance of international interpretation and application. It is therefore of the utmost importance to have a proper understanding of the interpretation of the relevant environmental law principles on an international level to enable courts to interpret and apply the principles on a national level.

4.3 The Incorporation of Sustainable Development through Section 24 of the Constitution

4.3.1 Introduction

The *Bill of Rights* was incorporated in our *Constitution* with the unanimous approval of political parties because it is believed that there were lessons, which could be learnt from our apartheid past and also from experiences from other countries around the world. Never again were the injustices of the apartheid past to be experienced again.[46]

In terms of section 7 of the *Constitution*, the *Bill of Rights* is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[47] The state must protect, respect, promote and fulfill the rights in the *Bill of Rights*.[48]

An important step taken in an attempt to develop environmental law in South Africa can firstly be seen with the mention of the environmental right in section 29 of the *Interim Constitution* and then the elaboration thereof in section 24 of the

---

46 *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W) 165 H – J.

47 Section 7(1) of the *Constitution*.

48 Section 7(2) of the *Constitution*.

Constitution.[49] However to better understand section 24 one needs to examine section 29 of the *Interim Constitution*. Many commentators have noted that section 29 of the *Interim Constitution* does not encapsulate the concept of 'sustainable development' in a country, where the need to address developmental issues such as poverty, unemployment, housing backlogs and the need for infrastructure development, are high.[50]

Section 29 could be taken to imply that as long as a basic minimum standard of health and well being is maintained, development can continue unrestrained and without considering the long-term consequences. This potentially dangerous omission has been rectified by section 24(b), which requires legislative measures to be implemented to ensure ecologically sustainable development and use of natural resources. This recognition is of crucial importance in a developing country such as South Africa. Section 24 of the *Constitution* entrenches a right for all individuals to a clean and healthy environment and states that:

> Everyone has the right:-
> (a) to an environment that it not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through the reasonable legislative and other measures that;
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.[51]

The concept of sustainable development, has developed due to the global awareness of environmental problems having a detrimental effect on the environment, in that they are starting to threaten living conditions of South African citizens and further impairing their fundamental rights and needs.[52]

---

49 An important step that was taken was the inclusion of the environmental clauses namely section 29 in the *Interim Constitution* and section 24 in the *Constitution*. Glazewski *Environmental Law in South Africa* (2nd ed) 77.

50 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 526.

51 This is a substantial elaboration on its predecessor of the *Interim Constitution*. Section 29 of the *Interim Constitution* merely stated that 'Every person shall have the right to an environment which is not detrimental to his or her health and well-being.'

52 In *MEC For Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd and Another* [unreported] the importance of section 24 was recognized in that it poses an obligation on the state to protect the environment through reasonable legislative measures that prevent pollution while promoting justifiable economic and social development. At para 14.

The concept of sustainable development as reflected in section 24(b)(iii) is the fundamental building block around with environmental law norms have been fashioned. The notion of sustainable development is an inherent factor to be considered in environmental decision-making and has been endorsed by the *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*[53] where it was held that:

> the concept of sustainable development is the fundamental building block around which environmental norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the Constitution. Pure economic principles will no longer determine in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically financially sound, will, in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio economic concerns.[54]

On a global level the concept of sustainable development has developed considerably but in South Africa it is a concept, which must be interpreted, applied and achieved at a national level by the South African courts.

4.3.2 Wording of Section 24

The first important characteristic of section 24 is that it states 'everyone shall have the right to a health environment' indicating that individuals are the bearers of such right. This right to a healthy environment is generally seen as falling within the category of third generation rights and it is often argued that such rights are collective rather than individual in nature.[55] However subsection (a) contains an individual right to a healthy environment and the conduct of a organ of state or any private individual or institution violating such right may be challenged. Subsection (b) clearly imposes a duty on the state to take necessary measures in order to protect the environment.

---

53 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (WLD).

54 At para 144 A to C.

55 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 522.

However this subsection also grants individuals a right to prevent the state from taking measures that could be considered retrogressive in relation to the protection of the environment. Clearly these rights are not merely restricted to individuals but usually affect groups of people causing individuals to exercise such right collectively.[56] Groups may also enforce the right where the infringement is of a collective nature.

Subsection (a) seems to create a right with two aspects. The first aspect is that which may overlap with the section 27, the right to health care and the second regarding the 'well-being' of a person. In terms of the first aspect subsection (a) states that a person has a right to an environment, which is not harmful to their health, it goes beyond the right enshrined in section 27.[57] Section 24(a) elaborates on the elusive nature of an environmental right providing for an environment, which is 'not harmful to one's well-being'.[58] Section 24 is negatively phrased providing for an environment, which is not harmful rather than a positive right, which would award people the right to a healthy environment.[59]

It is framed in the negative to avoid creating positive obligations upon state organs to provide an environment conducive to health and well-being.[60] The wording of this section implies that action may be taken if something adversely affects the

---

56 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 522.

57 Section 27 of the *Constitution* states:

(1) Everyone has the right to have access to –
   (a) health care services, including reproductive health care;
   (b) sufficient food and water; and
   (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

A particular environment may therefore be harmful to a person's health, but not necessarily infringe on a section 27 right. Should a persons health therefore be harmed due to some sort of environmental degradation or pollution (situation of a dumping site) and was to be constitutionally challenged, it must be based on the environmental clause and not on section 27.

58 A person's well-being may be harmed when their environmental interests are affected. However the term 'well-being' may imply that a decent and undisturbed environment has an inherent value for people. This too is a term, which has no clear definition, and many things can be linked to 'well-being'.

59 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 525; Scholtz *Milieuconventanten* 175 and Kidd *Environmental Law: A South African Guide* 36.

60 Loots 1997 *SAJELP* 58. See also Scholtz *Milieuconventanten* 175; and Beukes 1996 *SAYIL* 111.

environment resulting in a negative impact on the health and well-being of any person.[61]

Section 24(b) guarantees the right to have the environment protected through reasonable legislative and other measures and may be used by parties to compel state authorities to take steps to protect the environment even where no obligation in terms of any other statute to do so exists.[62] The steps, which authorities are to take, are to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and the use of resources while promoting economic and social development.[63]

4.3.3 Sustainable Development and the Rule of Law

The rule of law is foundational to South Africa constitutional order.[64] As section 1(c) of the *Constitution* states, South Africa is a Republic, which is founded on values and includes the rule of law.[65] All organs of state are bound by the provisions of the Constitution as the supreme law of the country and guarantees the right to administrative action that is lawful, reasonable and procedurally fair and further provides that the rights in the *Bill of Rights* may be limited only in terms of law of general application. The *Constitution* guarantees social, economic and cultural rights alongside civil and political rights and imposes positive duties on the state to assist individuals in the exercise of their rights.[66]

---

61 Loots 1997 *SAJELP* 58. In terms of this the most important remedies used for the infringement of section 24 rights is either the use of an interdict or a claim for damages depending on the situation. These remedies may also be used by state authorities to enforce environmental law by way of civil action.

62 Loots 1997 *SAJELP* 61.

63 Section 24(b)(iii) of the *Constitution*.

64 Botha 2001 *THRHR* 535.

65 Section 1 of the *Constitution* states: The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the Constitution and the rule of law.
(d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

66 Botha 2001 *THRHR* 536.

The rule of law requires state institutions to act in accordance with the law. This means that various organs of state[67] must obey the law and that further that the state cannot exercise power over anyone unless the law authorises such action.[68] This principle has appeared in numerous constitutional court cases and it can be argued that the rule of law entails more that the principle of legality and therefore has both procedural and substantive components.[69]

In terms of the substantive component, it prescribes that the individual's rights must be respected and the *Bill of Rights* clearly emphasises human dignity, equality, and freedom, which may qualify for protection under the rule of law.[70] The modern meaning of the rule of law is said to advocate respect for civil and political rights and even social and economic rights.[71]

In addition to the rule of law is another concept of the *Rechtsstaat*. There are many definition of the modern *Rechtsstaat* all of which emphasise the constitutional nature of such. Fundamental to the *Rechtsstaat* is the requirement of a constitution that has the strength and resilience of a fundamental law.[72] The *Constitution*, which is largely seen as a prerequisite of a *Rechtsstaat*, forms the basis for the South African constitutional state and therefore South Africa may be classified as a *Rechtsstaat.*[73]

---

67 In terms of section 239 of the *Constitution* an organ of state is defined as;
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution-
i. exercising a power or performing a public function in terms of the Constitution or a provincial constitution; or
ii. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

68 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 10 and 11 and Botha 2001 *THRHR* 524.

69 See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (7) BCLR 652 (CC) and *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

70 Scholtz 2005 *TSAR* 80.

71 Currie and De Waal *The Bill of Rights Handbook* (5th ed) 11.

72 Wiechers 2000 *TSAR* 625.

73 It is argued that the *Interim Constitution* and *Constitution* created a *Rechtsstaat*. All modern definition of the *Rechtsstaat* emphasise a constitutional nature of a particular state and therefore many authors will refer to the term constitutional state.

The constitutional dispensation in South Africa created by the *Interim Constitution* and *Constitution*, no doubt created a *Rechtsstaat*.[74]

A linkage exists between sustainable development and the rule of law as in the pursuit for sustainable development it is necessary to address a part of the substantive component of the rule of law as sustainable development must be aimed at the pursuit of section 24.[75] However, modern versions of the concept of the rule of law and *Rechtsstaat* may be seen to overlap. South Africa has been classified as a *Rechtsstaat* and the reference to the rule of law does not negate this fact. The rule of law has clearly been entrenched within the *Constitution*.

Scholtz opines that the modern versions of the *Rechtsstaat* and rule of law overlap[76] and secondly that South Africa is a *Rechtsstaat*, not only because we have a comprehensive written constitution but also because our *Constitution* includes certain rights which are guaranteed under the *Bill of Rights*.[77]

In terms of a *Rechtsstaat* and the rule of law, they both support the notion that it is important to ensure minimum basic standards are to be met, which will promote human dignity in society.[78] An example of such minimum basic standard is a liveable environment. This minimum basic standard to a liveable environment is included in section 24 of the *Constitution* and ensures that a fundamental condition of an environment which is not detrimental to the health and well-being. A healthy environment is therefore an important qualitative demand for the presence of the rule of law or *Rechtsstaat*.

Section 24 of the Constitution goes on to include the concept of sustainable development and that it should be promoted. The government must promote sustainable development, which is important to ensure that everyone has the right to

---

74 This was acknowledged *Makwanyane* case where Judge Ackermann stated: In reaction to our past, the concept and values of the *Constitutional State*, of the *Rechtsstaat*, and the constitutional right to equality before the law are deeply foundational to the creation of the new order referred to in the preamble. This case was however heard when the *Interim Constitution* was in effect.

75 Scholtz 2005 *TSAR* 85.

76 The inclusion of the reference to the rule of law may be due to the fact that it is difficult to translate the term *Rechtsstaat*.

77 Scholtz 2005 *TSAR* 80 and 81.

78 Scholtz 2005 *TSAR* 81.

an environment as depicted in section 24(a).[79] The promotion of sustainable development is therefore of great importance to ensure and promote a liveable environment and thereby promotes the substantive side of the rule of law.

A link exists which must be borne in mind when section 2 of *NEMA* is dissected. The principles, which underlie sustainable development, may serve as a guideline to ensure that government complies with the obligations in terms of section 24 and therefore promote the existence of the rule of law.[80]

The ideal of sustainable development gives content to section 2 of *NEMA,* which is a qualitative concretisation of a basic living requirement of the rule of law. Scholtz points out that a linkage between the rule of law and sustainable development exists in terms of which the promotion of the ideal of sustainable development serves as a mechanism to ensure the existence of one of the fundamental living requirements of the concept of the rule of law.[81] The existence of the fundamental living requirement of the right to an environment as coined in section 24 is aimed at human dignity. It is in this way that section 24 serves as a bridge between the two ideals of sustainable development and rule of law.

Therefore this means that section 24 forms the bridge between sustainable development and the rule of law and therefore the principles aimed at promoting sustainable development must also promote the rule of law.[82]

---

79 Scholtz 2005 *TSAR* 84.

80 Scholtz 2005 *TSAR* 83.

81 Scholtz 2005 *TSAR* 84.

82 Scholtz 2005 *TSAR* 81. Human beings function in a physical environment and forms part of an ecosystem. The destruction and degradation of the environment has severe effects on the possibility to continue life. Therefore it is important to ensure the continued existence of the environment which implies that the existence of a Rechtsstaat does not merely relate to requirements in relation to human conduct, but also in relation to the state of the environment.

4.4 Conclusion

It is important to promote sustainable development to overcome the injustices of the past, overcome poverty and eradicate it by developing our country at a sustainable pace.

To achieve sustainable development is a long-term process, which needs co-operation by all spheres of government and other international institutions. On a national basis the legal foundation for sustainable development within South Africa has clearly been laid. The first major step is the inclusion of the environmental right in section 24 of the *Constitution*, which is the basis upon which most other sections of environmental legislation formulated. *NEMA* is the framework Act for environmental law in South Africa, enunciating environmental management principles designed to give clear and unified directions to all environmental legal efforts to promote sustainable development.[83] The inclusion hereof entrenches the importance of the ideal of sustainable development.

In terms of section 231 and section 232 of the *Constitution* the courts are to consider international agreements and apply customary international law when interpreting legislation as provided for in section 233. In terms of section 233, any reasonable interpretation of legislation that is consistent with international law is to be considered when interpreting any legislation by the court whereas in terms of section 39 of the *Constitution* only when interpreting the *Bill of Rights* must a court consider international law.

In terms of these two sections of the *Constitution* it is important to consider international law when interpreting legislation whether it be the *Bill of Rights* or other legislation. It is therefore important to understand and consider the principles on an international basis to provide for proper interpretation and application of these principles to apply them on a national level.

---

[83] De Wet 2003 *Without Prejudice* 8.

South Africa may be classified as a *Rechtsstaat* but at the same time includes the notion of the rule of law within section 1(c) the *Constitution*. However modern versions of the two concepts overlap as the rule of law includes a substantive component, which is closely related to the *Rechtsstaat*. In terms of the *Rechtsstaat*, it is the government's responsibility to ensure the existence of conditions which will promote human dignity in society, and such obligation is provided for by section 24(a) of the *Constitution*.

An environment which is not harmful to the health and well-being of people is an important qualitative demand for the presence of the rule of law and therefore the rule of law and *Rechtsstaat* are not that different. The rule of law is a vague concept and is also qualified as an ideal.

An important link exists between the ideals of sustainable development and rule of law, as section 24 serves as the bridge between two ideals. The importance of sustainable development, and the aim in pursuing it within South Africa, has clearly been indicated and entrenched. Sustainable development is important for the existence of the substantive component of the rule of law and therefore South Africa may be called a sustainable development state.[84]

---

84 Scholtz 2005 *TSAR* 85.

CHAPTER 5

ENVIRONMENTAL LAW PRINCIPLES IN SOUTH AFRICAN ENVIRONMENTAL LEGISLATION AND CASE LAW

5.1 Introduction

South Africa is a developing country and should strive toward sustainable development to secure the constant development of a sustainable future for our country.[1]

South Africa has made progress in considering environmental degradation and aims for the protection thereof, by the inclusion of the environmental clause in the *Constitution* and the elaboration of sustainable development in a set of wide ranging environmental management principles set out under *NEMA*. It is of great importance that the concept of sustainable development and the environmental principles are recognized within our legislative framework for the preservation of the environment as it is essential to the survival of existing and future generations.[2]

This chapter will investigate the principles and their presence in all South African legislation and how the courts have interpreted and used these principles as set out in various provisions. Before the latter aspect is investigated it is important to take cognisance of the fact that customary international law influences national legislation a pointed out in the previous chapter. Since the *Constitution* so provides, South African courts must consider international agreements and apply customary international law when interpreting national legislation in terms of section 39 of the *Constitution* and therefore it is important to gain a proper understanding thereof. The position of the principles will then be investigated in various national legislative measures and the interpretation awarded by courts.

---

1 Attfield *et al* 2004 *Third World Quarterly* 405.
2 Winstanley 1995 *SAJELP* 86.

5.2 South African Legislation

The very first evidence of detailed environmental legislation is said to date back to the 1980's with the enactment of the first *Environment Conservation Act.*[3] It has subsequently been repealed by the *ECA* which has had many of its provision repealed by *NEMA.*[4] The introductory basis for *NEMA* was laid down by the *White Paper on an Environmental Management Policy for South Africa (hereafter the White Paper on Environmental Management)*[5] emphasising the notion of sustainable development and further endorsing the definition as contained in the *Brundtland Report.*[6] The *White Paper on Environment Management* referred to basic environmental management principles such as the polluter-pays principle and precautionary principle.[7]

NEMA is however regarded as a landmark statue in environmental affairs in South Africa and places the environment squarely within the process of constitutional transformation an on par with internationally recognized environmental principles.[8] The objective of *NEMA* is to 'provide for co-operative environmental governance by establishing principles for decision making on matters affecting the environment'. As *NEMA* was promulgated within the framework of the *Constitution* the Preamble re-iterates and reflects the environmental clause and the need for sustainable development to take place.[9]

---

3 *Environmental Conservation Act* 100 of 1982 (hereafter the *1982 ECA*). This was also re-iterated in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2005 [unreported] in para 15 where the court held that the first step taken to protect the environment was the enactment of the *ECA* followed by *NEMA* giving effect to section 24 of the *Constitution.*

4 *Environmental Conservation Act* 73 of 1989.

5 *White Paper on an Environmental Management Policy for South Africa* N/749 in *Government Gazette* No 18894 dated 15 May 1998.

6 Glazewski *Environmental Law in South Africa* (2nd ed) 162.

7 In the *White Paper on Environmental Management* the principles where described as follows:- "In terms of the preventive principle government must anticipate problems and prevent negative impacts on the environment and on people's environmental rights". The polluter-pays principle is defined as "Those responsible for environmental damage must pay the repair costs both to the environment and human health, and the costs of preventive measures to reduce or prevent further pollution and environmental damage". The precautionary principle is described, as "Government will apply a risk averse and cautious approach that recognises the limits of current knowledge about the environmental consequences of decisions or actions".

8 Bray 1999 *SAJELP* 2; Glazweski *Environmental Law in South Africa* (2nd ed) 166; Milton 1999 *SAJELP* 53 and De Wet 2003 *Without Prejudice* 8.

9 Scholtz 2005 *TSAR* 69. The Preamble of *NEMA* states that:

> Every person has the right to an environment that is not harmful to his or her health or well-being;

Apart from the Preamble section 2(3) of *NEMA* indicates the commitment to sustainable development by stating that development must be socially, environmentally and economically sustainable. It also defines sustainable development in section 1(xxix) to mean the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.[10] This was also recognised by Judge Lewis in the *Fuel Retailers Association of SA (Pty) Ltd v Director General Environmental Management, Mpumalanga and 13 Others.*[11]

NEMA is of great importance as it is the first 'umbrella' legislation which strives to establish an integrated environmental management framework which will transform and co-ordinate most of the diverse and fragmented sectors of the environment.[12] The Preamble states that law should establish principles guiding the exercise of functions affecting the environment and that the law should ensure that organs of the state maintain these principles guiding the exercise of functions affecting the environment.[13]

Sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;

Everyone has the right to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measure that –

Prevent pollution and ecological degradation

Promote conservation; and

Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

AND WHEREAS it is desirable that the law develops a framework for integrating good environmental management into all development activities;

That the law should establish principles guiding the exercise of functions affecting the environment and that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment.

10 This points to the notion of intergenerational equity showing that sustainable development is future orientated. This is clear by providing for an environment, which is to be protected for the benefit of present and future generations.

11 *Fuel Retailers Association of SA (Pty) Ltd v Director General Environmental Management, Mpumalanga and 13 Others* 2006 SCA 109 RSA paragraph 14.

12 Bray 1999 *SAJELP* 1.

13 Refer also to Cowen 1997 *SAJELP* 157 who states that the most important distinctive principles which he identifies in South African environmental law are intergenerational equity, polluter-pays principle and the precautionary principle.

5.2.1 *The Principles or "Relevant Factors" as contained in NEMA*

Section 2(4) of *NEMA* states that sustainable development requires the consideration of all relevant factors and sets out eight sub-principles.[14] Section 2 is also anthropocentric[15] in nature by stating that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental cultural and social interest equitably.[16]

Scholtz is of the opinion that sustainable development is also to be classified as an 'ideal' in South African law and accordingly notes that the 'relevant factors' as referred to in section 2 are actually acknowledged environmental principles.[17] It is of importance to acknowledge the nature of sustainable development as an ideal in South African environmental law which will serve as the basis for certain environmental principles that have an influence on rules.[18]

---

14 These are reflected in section 2(4)(a)(i)-(viii).

15 An important aspect of sustainable development, which was recognised in the *Rio Declaration*, is the anthropocentric approach toward environmental protection and development. Sands *Principles of International Environmental Law* 54. The anthropocentric approach is a human centred theory founded on the assumption that nature has insignificant intrinsic value. Humans are considered to be the central component of the planet. It allows humans to act as they please with respect to nature provided they are serving human nature. The main aspect of the anthropocentric approach is to place people and their needs at the forefront of its concern and serve their interest equitably. Principle 1 of the *Rio Declaration* proclaims that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. Principle 1 reflects an anthropocentric approach regarding environmental issues by declaring that human beings are at the centre of concerns for sustainable development and that they are entitled to a health and productive life in harmony with nature. Sands *Principles of International Environmental Law* 54. This anthropocentric approach is evident in Section 24 of the *Constitution* which states that 'everyone has the right to an environment that is not harmful to their health or well-being' and has further been included as a principle in the *NEMA* implying that the health and well being of people will be the main aim of the administration and implementation of the Act. This is further strengthened by stating that environmental management must place people and their needs at the forefront of its concern and serve their interests equitably. Section 2(2) of *NEMA* states 'environmental management must place people and their needs at the forefront of its concern and sere their physical, psychological, developmental, cultural and social interests equitably. It is generally accepted that human interest cannot be separated from the protection of the environment. Protection of the environment in respect of human interests has spill over effects to non-humans like animals and nature. Therefore the concept of sustainable development seems very anthropocentric as development is emphasized. Verschuuren *Principles of International Environmental Law* 43.

16 Section 2(2).

17 See Scholtz 2005 *TSAR* 78 who makes this submission.

18 Scholtz 2005 *TSAR* 79.

These principles include a wide spectrum of aspects and many are reflections of emerging environmental norms.[19] This can be shown through the wording of the different subsection reflecting the preventive principle in section 2(4)(a)(viii), the precautionary principle reflected in section 2(4)(a)(vii) and the polluter-pays principle in section (2)(4)(p).[20] The preventive principle also elaborates the notion of sustainable development by specifically providing for in section 2(4)(a)(ii) 'that the pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimized and remedied'. Other recognised environmental principles are also evident.[21]

These principles apply throughout the Republic to all 'organs of state' to any activity, which may significantly effect the environment.[22] These principles will apply alongside all other appropriate and relevant considerations including the states responsibility to respect, protect and promote and fulfil the social and economic rights in Chapter 2[23] and in particular the basic needs of categories of person disadvantaged by unfair discrimination.[24] Other functions of the principles are that they are to serve

---

19 Glazewski *Environmental Law in South Africa* (2nd ed) 169.

20 Glazewski proposes that the preventive principle is also present in section 2(4)(a)(i) and 2(4)(a)(iii) as well as section 2(4)(a)(viii).

21 Furthermore other acknowledged principles also find presence in *NEMA* such as the integration principle in section 2(4)(b) which states that: environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspect of the environment and all people in the environment by pursuing the selection of the best practical environmental option. Section 2(4)(f) states that: the participation of all interested and affected parties in environmental governance must be promoted, and all people must have an opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantages persons must be ensured. Section 2(4)(o) states that: The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage. However these principles have not been investigated or discussed but the polluter pays, preventive and precautionary principles have been identified as thee most important of the principles to be investigated and dissected.

22 Section 2(1).

23 This makes it clear that decision-makers are not only to pay consideration to ecological factors but also to social considerations such as housing, food, water, social security, well being and even dignity, all of which are referred to in the *Bill of Rights*. In the *BP Southern Africa* case the court held that after reviewing and evaluating various *NEMA* provisions including the principles, the Department of Environmental Affairs and Tourism (hereafter *DEAT*) is obligated to have regard to the effects of proposed activities on the environment, socio economic conditions and cultural heritage. Pg 151 at B.

24 Section 2(1)(a).

as the general framework within which environmental management plans must be formulated.[25]

The principles are also to serve as a guideline by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any other statutory law concerning the protection of the environment.[26] Most importantly though they are to be used in guiding the interpretation, administration and implementation of *NEMA* and any other laws concerned with the protection and conservation of the environment.[27]

This is all evidence that these principles are of great importance when it comes to the protection of the environment and must be considered in all aspects when decision are made which may in some way affect the environment. Constant reference is made to the environmental management principles, either by reference that they are to be applied and considered as contained in section 2 of *NEMA*, or are further elaborated on by specific mention and they are to be used in the application and interpretation of the various acts.[28]

As mentioned above, section 24 of the *Constitution* imposes an obligation on government to ensure that people have an environment, which is not harmful to their health and well-being. Furthermore the state must promote sustainable development.[29] Therefore the principles, which underlie sustainable development, may be used as a guideline to ensure that government complies with its obligation in terms of section 24 of the *Constitution*.[30]

The principles incorporated in *NEMA* and the wording as used is a reflection of the acknowledged international environmental principles and it is the aim of this study to

---

25 Section 2(1)(b). In *Minister of Public Works and others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC) it was emphasised by Judge President Chaskalson that the principles are directed to the formulation of environmental policies by the relevant organs of State and in the drafting and adopting of their environmental implementation and management plans, rather that to controlling the manner in which organs of State use their property. At para 68.

26 Section 2(1)(c).

27 Section 2(1)(e).

28 This will be referred to later in this chapter and the sections of the relevant legislation.

29 Section 24(b) of the *Constitution*.

30 Scholtz 2005 *TSAR* 84.

identify the important principles, which are indicative of the international principles. These principles are however also present in other environmental legislation.

5.3 The Precautionary Principle

Section 2(4)(a)(vii) reflects the precautionary principle. It is reflected in this section which states 'that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions'.

This is clearly in line with the precautionary principle as contained in principle 15 of the *Rio Declaration*. Although section 2(4)(a)(vii) is not the precise wording of principle 15, it is a clear reflection thereof. It re-iterates principle 15 by making mention of the fact that a cautious approach must be applied in decision making despite the limit of current knowledge about consequences of decisions and actions.[31]

The wording of section 2(4)(a)(vii) is unclear in comparison to the wording used by the drafters of the *Rio Declaration*. This is illustrated as follows. Principle 15 is clear by stating that a 'precautionary approach shall be applied' whereby comparison to subsection (4)(a)(vii) the wording of 'the risk averse and cautious approach must be applied'. From this wording it can be inferred that there is reference to a precautionary approach.

Further regarding the full scientific knowledge aspect principle 15 uses the clear wording of 'lack of full scientific certainty' whereas *NEMA* merely refers to the limits of current knowledge.[32] Due to this uncertainty section 2(4)(a)(vii) should be read together with section 2(4)(g) of *NEMA* states that decisions which are taken are to

---

[31] The wording in section 2(4)(a)(vii) may not be as clear as the wording of principle 15 of the *Rio Declaration* and therefore leaves some degree of uncertainty to many in the legal profession.

[32] If one were to question the wording of *NEMA* against the precise wording used in the *Rio Declaration* it could then be argued that in terms of *NEMA* no scientific knowledge regarding the consequences of decisions and actions is necessary. It is not the intention of this study to clarify this aspect.

include the recognition of all forms of knowledge including traditional and ordinary knowledge.[33] This would then include scientific knowledge of the consequences.

Despite this unclear formulation, it cannot be ignored that principle 2(4)(a)(vii) of *NEMA* is reflective of the precautionary principle and has been incorporated into South African legislation. The precautionary principle has also surfaced in subsequent environmental legislation either by explicit incorporation or merely with a provision containing a reference to the principles as contained in *NEMA*.

The first example of this is seen in section 2 of the *Marine Living Resources Act*.[34] Section 2 relates to the principles and objectives of the Act, which any Minister or organ of state must consider when exercising any power under the Act. Further in terms of section 83 of the *Marine Living Resources Act* the Minister may permit any scientific investigation necessary.[35] Section 2 read together with section 83 of the *Marine Living Resources Act* has a more express reference to the precautionary principle in relation to section 2 of *NEMA*.

Section 4 of the *World Heritage Convention Act*[36] refers to the fundamental principles, which apply throughout the Republic to all organs of state in relation to World Heritages Sites subject to applicable law including the *National Heritage Resources Act* and *NEMA*.[37] Section 4(2)(g) of the *World Heritage Convention Act* contains the exact wording of the precautionary principle as contained in *NEMA*.[38]

Section 23 of the *National Environmental Management: Air Quality Act*[39] is also an express inclusion of the precautionary principle. Section 23 makes provision that the

---

33 Section 2(4)(g) states that "Decisions must take into account the interests, needs and values of all interested and affected parties and includes recognising all forms of knowledge, including traditional and ordinary knowledge". It could then be argued that section 2(4)(g) includes scientific knowledge of consequences of actions and decisions.

34 *Marine Living Resources Act* 18 of 1998.

35 Section 83 states that "The Minister, may notwithstanding the provisions of this Act, permit a scientific investigation or practical experiment".

36 *World Heritage Convention Act* 49 of 1999.

37 Section 4(1)(a).

38 Section 4(2)(g) is reflective of the precautionary principle as it states that "a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decision and actions".

39 *National Environmental Management: Air Quality Act* 39 of 2004 (hereafter the *Air Quality Act*).

Minister must apply the precautionary principle as in section 2(4)(a)(vii) of *NEMA*.[40] Section 23 expressly refers to the precautionary principle as it appears in *NEMA*. This is a clear indication, and the first in the discussed legislation, where a specific principle is named and referred to as it appears in *NEMA*.

South Africa clearly recognises the precautionary principle. In doing so South Africa recognises the concept and the measures which must be taken and the meaning behind the principle although it is not that clear in other national legislation.

5.4 The Preventive Principle

The preventive principle requires that an activity, which does or will affect or cause environmental degradation, be prohibited. Environmental degradation is to be prevented; therefore, action must be taken at an early stage before environmental degradation has occurred. These early measures are preferable that measures taken to counteract the impact of pollution once it has occurred. In this way environmental harm is minimised in a cost-effective manner.[41] No clear definition of the preventive principle is found in the *Rio Declaration* but it is common knowledge as to what the principle entails.

---

[40] Section 23 states that:

"(1) The Minister of MEC may, by notice in the Government Gazette, declare any appliance or activity falling within a specific category, as a controlled emitter if such appliance or activity, or appliances or activities falling within the specific category, results is atmospheric emissions which through ambient concentrations, bioaccumulation, deposition or in any other way, present a threat to health or the environment or which the Minister or MEC reasonably believes presents such a threat.

(2) Before publishing a notice in terms of subsection (1) or any amendment to the notice the Minister or MEC must:-

(a) follow a consultative process in accordance with section 56 and 57;

(b) apply the precautionary principle contained in section 2(4)(a)(vii) of the National Environmental Management Act.

(c) take into account the Republics obligations in terms of any applicable international agreement; and

(d) consider-

(i) any sound scientific information and

(ii) any risk assessment."

[41] It can be found in Article 2(2) of the *Convention on the Protection and Use of Transboundary Watercourses* of 1992, Article 2(4) of the *Convention for the Protection of the Marine Environment of the North-East Atlantic* of 1992 and Principle 1 of the *UNEP Draft Principles* of 1978.

Evidence of the preventive principle is found in section 2(4)(a)(viii) of *NEMA*, which states 'that the negative impacts on the environment and peoples environmental rights be anticipated and prevented, and where they cannot be altogether prevented are minimised and remedied'. It is reflected in section 2(4)(a)(i) which states 'that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided are minimised and remedied'. Further in section 2(4)(a)(iii) stating 'that the disturbance of landscapes and sites that constitutes a nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied'.

By the use of the word 'anticipated', it indicates that parties should foresee any potential negative consequence an action could have on the environment and structure their action to prevent such negative impact. Section 24(b)(ii) of the *Constitution* also states that reasonable legislative and other measures must be taken in order to prevent pollution clearly indicating that preventive principle is acknowledged in South African legislation.

Section 28 of *NEMA* includes the duty of prevention as seen in the wording of subsection (1).[42] This is however a rule in section 28 of *NEMA* as a rule may have direct, easier application in individual cases.[43] A policy is that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.[44] This is an example where principles have been incorporated into rules to create obligations, which one must follow although the obligation is not always clear. This is what Scholtz terms a principle of law versus principle of policy.[45]

One can refer back to the argument that in order to make an ideal more concrete one needs to formulate legal principles but to apply these principles, concrete rules have to be developed. To bridge the gap between ideals and concrete rules, principles are a necessary link between ideal of sustainable development and concrete environmental legislation.

---

42 Subsection (1) states that: "Every person … must take reasonable measures to prevent pollution".
43 Verschuuren *Principles of Environmental Law* 38.
44 Verschuuren *Principles of Environmental Law* 41.
45 Scholtz *TSAR* 80.

The preventive principle is also present in other environmental legislation such as the *National Water Act*.[46] Section 19 is of importance as it relates to the polluter pays and preventive principles. Section 19(1) of the *Water Act* states that the owner of land on which an activity has or is to take place which is likely to cause pollution must take all reasonable steps to prevent such pollution from occurring. Section 19(2)(c) further states that the measure referred to in section 19(1) may be measures, which 'contain or prevent the movements of pollutants'.

Another inclusion of the preventive principle is evident in the *National Heritage Resources Act*.[47] Section 45(1)(b) provides that the national heritage resources committee must indicate necessary work to prevent further degradation of a site, which has been or is to be declared as a heritage site.

Section 45(1)(b) is an indication of the preventive principle as the heritage resources committee must indicate work which is necessary to prevent further degradation of a site declared as a heritage site.[48] These measures must be complied with to prevent further deterioration. Failure to do this will result in the application of section 45(2), in that should the owner of land fail to comply with an order that was issued to prevent further degradation of a site, the authority may take reasonable steps necessary and recover the costs, which they have incurred from the owner of the land.

---

46 *National Water Act* 36 of 1998 (hereafter the *Water Act*).

47 *National Heritage Resources Act* 25 of 1999.

48 In terms of section 45 it states the following:

"(1) When the heritage resources authority responsible for the protection of a heritage site considers that such site

(a) has been allowed to fall into disrepair for the purposes of

(i) effecting or enabling its destruction or demolition;

(ii) enabling the development of the designated land; and

(iii) enabling the development of any land adjoining the designated land; or

(b) is neglected to such an extent that it will loose its potential for conservation, the heritage resources authority may serve the owner an order to repair or maintain the site, to the satisfaction of the heritage resource authority, within a reasonable period of time as specified in the order: Provided that the heritage resources authority must specify only such work as, in its opinion, is necessary to prevent the further deterioration in the condition of the place.

(2) Subject to subsection (3), upon failure of the owner to comply with the terms set out in subsection (1) within the specified time, the authority which served the order may itself take such steps as may be necessary for the repair and maintenance thereof and recover the costs from the owner.

Again the *World Heritage Act* includes the preventive principle. Section 4(2)(h) is also the exact wording of the principle as contained in *NEMA*.[49] It can also be argued that the preventive principle is reflected in section 4(2)(b).[50]

Although some of the provisions in various legislation is differently phrased in comparison to *NEMA* there is still a clear indication of the preventive principle in South African legislation and the importance thereof has further been entrenched by section 24 of the *Constitution*.

5.5 The Polluter-Pays Principle

According to the international conferences and declarations the polluter-pays principle should be enforced by national legislation of all countries. The international application of the principle in developed countries should only serve as a framework for the interpretation of the principle in national policy and legislation.[51]

Although not all international instruments have been ratified such instruments are still to be considered when interpreting legislation in terms of section 233 of the *Constitution*. An increasing number of national legislation is being refined to oblige polluter to adopt progressive measures to prevent pollution.[52] The most prominent adoption of the principle, although it has been included in many other policy documents, is undoubtedly the incorporation in *NEMA*. In terms of section 2(4)(p) it states that:

> the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

---

49 Section 4(2)(h) shows that a preventive approach must be taken. It states as follows "negative impacts on the environment and on the environmental rights of people must be anticipated and prevented, and where they cannot be prevented, they must be mitigated".

50 Pollution and degradation of the environment are avoided, or where they cannot be avoided, are mitigated.

51 Oosthuizen 1998 *SAJELP* 357.

52 De Wet 2000 *Without Prejudice* 28.

In terms of Principle 16 if the *Rio Declaration* the polluter pays principle requires that the polluter should pay for the cost of pollution with due regard to the public interest. The cost of remedying pollution should be borne by the polluter rather than by innocent individuals or society at large. In terms of subsection (4)(p) of *NEMA* there is a clear reflection of principle 16 of the *Rio Declaration* and subsection (4)(p) may be more clearly formulated. In terms of principle 16, regard is also to be given to public interest without distorting international trade and investment while the formulation used in subsection (4)(p) of *NEMA* relates more to a national level.

It specifically refers to the costs of remedying pollution, preventing, controlling and minimizing further pollution. Further it clearly states that the person who is responsible for harming the environment must pay while principle 16 of the *Rio Declaration* makes provision that national authorities should promote internalisation of environmental costs and that in principle the polluter should pay but at the same time they are to give consideration to public interest.

Section 28 is also an extremely important section of *NEMA*, which regulates the provisions of liability. Legal rules to compensate for harm to the environment and are undoubtedly part of any body of environmental law.[53] The polluter pays principle is concretised and manifested in section 28 and section 30 of *NEMA*. Section 28 establishes a general duty of care and provides for liability in cases where this duty is breached and section 30 makes certain person liable for the consequences of incidents of a serious nature.

Further, section 28(1) of *NEMA* provides that every person who has caused significant pollution or environmental degradation must take reasonable steps to prevent such pollution from occurring, continuing and re-occurring.[54] The importance of this duty lies in its generality being that all conduct whether it has been in the past or in the

---

53 Soltau 1999 *SAJELP* 33.

54 Section 28(1) of *NEMA*. It states: "Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution from occurring, continuing, or reoccurring, or, in so far as such harm of the environment is authorised by law or cannot be reasonably avoided or stopped, to minimise and rectify such pollution or degradation of the environment".

present, which may or does cause pollution or environmental degradation is subject to the duty to take reasonable measures.[55]

An important aspect of section 28 could be the fact that should it be interpreted correctly it could apply retrospectively. However in the recent *Bareki v Gencor Ltd*[56] decision the opposite was decided. In subsection (1) the words 'any person who causes, has caused or may cause significant pollution' illustrate this. Where environmental harm may be authorised by law or it cannot be avoided or stopped, a duty to minimise and rectify such pollution or degradation still exists.[57]

Another important aspect of section 28 is the category of persons to whom this obligation applies. It specifically uses the wording of 'every person' in subsection 1 but subsection 2 goes on to list three classes of persons to whom the duty lies. Section 28(2) does not limit the duty of the provision but does state whom the responsible party to take such actions are.[58] It states that the owner of land or premises, a person in control of land or premises and a person who has the right to use the land or premises.

The duty of care is triggered where person's activities cause, caused or threaten to cause significant pollution or degradation of the environment.[59] The question now arises as to what constitutes significant pollution? If one looks at the definition of pollution in *NEMA*, any change in the environment, where it has had an adverse effect on human health or well-being is significant. However one could interpret this to mean pollution, which entails harm to humans or damages property or whether interference with ecosystems is necessary. That is why the definition of pollution

---

55 Soltau 1999 *SAJELP* 43 and Glazweski *Environmental Law in South Africa* (2nd ed) 149.

56 *Bareki NO and Another v Gencor Ltd and Another* 2006 (1) SA 432 (T).

57 Soltau points out that the legislation of the ongoing duty to minimise and rectify pollution is welcomed but care should be taken that the 'cannot reasonable be avoided' criterion does not become a loophole for polluters. Soltau 1999 *SAJELP* 44.

58 Section 28(2) states: "Without limiting the generality of the duty of subsection (1), the person on whom subsection (1) imposes a obligation to take reasonable measures, include the owner of land or premises, a person in control of land or premises or a person who has the right to use land or premises on which or in which (a) any activity or process is or was performed or undertaken; and (b) any other situation exists which causes, has caused or is likely to cause significant environmental degradation of the environment".

59 The inclusion of the word 'degradation' enlarges the ambit of the duty to encompass also general reductions in the quality of the environment.

according to the *NEMA* is important. Therefore it is held that impacts which are irreversible or that affect scarce or non-renewable resources ought to be significant.[60]

Oosthuizen has submitted that the polluter pays principle is reflected in section 24 of the *Constitution* the objective being to prevent pollution. This is in accordance with the polluter pays principle as adopted in principle 16 of the *Rio Declaration*. Although not explicitly mentioned there is no contradiction of the purpose and application thereof. Further the purpose and application may be implied by section 24(b)(i)-(iii) in that it is possibly all reasonable legislative measure aimed at the prevention of pollution and environmental degradation.[61]

Section 28 of *NEMA* goes on to set out measures which are considered to be reasonable and further that consideration must be given to the principles as contained in section 2 of *NEMA*.[62] In terms of subsection (11) the costs may be apportioned between polluters in respect of the degree to which their actions caused the pollution.[63]

When considering reasonable measures in terms of section 28 the concept of negligence will play an importance role. In common law the test for fault has two test, namely; the foreseeability of harm and the question whether the defendant took reasonable steps to avert such harm. In pollution cases the foreseeablity of harm will be a crucial factor as once it has been established that the harm was reasonably foreseeable the question will be raised as to whether the party took any reasonable steps to avoid such harm. Section 28(1) is clearly the central norm, which is further amplified by the remaining subsections of section 28. Therefore section 28 must be read together in totality in applying it to environmental situations.

---

60 Soltau 1999 *SAJELP* 44 and 45.

61 Oosthuizen 1998 *SAJELP* 358.

62 Section 28(3) – (13).

63 But as pointed out in Chapter 3, when transboundary pollution occurs it is not easy to specify which activity caused a specific degree of pollution and to what extent harm has been cause as well as environmental degradation as effects may only occur over the long term.

The polluter pays principle is probably the most prominent of all the principles in South African legislation. Chapter 3 of the *White Paper On Environmental Management in South Africa*[64] adopts the polluter pays principles and states that:

> Those responsible for environmental damage must pay the repair costs both to the environment and human health, and the costs of preventive measures to reduce or prevent further pollution and environmental damage.

The *White Paper on a Minerals and Mining Policy for South Africa*[65] specifically endorses the polluter pays principle in paragraph 4.4 (iii), stating that:

> The polluter pays principle will be applied in the regulation and enforcement of environmental management. The mining entrepreneur will be responsible for all costs pertaining to the impact of the operation on the environment. Where for reasons such as the demise or incapacity of a mining entrepreneur, no responsible person exists or can be identified to address pollution emanating from past mining operations, the State may accept responsibility or co-responsibility for the rehabilitation required. Government may require that any person benefiting from such rehabilitation should contribute to the cost involved in such proportions as may be negotiated.

In the *Water Act*, the polluter-pays principle is present in section 19. Although the *Water Act* relates to water usage and resources, section 19 bears almost the identical wording of section 28 of *NEMA* regarding the responsibility of the polluter and the actions, which must be taken.[66] The *Water Act* further provides for the definition of pollution meaning the direct or indirect alteration of the physical, chemical or biological properties of a water resources so as to make it less fit for any beneficial purpose for which it may reasonably be expected to be used or harm or potentially harmful to the welfare, health and well-being of humans, to any aquatic or non-

---

64 *White Paper on Environmental Management Policy for South Africa* N 749/1998 Government Gazette No 18894 dated 15 May 1998.

65 *A Mineral and Mining Policy for South Africa, Department of Minerals and Energy*, October 1998 N 2359/1998 in Government Gazette No 19344 dated 20 October 1998.

66 Section 19(1) of the *Water Act* states: "the any owner of land, a person in control of land or a person who occupies or uses the land on which (a) any activity or process is or was performed or undertaken or (b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource must take all reasonable measures to prevent any such pollution from occurring, continuing or reoccurring". Section 19(2) – 19(8) again set out reasonable steps and actions, which can be enforced and possible remedies due to non-compliance in regard to these subsections.

aquatic organism, and to property.[67] This Act is aimed at the protection of the water resources for the benefit of present and future generations.[68]

In respect of the *National Heritage Resources Act* measures must be complied with to prevent further deterioration of areas declared as a National Heritage site. Failure to take the necessary steps and prevent further deterioration of areas will result in the application of section 45(2), in that should the owner of land fail to comply with an order that was issued to prevent further degradation of a site, the authority may take reasonable steps necessary and recover the costs which they have incurred from the owner of the land. This is an indication of the polluter pays principle.

5.6 The Inclusion of the Principles in Other Environmental Legislation

Despite the fact that most environmental legislation does not expressly define and include the environmental principles, reference is still made to these principles. Such examples are seen by section 6(1)(a) of the *National Heritage Resources Act*[69] in terms of which *SAHRA*[70] after consultation with the Minister, may by notice in the Government Gazette, prescribe any principle for the heritage resources management in addition to, but not inconsistent with, the principles set out in section 5 of the Act. Under section 6(1)(b) the Minister may prescribe any principle in greater detail.

A more direct reference to the principles as contained in *NEMA* is seen in the *Minerals and Petroleum Resources Development Act.*[71] This act does not include the principles individually but section 37 provides that the principles as contained in *NEMA* must apply.[72] This means that in any decision making the principles in section 2 of *NEMA* must be considered and applied where necessary.

---

67 Section 1(xv) of the *Water Act.*

68 Here again is a reference to the future orientation in that the environment must be conserved to benefit the needs of present and future generations showing the principle of intergenerational equity.

69 *National Heritage Resources Act* 25 of 1999.

70 South African Heritage Resources Agency.

71 *Minerals and Petroleum Resources Development Act* 28 of 2000.

72 Section 37 states:

"(1) The principles set out in section 2 of the National Environmental Management Act –

Another example of mere reference to the principles is the *National Environmental Management: Protected Areas Act.*[73] In terms of section 5 of the *Protected Areas Act* the act must be interpreted and applied in accordance with the national environmental principles.[74] Section 7 of the *National Environmental Management: Biodiversity Act*[75] also merely refers to the environmental principles and that they are to be used as a guide when applying the *Biodiversity Act.*[76]

Since it has become law, the *National Environmental Management: Air Quality Act,*[77] imposes a set of measurable air quality norms and standards that polluters will have to comply with and makes non-compliance easier to detect. The *Air Quality Act* has a more explicitly inclusion of the principles in various sections in the Act. Firstly this is seen in section 2, which states the object of the Act to protect the environment and to give effect to section 24(b) of the *Constitution*. This is also re-iterating the importance of sustainable development as it provides that one must protect the environment by preventing pollution and environmental degradation and secure economic sustainable development.[78]

(a) apply to all prospecting an mining operations, as the case may be, and any other matter relating to such operation; and
(b) serve as a guideline for the interpretation, administration and implementation of the environmental requirements of this Act

(2) Any prospecting or mining operation must be conducted in accordance with general accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.

73 *National Environmental Management: Protected Areas Act* 57 of 2003 (hereafter the *Protected Areas Act*).

74 Section 5 reads as follows: "This Act must (a) be interpreted and applied in accordance with the national environmental management principles; and (b) be read with the applicable provisions of the National Environmental Management Act".

75 *National Environmental Management*: *Biodiversity Act* 10 of 2004 (hereafter the *Biodiversity Act*).

76 Section 7 states that "The application of this Act must be guided by the national environmental management principles as set out in principle 2 of the National Environmental Management Act".

77 *National Environmental Management: Air Quality Act* 39 of 2006 (hereafter the *Air Quality Act*).

78 Section 2 of the Act states that the object of the Act is to:
(a) to protect the environment by providing reasonable measures for-
(i) the protection and enhancement of the quality of air in the Republic;
(ii) the prevention of air pollution and ecological degradation; and
(iii) securing ecological sustainable development while promoting justifiable and economic and social development; and
(b) generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment which is not harmful to the health and well-being of people.

Section 5 of the *Air Quality Act* is the first mention of the environmental principles in this particular act but again only a reference to these principles as contained in section 2 of *NEMA* which should be used as a guide in the interpretation and application of this Act.[79] In addition to this section 7 states that national norms, which are established under this act, must be aimed at ensuring the prevention of air pollution and degradation of air quality.[80]

Much of the legislation above does not make explicit mention of the environmental principles, reference is still made to them as they appear in *NEMA*. This indicates the recognition that South African legislation awards to the environmental principles. It is thus that the importance and applicability of the environmental principles regarding environmental situations are entrenched in environmental legislation and especially in *NEMA*. These principles are clearly important for the promotion of sustainable development within South Africa and need to be utilised in all aspects.

5.7 Environmental Principles in National Case Law

It is clear from the above that the environmental principles are important in South African environmental legislation. One of the important aspects of these principles is the adjudication by the courts and how they have utilised these principles in the interpretation and application of environmental legislative measures in relation to certain environmental situations. It is thus necessary to investigate the relevant court decision regarding the environmental principles as contained in *NEMA*.

Statutory provisions are strengthening the fight of citizens against environmental degradation and pollution, which is detrimental to their health and well-being. It is useful to identify the legal provisions, which can be used by an aggrieved party when they feel their environmental right is being violated. The violation of environmental

---

[79] Section 5 states that:
(1) this Act must be read with any applicable provision of the National Environmental Management Act;
(2) the interpretation and application of this Act must be guided by the national environmental management principles as set out in section 2 of the National Environmental Management Act.

[80] Section 7(2).

rights has been challenged under various acts that have been applicable at the time when the environmental degradation was busy taking place.

One such instance is the *Hichange Investments* case, which was decided in terms of section 28 of *NEMA*.[81] The applicant instituted action and sought relief in terms of section 28(12)[82] of *NEMA* due to the respondents contravening section 9(1)[83] of the *Atmospheric Prevention Pollution Act (hereafter APPA)*.[84] The applicant averred that the gas, which was being emitted from a tannery on an adjacent property, was becoming intolerable and thus applied to the court for relief under section 28(12).

The court held that pollution was a complex, technical and scientific issue that raised questions that could only be answered properly with insight into detailed scientific knowledge and information. Further it was held that it was clear from the evidence submitted that significant pollution as defined in *NEMA* had occurred and it is detectable by people in the surrounding area due to the constant stench of rotten eggs despite earlier attempts to limit the gas emissions.

---

81 *Hichange Investments v Cape Products t/a Pelts Products and Others* 2004 (2) SA 393 (E).

82 Section 28(12) of *NEMA* states that any person may, after giving the Director-General or provincial head of department 30 day's notice, apply to a competent court for and order directing the Director-General or provincial head of department to take any of the steps mention in subsection (4) if the Director-General or provincial head of department fails to inform such person in writing that he or she had directed a person contemplated in subsection (8) to take one of those steps, and the provisions of section 32(2) and section 32(3) shall apply to such proceedings with the necessary changes.

83 Section 9(1) of *A PPA* states that (1) Save as provided in subsection (4) of section 11, no person shall within a controlled area-

(a) carry on a scheduled process in or on any premises, unless –
   i. he is the holder of a current registration certificate authorising him to carry on that process in or on those premises; or
   ii. in the case of a person who was carrying on any such process in or on any premises immediately prior to the date of publication of the notice by virtue of which the area in question is a controlled area, he has within three months after that date applied for the issue to him of a registration certificate authorising the carrying on of that process in or on those premises, ad his application has not been refused; or

(b) erect or cause to be erected any building or plant, or alter or extend or cause to be altered or extended any existing building or plant, which is intended to be used for the purpose of carrying on any scheduled process in or on any premises, unless he is the holder of a provisional registration certificate authorising the erection, alteration or extension of that building or plant for the said purpose; or

(c) alter or extend or cause to be altered or extended an existing building or plant in respect of which a current registration certificate has been issued unless he has, before taking steps to bring about the proposed alteration or extension, applied to the chief officer for provisional registration of the proposed alteration or extension or unless such alteration or extension will not affect the escape into the atmosphere of noxious or offensive gases produced by the scheduled process in question.

84 *Atmospheric Prevention Pollution Act* 45 of 1965.

Although previous requests were made to the tannery's management as well as the Department of Environmental Affairs, who did not take actions in terms of section 28(4) the court found the Department liable in that they were to take the appropriate measures in ordering the tannery to take corrective measures at the expense of the tannery. Therefore the polluter was forced to pay.

Another case is the *Kyalami Ridge Case*.[85] The court was confronted with environmental issues in terms of section 2 of *NEMA*. The residents of the surrounding area in this case claimed their right to a healthy environment in terms of section 24 of the *Constitution*. An urgent application was made to the High Court for an interdict, at the request of residence within the vicinity of the Leeuwkop prison, to demand that the Minister of Public Works stop the establishment of the camp on the basis that it had contravened the regulations of the *NEMA* and further that there was not legislation authorising the government to take the action it had.[86]

The court pointed out that chapter 1 of *NEMA* provides for national environmental principles.[87] The main contention with regarding to non-compliance of this Act was with section 2(4)(g) and (k) requiring that 'decisions must take into account he interest, needs and values of all interested and affected parties'[88] and further that 'decisions must be taken in an open and transparent manner.'[89] Section 2(1) deals with the application of the principles.

The basis of this demand was to halt establishment of the camp on the site involving the use of the land and was being carried out in contravention of the *ECA* and particularly section 2(4)(g) and (h) of *NEMA*. The court stated that *NEMA* is a framework legislation that makes provision for the preparation of environmental implementation and management plans. The principles as contained in section 2 are not there to control the manner in which organs of state use their property but are there to direct organs of state in the manner which they use their property.

---

85 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening* 2001 (3) SA 1151 (CC).

86 In terms of this the actions taken by government to establish the camp as well as the camp itself was then unlawful.

87 Para 66.

88 Section 2(4)(g) of NEMA.

89 Section 2(4)(k) of *NEMA*.

The judge did not see it appropriate to decide whether the principles in section 2 of *NEMA* can be applied in a dispute between members of the public and the government concerning activities that are not regulated by environmental implementation plans or other provisions formulated under *NEMA* but for the purposes of judgment it was assumed that they do apply.[90]

The court referred to the section 2 principles and stated that they are only applicable to activities that may 'significantly affect the environment.' The onus was on the residents who had to show that the proposed development would significantly affect the environment and the court held that they did not adduce enough evidence to discharge the onus in that the establishment of the camp would have significant effect.[91] It follows that if the development has to be carried out in accordance with principles recorded in section 2 of *NEMA*, it has not been shown that the provisions of this Act were infringed by the government's decision to locate the camp at Leeuwkop.

Further the residents in the Leeuwkop area also failed to adduce evidence that the establishment of the camp will significantly affect the environment.[92] Therefore it is this flawed interpretation of section 2 which led to the rejection of the applicant's contention.[93]

The Court's judgement in respect of its stance on the environment is very interesting and in reaching its decision, the interpretation awarded in terms of section 2 is flawed being termed the reason for the applicant's failure and could set a most unfortunate precedent for future environmental cases.[94]

---

90 Para 75.

91 Para 73,74, 75 at 1178.

92 A report was given to the court which raised raised concerns about possible soil erosion, air pollution due to the use of coal fires, water pollution if the sewerage and solid waste removal services were not provided for to the residents of the camp, the possible damage to the flora and fauna by residents, the possible loss of the agricultural potential of the land and the impact that the establishment will have on the socio-cultural environment of the area and property values. This report was contended to be based purely upon opinion and hypothesis as Ms Holgate only visited the proposed site for establishment of the camp only one without knowledge of any of the details of the development of the camp.

93 See also the view expressed by Kidd on this case. Kidd 2001 *SAJELP* 119.

94 Kidd 2001 *SAJELP* 119. In this case the actions of the government were questioned after a transit camp was established on a portion of State land on which the Leeuwkop prison was situated after heavy rains had led to the flooding of the Alexandra Township and left more than 300 people homeless.

The most recent decision and probably one of the most important cases regarding the principles of *NEMA* is *Bareki* case. In this matter the plaintiff brought an action again Gencor and several other defendants on the basis of section 28 of *NEMA* in that it is the duty of the polluter who should take reasonable measures to rectify the pollution and degradation of the environment as intended in section 28(1) read with section 28(2) and 28(3) of *NEMA*. However the defendants raised an exception in stating that section 28 of *NEMA* was not to be retrospective and could not apply to any actions, which caused pollution, or environmental degradation, which had been taken before the 29 January 1999, which was the date of commencement of the Act.[95]

The plaintiffs' claim is based on the alleged degradation of the environment caused by the asbestos mining activities, which had been conducted over a number of years.[96] Although mining activities had ceased more than 20 years ago the remains of the mining activities still remained in the form of asbestos dumps, a beneficiation plant, a mill and a haul road between the mine and the beneficiation plant.[97]

The plaintiff averred that the first and second respondents caused much environmental degradation through the contamination of the mining area in Heuningvlei through the emission of asbestos fibres into the atmosphere during the mining activities. The pollution and degradation of the environment therefore poses a serious health risk to residents and occupiers of the areas and is a further threat to the environmental integrity of the region. In terms of section 28 the plaintiff averred that the respondents were to take reasonable measures to rectify the pollution and in terms of section 28 still remain responsible despite the fact that *NEMA* only came into operation in 1999.[98]

---

95 Bareki is the first plaintiff who brought an action is a traditional leader bringing his action in his own interest and further in the interest of the Bareki tribe and inhabitants of the Heuningvlei community in the North West Province. The second plaintiff was an environmental concern group and both plaintiffs aver that they have the necessary standing in terms of section 38 of the Constitution as well as section 32 of *NEMA*. There are six defendants, Gencor is the first defendant. Griqualand Exploration and Finance Co (Pty) Ltd ('Gefco') is the second defendant, Hanova Mining Holdings (Pty) Ltd the third defendant, the Government of the RSA the fourth defendant, the Minister of Minerals and Energy the fifth defendant and the Minister of Environmental Affairs and Tourism (hereafter *DEAT*) the sixth defendant.

96 Mining activities were carried out at the Bute Asbestos Mine but were discontinued between 1981 or 1985.

97 Page 434 B – D.

98 Page 435 B – C.

Furthermore it was argued upon interpretation of section 28 of *NEMA*, the state, as owner of the land, also retains the duty to take reasonable measures to rectify pollution or environmental degradation and has failed to take such reasonable steps.[99] In the light of the unwillingness of Gencor, Gefco and the Government to accept liability for the costs of rehabilitation, Bareki and others wanted to compel the Director-General DEAT to comply with the statutory obligations in terms of s 28(7) and (8) of *NEMA*. This meant that DEAT could effect the rehabilitation and it could claim the aforesaid sum from Gencor, Gefco and the Government. The Court can, in terms of s 172 of the *Constitution*, direct the said Director-General to recover the said sum from Gencor, Gefco and the Government.[100]

Section 24 of the *Constitution* was referred to and when a court interprets *NEMA* they must promote the spirit, purport and objects of the *Bill of Rights*. *NEMA* was enacted to give content to section 24 of the *Constitution*.[101] Judge De Villiers referred to the preamble of *NEMA* and then went on to mention the relevance of sustainable development, the principles as mentioned in section 2 and section 28 of *NEMA*.[102] The defendant submitted that section 28(1), (2) and (3) of *NEMA* does not have a retrospective effect and Judge De Villiers agreed with this submission by stating that there is a 'common law a *prima facie* rule of construction that a statute should not be interpreted as having retrospective effect. This presumption against retrospectivity[103] may be rebutted, either expressly or by necessary implication by provisions or indications to the contrary in the enactment under consideration'.[104]

---

99 The plaintiff submitted that the estimated fair and reasonable cost of reasonable measures to rectify the pollution were calculated at R64 265 584. The respondents disputed such costs and their estimation was in the region of about R18 million to R24 million but reasonable measures for rehabilitation cannot be affected as such cost.

100 Page 435 F – H.

101 Page 436 E – G.

102 The section of importance from the preamble of *NEMA* is 'Whereas many inhabitants of South Africa live in an environment that is harmful to their health and well-being; everyone has the right to an environment that is not harmful to his or her health or well-being . . . everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislature and other measures that - prevent pollution and ecological degradation'. Judge De Villiers also set out section 2 and 28 of *NEMA*, which is important.

103 A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. It changes the law from what it otherwise would be with respect to a prior event. A retroactive statute is one that operates as of a time prior to its enactment, therefore acting backwards. It changes the law from what it was.

104 Page 438 H – J.

But in order to decided on the retrospectivity of *NEMA* it was important to determine the nature of the duty in terms of section 28(1) and (2). Firstly it is important to determine if there is any unfairness regarding the retrospective effect of *NEMA* and it is therefore important to examine the nature of the duty and the circumstances under which it arises.[105]

It was submitted on Gencor's behalf that the duty or obligation is a strict one, in other words without fault (*culpa*) being an element of liability. Subsections (1) and (2) certainly make no mention of such a requirement. Section 28(8)*(d)* relates to 'any person who negligently failed to prevent (i) the activity or process being performed or undertaken; or (ii) the situation from coming about.'[106]

From section 28(1) the duty or obligation to take reasonable corrective measures flows merely from the fact that a person who causes, has caused or may cause significant pollution or degradation of the environment. Section 28(2) goes further by imposing such an obligation on an owner of land or premises, or a person in control thereof, or a person who has a right to use it, on which any activity or process is or was performed or undertaken, or any other situation exists which causes, has caused or is likely to cause significant pollution or degradation of the environment.[107]

Judge De Villiers agreed with the submission that section 28(1) and (2), create at least, strict liability and in some instances absolute liability. Furthermore no monetary limit is set to such liability.[108] Under *NEMA* the polluter has no statutory defences, which they can rely on but in section 28 an obligation is placed on a polluter to take reasonable measures to minimise or rectify the pollution, even if such pollution is authorised by law or cannot be reasonably avoided or stopped.[109]

---

105 Page 439 F – J.

106 The purpose of section 28 is not to create a duty or obligation to take reasonable corrective measures.

107 Therefore even an owner or possessor of land on whose land the activity or process causing pollution has been performed without his knowledge and consent, *prima facie* incurs an obligation to take reasonable corrective measures.

108 Judge De Villiers here pointed out the comparison between the amounts submitted by both parties to be the estimate of the fair and reasonable cost of the reasonable measures to rectify the pollution in the mining area.

109 Page 440 H to page 441 B.

Furthermore the wording of section 28 was questioned. The plaintiff alleged that the use of the past tense in the words 'has caused' and 'was responsible' is an indication of the intended retrospective effect *NEMA* is to have. That would mean that when *NEMA* came into operation any person who had, prior to the enactment of *NEMA*, caused any pollution or environmental degradation was then to be held accountable.[110]

Judge De Villiers however disagreed and stated that the mere usage of the words in the past tense were only to refer to a person who, after the commencement of the Act, had caused pollution but was no longer doing so. Therefore the court upheld the exception to the first claim based on *NEMA* as it was held that it was never the intention of the Legislature to give a retrospective effect to *NEMA*.[111]

Therefore this case is important in the decision reached regarding retrospectivity of legislation and the impact, which it could have on responsible parties. Should it have been found that there was intended to be retrospective effect, all polluters would be facing actions and *NEMA* is only applicable to actions, which have taken place since the commencement of *NEMA*. Therefore because the actions of the defendant had ceased more 20 years ago other legislation is applicable and an action should be brought under the relevant sections of applicable legislation.[112] *NEMA* does therefore not imply a retrospective effect and person who have suffered pollution cannot bring an application in terms of *NEMA* unless the pollution has occurred after 1998.[113]

Much critique may be delivered about this case in the future. Although it is true that it could not have been the intention of the legislature to achieve retrospectivity, the question may be raised as to whether the polluter pays principle always has a degree of retrospectivity attached to it, due to the nature and wording thereof as used in *NEMA*. Should this be the case it will deviate from the general rule that it could not be the intent to create retrospectivity and that it is in fact retrospective in nature. This will not mean that the whole of *NEMA* will have a retrospective effect but merely section 28 in that the person who has caused pollution is to pay the cost thereof.

---

110 Page 444 G – J.

111 Page 444 I – J.

112 This paragraph relates to the second exception of the matter but for the purposes of this study the focus is mainly on the retrospectivity issue of *NEMA* raised in the matter.

113 Page 445 F – I.

The judge failed to refer to the polluter pays principle, although the action was brought specifically based on section 28 of *NEMA*. By not referring to principle directly no consideration of foreign law was made and therefore the judge did not establish the content and effect of the polluter pays principle. Furthermore the judge also failed to take into consideration the aim of sustainable development as contained in section 24 of the *Constitution* and section 2 of *NEMA*. Had the judge given consideration to international law and the true nature of sustainable development a different decision may have been made.

5.8 Conclusion

The principles as mentioned in section 2(4) of *NEMA* are of utmost importance, as they are international environmental principles, which have been incorporated into national legislation at an attempt to achieve sustainable development.

The environmental principles are present in much national environmental legislation by either explicit inclusion or the mere reference to them as they appear in section 2 of *NEMA*. This would mean that although the principles have not expressly been included in particular sections of environmental legislation, the principles as contained in *NEMA*, would still be applicable and this re-iterates the importance of the principles in environmental matters. They should always be used as guidelines when interpreting and applying environmental legislation to specific environmental situations.

The importance of the principles have not all evolved equally in South African law, but the most prominent one is the polluter pays principle which has received much recognition by courts and is the most prominently included principle in environmental legislation.

The problem with this principle is the 'significant pollution or degradation' which affects the environment aspect. It is argued that the inclusion of the word 'degradation' enlarges the ambit of the duty to encompass also general reductions in

the quality of the environment. Therefore the threshold set by 'significant pollution' or 'degradation' is important to ascertain. However this would vary as to how the term 'significant' is interpreted. Is it to mean pollution or degradation, which entail harm to human or damage to property or must there be some sort of interference with ecosystems? In respect of *NEMA* pollution is defined as any change in the environment or where the change has an adverse effect on human health or well-being.

Environmental liability rules are crucial in a system of regulation as they concretise the polluter pays principle. This is an example where the principles act as the bridge between an ideal and rules. To promote sustainable development more concrete economic, legal and social instruments must be brought into action to generate a more sustainable use of the earths resources.

Principles are a necessary medium for ideals to find their way into concrete rules. To illustrate this one may refer to the functions which principles serve namely that they define open or unclear rules; they enhance the normative power of statutory rules; they increase legal certainty and enhance the legitimacy of decision-making; they form the basis for new legislation or treaties; they form the basis for negotiations between various actors in society and they create flexibility in the law. Further principles have to play an important role in national legal systems because they help to implement international obligations; they stimulate integration of environmental consideration into other policy fields but most importantly they are necessary to pursue an ideal.

This means that principles must be used to interpret current rules, to guide interpretation and applicability and most importantly create new legal rules. Unfortunately in South African legislation, principles and ideals are present, but judges have been reluctant to use them in the proper manner. This means that the role of law as a goal-implementing instrument focuses on the work of legal experts and the effort made in trying to achieve and promote sustainable development.

Although legal experts and practitioners are increasingly involved in the communication process the problem still remains that legal practitioners receive little

guidance on what constitutes legal ethics in environmental practice and no guidance on how this all meshes. This is evident in recent court decisions.

The most recent decision is the *Bareki* decision where the court was faced with the question as to whether *NEMA* has retrospective effect. A discrepancy of the *Bareki* decision is however that the judge referred to *NEMA,* which is not intended to have retrospective effect but not once referred to the retrospective effect which the polluter pays principle, has in terms of section 28. Should the judge actually have considered international law and foreign law in trying to interpret the polluter pays principle on a national level a different decision may have been reached. This is illustrative that legal practitioners in South Africa do not have a proper understanding of the principles and do not correctly interpret and apply them.

Such 'short-sighted' decisions made by judges who fail to take into consideration all aspects regarding the environmental principles will have a detrimental impact on the further protection of the environment and most importantly in promoting sustainable development. These wrong decisions will create precedents for future cases because judges, without the sufficient knowledge, will continue with their reluctancy to pronounce on the principles and if they do, will fail to take international law into consideration to determine the real nature of the principles.

Therefore effective environmental legislation with clearer definitions and enforcement measures will be beneficial to the protection and conservation of the environment also in trying to promote sustainable development and give section 24 greater effect. One should put the functions of principles in action and use them to interpret and guide the interpretation of rules and most importantly use them to create new rules to create effective environmental law.

CHAPTER 6

PROPOSAL AND CONCLUSION

6.1 Introduction

The aim of this study was to determine how sustainable development can be promoted within South Africa by first defining the concept within international law. Sustainable development is aimed as alleviating poverty, enhancing the standard of living and quality of people's lives, especially the lives of the previously disadvantaged but most importantly, is aimed at the protection of the environment for future generations. The concept of sustainable development contains principles with the potential to impact positively on environmental problems, developmental needs and may socially impact the environment. Thus sustainable development and its underlying principles are of great importance for developing countries internationally, but most importantly for country such as South Africa.

After astonishing evidence was adduced regarding the effects which human conduct was having on the environment, numerous attempts were launched in trying to protect the world's environment, which led to the introduction of the concept of sustainable development being introduced into the field of international law under a new branch of international environmental law. Environmental law is a branch of law which has only received attention over the last four decades but is one which is developing at an astonishing rate due to the negative effects which human conduct is having on the environment and the detrimental effect it has not only for future generations but also for present generations.

In chapter 2 of this study it was found that sustainable development is a concept which has been given international recognition in law regardless of the fact that it is still lacking in clear meaning. Many international documents have included this concept within its text as a goal which is to be achieved, including documents which may be terms as soft-law documents and not have the same legally binding status as other international agreements which have been concluded. Further it can be

concluded that it will be beneficial to classify sustainable development as an ideal rather than a principle as opined by Verschuuren due to the fact that it remains a loose, vague and indeterminate general idea of perfection we ought to aim at. However another important aspect for the classification of sustainable development as an ideal is due to the relationship, which exist between ideals and principles. To classify sustainable development as an ideal, will serve as the basis for certain principles to influence rules.

Further in chapter 2 it was show that a differentiation between the principles which are characteristic of sustainable development and those which underlie sustainable development must be made. It is these principles, which underlie sustainable development, which are an important aspect in the promotion of the ideal.

In chapter 3, the principles which underlie sustainable development, where identified and briefly discussed. Prevention of damage to the environment at an early stage is better than trying to remedy such damage once it as occurred. In an attempt to curb environmental damage at an early stage, the *Rio Declaration* introduced numerous principles, which must be implemented in order to promote and achieve sustainable development. In this chapter, three of the most important and prominent international environmental law principles where identified and discussed, each one bearing their own functions within the environment.

The principles which were identified were the precautionary principle, preventive principle and the polluter-pays principle and it was found that these principles have gained international recognition by being incorporated into numerous international and domestic policy documents and have become a central theme in some. However, although these principles have been included in numerous treaties and been invoked by parties in matters before the *ICJ,* there is not sufficient evidence to support the view that these principles have evolved into customary international law although this issue is still open to debate.

These principles are of great importance as they are to be implemented in order to achieve the ideal of sustainable development and not only to preserve the environment for present generations but also for future generations. The above-mentioned

principles are to be used by all institutional organisations in guiding their activities, which may have a harmful effect on the environment. Furthermore these principles must also be considered, when states enact and enforce national environmental legislation and should aim at, and prevent, further environmental harm and degradation.

Within South Africa, the concept of sustainable development is not all that new and has spread rapidly through our legislation pertaining to environmental law. Sustainable development and its underlying principles have clearly been entrenched through the recognition of international law in section 233 of the *Constitution* and the interpretation provision namely section 39. In terms of the various sections of the *Constitution* international law clearly has an impact on South African domestic legislation as the *Constitution* provides that courts must take into consideration international law either when interpreting the *Bill of Rights* in terms of section 39 or by section 233, which states that a court must award recognition to international law when interpreting any legislation.

As pointed out in Chapter 4 and 5 of this study, sustainable development and the environmental principles are entrenched in South African legislation although the principles are not as clearly defined as appears in other international documents. The lack of clarity of the environmental principles within South African legislation needs to be addressed as is evident from the recently decided *Bareki* decision. In making its decision, the court did not consider or take cognisance of the environmental principles as they apply on an international level. The court failed to consider the nature of international law principles and therefore the *Bareki* decision can be seen as a "missed opportunity" in interpreting legislation correctly and setting better precedents for environmental law.

Regarding the interpretation and implementation of section 2 of *NEMA* the question may be raised, whether our courts have really used section 2 in decided environmental matters brought before them. The courts are extremely hesitant to pronounce on any aspects of the principles contained in section 2, although various issues and the call for the implementation of section 2 have been raised on numerous occasions. The courts seldom seem to use section 2 in interpretation as can be seen in the latest

decision decided namely the *Bareki* decision in that the court hardly used section 2 to interpret the matter.

The hesitancy of courts to use section 2 may be based on the fact that judges are not environmentally trained or are poorly trained at the least. They do not possess the necessary knowledge and understanding of the concept of sustainable development and further do not fully understand the meaning of the principles and their aim. Further due to the backlog of matters in courts, judges have little time to gain the necessary knowledge in order to fully understand and use these principles and apply proper implementation thereof in matters brought before them calling for such.

In the *Bareki* decision an example of the ineffective interpretation by courts is seen in section 28 of NEMA. Section 28 clearly incorporates the polluter pays principle as well as the preventive principle. Section 2 is therefore necessary and important when interpreting the provisions of section 28 of NEMA. A lack of understanding regarding section 2 will result in improper interpretation and implementation of section 28.

It is clear that all environmental legislation being enacted, as well as section 2 of *NEMA,* underscore the importance of the principles in trying to promote sustainable development and therefore it is vital that further environmental legislation, contain extensive reference to the principles and define these principles clearer. However it does not seem that practice supports this view as South African courts are hesitant and rarely use section 2 or the principles referred to in various legislation.

The environmental principles must play a more important role in various aspects the first and most importantly is to be used in the interpretation of legislation. Only by having a proper understanding of the principles and how they are to be applied can the ideal of sustainable development be achieved. They can play a role where a lacuna in law exists by guiding for the promulgation of new legislation of amending of existing legislation. The principles must be used to build a bridge to achieve sustainable development and in doing so promote the existence of an essential element of the rule of law as pointed out in chapter 4. The principles are important to form a sustainable development state which South Africa needs to be.

The usage of the principles can promote the ideal of sustainable development, therefore promote section 24 of the *Constitution* and in turn promote the existence of the rule of law. Section 24 guarantees a liveable environment, which is an essential component of the rule of law as well as a *Rechtsstaat*. In terms of section 24, government has an obligation to ensure a liveable environment. By applying section 2 of *NEMA,* it may serve as a guideline to ensure that government comply with the obligations in terms of section 24 and therefore promote the existence of the rule of law. The promotion of sustainable development serves as a mechanism to ensure the existence of one of the fundamental requirements of the rule of law. Therefore section 24 forms the bridge between sustainable development and the rule of law and the principles aimed at promoting sustainable development must also promote the rule of law.

The fact that sustainable development and the underlying principles are entrenched within national legislation is a positive aspect and shows adherence to international law whether it be binding or non-binding in nature. The problem still remains however, that sustainable development and the underlying principles, are novel and practice is a problem, as can be seen in our court decisions. This however does not negate the importance of the principles within environmental legislation. It is extremely important that judges be schooled, other officials and government organisations as well as non-governmental organisations. In this way they can fulfil the role as envisaged in chapter 2 and other legislation.

The environmental principles must play a more important role in various aspects, the first and most importantly is to be used in the interpretation of legislation. Only by having a proper understanding of the principles and how they are to be applied can the ideal of sustainable development be achieved. They can play a role where a lacuna in law exists by guiding for the promulgation of new legislation of amending of existing legislation. The principles must be used to build a bridge to achieve sustainable development and in doing so promote the existence of an essential element of the rule of law as pointed out in chapter 4. The principles are important to form a sustainable development state, which South Africa needs to be.

In order to achieve this it is necessary that officials, judiciary officers, advocates and attorneys receive a proper education in the field of environmental law to utiltise these principles and acknowledge them to an greater extent which will no longer render the position of these principles within the environmental law as "useless". The inclusion and interpretation of these principles play an important role as they are to be used as a guideline in the promulgation process of environmental legislation aiming such legislation at the ideal of sustainable development.

BIBLIOGRAPHY

BOOKS

B

Birnie and Boyle *International Law and the Environment* (2nd ed)

Birnie PW and Boyle AE *International Law and the Environment* 2nd ed (Oxford University Press, 2002)

Bigg *The World Summit on Sustainable Development: Was it Worth It?*

Bigg T "The World Summit on Sustainable Development: Was it Worth It?" in Bigg T (ed) *Survival for a Small Planet: The Sustainable Development Agenda* (Earthscan, London 2004)

Boyle and Freestone (ed) *International Law and Sustainable Development*

Boyle A and Freestone D (ed) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, New York 1999)

Boyle *Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs*

Boyle AE "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francioni F and Scovazzi T *International Responsibility for Environmental Harm* (Graham & Trotman/Martinus Nijhoff, London, 1991) 363 - 380

Brownlie *Principles of Public International Law* (6th ed)

Brownlie I *Principles of Public International Law* 6th ed (Oxford University Press, New York 2003)

C

Chasek *The UN Commission on Sustainable Development: The First Five Years*

Chasek PS "The UN Commission of Sustainable Development: The First Five Years" in Chasek PS (ed) *The Global Environment in the Twenty-First Century: Prospects for International Co-operation* (United Nations University Press, 2000) 378 - 389

D

Davies *European Union Environmental Law*

Davies PGG *European Union Environmental Law: An Introduction to Key Selected Issues* (Ashgate Publishing Limited England, 2004)

Deville and Harding *Applying the Precautionary Principle*

Deville A and Harding R *Applying the Precautionary Principle* (Federation Press Sydney, 1997)

De Waal and Curie *Bill of Rights Handbook* (5th ed)

De Waal J and Currie I *The Bill of Rights Handbook* 5th ed (JUTA Law, Lansdowne, 2005)

Desai *Institutionalizing International Environmental Law*

Desai BH *Institutionalizing International Environmental Law* (Transnational Publishers, New York, 2003)

Dugard *International Law: A South African Perspective* (2nd ed)

Dugard J *International Law: A South African Perspective* 2nd ed (JUTA Law, Landsdowne, 2000)

Dixon *International Law* (5th ed)

Dixon M *Textbook on International Law* 5th ed (Oxford University Press, London, 2005)

E

Evans (ed) *International Law*

Evans MD (ed) *International Law* (Oxford University Press, 2003)

G

Glazewski *Environmental Law in South Africa* (2nd ed)

Glazewski J *Environmental Law in South Africa* 2nd ed (Butterworths Durban, 2003)

H

Handl *Sustainable Development: General Rules versus Specific Obligations*

Handl G "Sustainable Development: General Rules versus Specific Obligations" in Lang W (ed) *Sustainable Development and International Law* (Graham and Trotman London, 1995) 35-45.

Hunter Salzman and Zaelke *International Environmental Law and Policy* (2nd ed)

Hunter D, Salzman J and Zaelke D 2nd ed *International Environmental Law and Policy* (Foundation Press United States, 2002)

I

Iwama *Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm*

Iwama T "Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm" in Weiss EB (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Japan, 1992)

K

Kiss and Shelton *International Environmental Law* (3rd ed)

Kiss A and Shelton D *International Environmental Law* 3rd ed (Transnational Publishers, New York, 2003)

Kiss *An Introductory Note on a Human Right to Environment*

Kiss A "An Introductory Note on a Human Right to Environment" in Weiss EB (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press Japan, 1992)

Kidd *Environmental Law: A South African Guide*

Kidd M *Environmental Law: A South African Guide* (Kenwyn, Cape Town 1997)

M

Mupimpila *Sources of Sustainable Development in Southern Africa*

Mupimpila C "Sources of Sustainable Development in Southern Africa" in Whitman J (ed) *The Sustainability Challenge for Southern Africa* (MacMillan Press, London, 2000) 59 – 85

N

Nanda and Pring *International Environmental Law*

Nanda VP and Pring GR *International Environmental Law for the 21st Century* (Transnational Publishers, New York, 2003)

P

Palmer *Environmental Ethics*

Palmer C *Contemporary Ethical Issues: Environmental Ethics* (ABC-CLIO United States, 1997)

R

Robinson (ed) *Agenda 21: Earth's Action Plan*

Robinson NA (ed) *Agenda 21: Earth's Action Plan* (Oceana Publications, New York, 1993)

Rabie *Nature and Scope of Environmental Law*

Rabie "Nature and Scope of Environmental Law" in Fuggle and Rabie (ed) *Environmental Management in South Africa* (Cape Town, 1992)

S

Sands *Principles of International Environmental Law* (2nd ed)

Sands P *Principles of International Environmental Law* 2nd ed (Cambridge, London, 2003) 252-266

Sands *International Law in the Field of Sustainable Development: Emerging Legal Principles*

Sands P "International Law in the Field of Sustainable Development: Emerging Legal Principles" in Lang W (ed) *Sustainable Development and International Law* (Graham and Trotman, London, 1995) 53 – 67

Sands *Transnational Environmental Law: Lessons in Global Change*

Sands P *Transnational Environmental Law: Lessons in Global Change* (Kluwer Law International, London, 1999)

Schrijver *Die verankering en betekenis van duurzame ontwikkeling in het internationale recht*

Schrijver NJ 'Die verankering en betekenis van duurzame ontwikkeling in het internationale recht' in Schrijver NJ and Hey E (ed) Volkenrecht en Duurzame Ontwkkeling (Asser Press, Leiden, 2003)

Silveira *The Rio Process: Marriage of Environment and Development*

Silveira MPW "The Rio Process: Marriage of Environment and Development" in Lang W (ed) *Sustainable Development and International Law* (Graham and Trotman, London, 1995) 9-17

Strachan *et al Language Guide*

Strachan JR *et al The Plain Language Guide to the World Summit on Sustainable Development* (Earth Scan, London, 2005)

Szasz *International Norm Making*

Szasz PC "International Norm Making" in Weiss EB (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Japan, 1992)

T

Timoshenko *From Stockholm to Rio: The Institutionalization of Sustainable Development*

Timoshenko AS "From Stockholm to Rio: The Institutionalization of Sustainable Development" in Lang W (ed) *Sustainable Development and International Law* (Graham and Trotman, London, 1995) 143 - 161

Trouwborst *Evolution and Status of the Precautionary Principle in International Law*

Trouwborst A *Evolution and Status of the Precautionary Principle in International Law* (Martinus Nijhoff Publishers, Netherlands, 2002)

Turner *Sustainable Environmental Economics and Management*

Turner RK "Sustainability: Principles and Practice" in Turner RK (ed) *Sustainable Environmental Economics and Management: Principles and Practice* (John Wile and Sons, England, 1995) 3 - 37

V

Verschuuren *Principles of Environmental Law*

Verschuuren J *Principles of Environmental Law: The Ideal of Sustainable Development and the Role of Principles of International, European and National Environmental Law* (Baden-Baden, Germany, 2003)

W

Weiss *In Fairness to Future Generations*

Weiss EB *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, New York, 1992)

Weiss *Environmental Equity: The Imperative for the Twenty-First Century*

Weiss EB "Environmental Equity: The Imperative for the Twenty-First Century" in Lang W (ed) *Sustainable Development and International Law* (Graham and Trotman, London, 1995) 17-26

Weiss *Global Environmental Change and International Law: The Introductory Framework*

Weiss EB "Global Environmental Change and International Law: The Introductory Framework" in Weiss EB (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Japan, 1992)

Weiss *Intergenerational Equity: A Legal Framework for Global Environmental Change*

Weiss EB "Intergenerational Equity: A Legal Framework for Global Environmental Change" in Weiss EB (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Japan, 1992)

DISSERATIONS AND THESIS'

Scholtz *Milieuconvenanten*

Scholtz W LLD *Milieuconvenanten, Oftewel Omgewingsbestuur – Samewerkingsooreenkomste, as Selfregulerende Instrument in die Omgewingsreg: 'n Regsvergelykende Ondersoek* (Universiteit Leiden, 2001)

JOURNAL ARTICLES

A

Attfield *et al* 2004 *Third World Quarterly*

Attfield R, Hattingh J and Matshabaphala M "Sustainable Development, Sustainable Livelihoods and Land Reform in South Africa: A Conceptual and Ethical Inquiry" 2004 *Third World Quarterly* 405 - 421

B

Boer 1995 *Willamette Law Review*

Boer "Institutionalising Economic Sustainable Development: The roles of National, State, and Local Governments in Translating Grand strategy into Action" 1995 *Willamette Law Review* 307

Beckermann 1997 *Journal of Political Philosophy*

Beckermann W "Debate: Intergenerational Equity and the Environment" 1997 *Journal of Political Philosophy* 392 - 405

Blauuw 1990 *SALJ*

Blauuw "The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" 1990 *SALJ* 77

Bosselmann 2002 *SAJELP*

Bosselmann K "The European Union Reform of Environmental Governance: Any Closer to Sustainable Development? 2002 *SAJELP* 105 – 123

Boutillon 2002 *Michigan Journal of International Law*

Boutillon S "The Precautionary Principle: Development of an International Standard" 2002 *Michigan Journal of International Law* 429 – 469

Botha *1995 SAYIL*

Botha N "Incorporation of treaties under the Interim Constitution: A Pattern Emerges" 1995 *SAYIL* 196 – 204

Botha 2000 *SAYIL*

Botha N "Treaty Making in South Africa: A reassessment" 2000 *SAYIL* 67- 96

Botha 1997 *SAYIL*

Botha N "Treaties after the 1996 Constitution: More Questions than Answers" 1997 *SAYIL*

Barresi 1998 *Tulane Environmental Law Journal*

Barresi PA "Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena" 1998 *Tulane Environmental Law Journal* 59-88

Bosselmann 2002 *New Zealand Environmental Law*

Bosselmann K "Rio+10: Any Closer to Sustainable Development?" 2002 *New Zealand Environmental Law* 297-317

Bray 1999 *SAJELP*

Bray E "Co-Operative Governance in the Context of the National Environmental Management Act 107 of 1998" 1999 *SAJELP* 1 – 12

Bray 1998 *SAJELP*

Bray E "Toward Sustainable Development: Are We on the Right Track?" 1998 *SAJELP* 1 - 15

Bray 1996 *SAJELP*

Bray E "Clearing the Air: Industrial Polluters Beware!" 1996 *SAJELP* 211-219

C

Couzens 1999 *SAJELP*

Couzens E "NEMA – A Step Closer to Coherence?" 1999 *SAJELP* 13-19

Cameron and Abouchar 1991 *Boston College International and Comparative Law Review.*

Cameron J and Abouchar J "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment" 1991 *Boston College International and Comparative Law Review* 1 – 27

Cowen 1997 *SAJELP*

Cowen DV "Distinctive Principles of South African Environmental Law and Policy and the Quest for a Philosophy which Should Inform Them" 1997 *SAJELP* 147-165

D

Dernbach 1998 *Case Western Reserve Law Review*

Dernbach JC "Sustainable development as Framework for National Governance" 1998 *Case Western Reserve Law Review* 1 – 101

Devine 1995 *SAYIL*

Devine DJ "Some Problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive Constitution" 1995 *SAYIL* 1 – 24

De Wet 2003 *Without Prejudice*

De Wet T "When the Left Hand Doesn't Know What the Right Hand is Doing" 2003 *Without Prejudice* 8

De Wet 2000 *Without Prejudice*

De Wet T "Cleaning Up Their Act" 2000 *Without Prejudice* 28-29

Douma 2000 *RECIEL*

Douma W "The Precautionary Principle in the European Union" 2000 *RECIEL* 132 – 143

E

Ellis and FitzGerald 2004 *McGill Law Journal*

Ellis J and GitzGerald A "The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality" 2004 *McGill Law Journal* 779 – 800

F

Ferreira 1999 *TSAR*

Ferreira GM "Omgewingsbelied en die Fundamentele Reg Op 'n Skoon en Gesonde Omgewing" 1999 *TSAR* 90 – 113

Ferreira 1999 *TSAR*

Ferreira GM "Grondwetlike Waardes en Sosio-Ekonomiese Regte met Verwysing na die Reg op 'n Skoon en Gesonde Omgewing" 1999 *TSAR* 285 – 303

Ferreira 1999 *SAJELP*

Ferreira GM "Constitutitional Values and the Application of the Fundamental Right to a Clean and Healthy Environment to the Private-Law Relationship" 1999 *SAJELP* 171 – 187

G

Gergen 1994 *New York University Law Review*

Gergen MJ "The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste" 1994 *New York University Law Review* 624 – 692

Gundling 1990 *International Journal of Estuarine and Coastal Law*

Gundling L "The Status in International Law of the Principle of Precautionary Action" 1990 *International Journal of Estuarine and Coastal Law* 23-30

H

Hickey and Walker 1995 *Virginia Environmental Law Journal*

Hickey JE and Walker VR "Refining the Precautionary Principle in International Environmental Law" 1995 *Virginia Environmental Law Journal* 423 – 454

Hoelting 1995 *Georgia Journal of International and Comparative Law*

Hoelting RA "After Rio: The Sustainable Development Concept Following the United Nations Conference on Environment and Development" 1995 *Georgia Journal of International and Comparative Law* 117 - 136

K

Kidd 2001 *SAJELP*

Kidd M "The Constitutional Courts Dilution of NEMA: Minister of Public Works and Others v Kyalami ridge Environmental Association and Another" 2001 *SAJELP* 119 - 127

L

Lammers 1998 *Leiden Journal of International Law*

Lammers JC "The *Gabcikovo-Nagymaros* Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment" 1998 *Leiden Journal of International Law* 287-320

Luis da Cruz Vilaca 2004 *European Public Law*

Luis da Cruz Vilaca J "The Precautionary Principle in the EC Law" 2004 *European Public Law* 369 – 406

Loots 1997 *SAJELP*

Loots C "The Impact of the Constitution on Environmental Law" 1997 *SAJELP* 57 – 68

Loots 1994 *SAJELP*

Loots C "Making Environmental Law Effective" 1994 *SAJELP* 17 – 34

M

Maggio 1997 *Buffalo Environmental Law Journal*

Maggio GF "Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources" 1997 *Buffalo Environmental Law Journal* 161 – 223

Manning 2002 *Without Prejudice*

Manning I "Jeers For Johannesburg? Was the Summit Worth It?" 2002 *Without Prejudice* 13

McIntyre and Mosedale 1997 *Journal of Environmental Law*

McIntyre O and Mosedale T "The Precautionary Principle as a Norm of Customary International Law" 1997 *Journal of Environmental Law* 221 – 241

Milton 1999 *SAJELP*

Milton J "Sharpening the Dog's Teeth: Of NEMA and Criminal Proceedings" 1999 *SAJELP* 53 - 65

Munslow and Fitzgerald 1994 *Third World Quarterly*

Munslow B and Fitzgerald P "South Africa: The Sustainable Development Challenge" 1994 *Third World Quarterly* 227-242

O

Oosthuizen 1998 *SAJELP*

Oosthuizen FC "The Polluter Pays Principle: Just a Buzz Word of Environmental Policy 1998 *SAJELP* 355 - 361

Olivier 1997 *SAYIL*

Olivier ME "Informal International Agreements under the 1996 Constitution" 1997 *SAYIL* 63

Olivier 1999 *SAJELP*

Olivier ME "Enforcement of International Environmental Law" 1999 *SAJELP* 152-161

P

Pallemaerts 1995 *Journal of Law and Commerce*

Pallemaerts M "International Environmental Law in the Age of Sustainable Development: A Critical Analysis of the UNCED Process" 1995 *Journal of Law and Commerce* 623

Pallemaerts 2003 *RECIEL*

Pallemaerts M "International Law and Sustainable Development: Any Progress in Johannesburg?" 2003 *RECIEL* 1 - 11

Patel 2000 *Local Environment*

Patel Z "Rethinking Sustainable Development in the Post-Apartheid Reconstruction of South African Cities" 2000 *Local Environment* 383-399

Pring 2002 *Denver Journal of International Law and Policy*

Pring GR "The 2002 Johannesburg World Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'burg Into 'Joke'burg'" 2002 *Denver Journal of International Law and Policy* 410 – 420

S

Scholtz 2005 *TSAR*

Scholtz W "The Anthropocentric approach to sustainable development in NEMA and the Constitution of South Africa" 2005 *TSAR* 69 - 85

Scholtz 2002 *SAJELP*

Scholtz W "The Precautionary Principle and International Trade: Conflict or Reconciliation" 2002 *SAJELP* 163 - 177

Scholtz 2005 *MqJICEL*

Scholtz W "Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issues of Biodiversity and Custodial Sovereignty" 2005 *MqJICEL* 9 – 30

Scholtz 2003 *SAYIL*

Scholtz W "A Few Thoughts on Article 231 of the South African Constitution, Act 108 of 1996" 2003 *SAYIL*

Silveira 1995 *Willamette Law Review*

Silveira MPW "International Legal Instruments and Sustainable Development: Principles, Requirements and Restructuring" 1995 *Willamette Law Review* 239 –251

Sunstein 2003 *U. Pa. L. Rev.*

Sunstein CR "Beyond the Precautionary Principle" 2003 *U. Pa. L. Rev.* 1003-1058

T

Thornberg 2001 *New York Law School Journal on Human Rights*

Thornberg J "The United Nations Commission on Sustainable Development" 2001 *New York Law School Journal on Human Rights* 957 – 967

Tladi 2002 *SAJELP*

Tladi D "Of Course for Humans: A Contextual Defence of Intergenerational Equity" 2002 *SAJELP* 178 - 186

W

Winstanley 1995 *SAJELP*

Winstanley T "Entrenching Environmental Protection in the New Constitution" 1995 *SAJELP* 85-97

Weiss 1987 *Am. Soc'y Int'l L. Proc*

Weiss EB "Intergenerational Equity in International Law" 1987 *Am. Soc'y Int'l L. Proc* 16 – 132

Weiss 1990 *American Journal of International Law*

Weiss EB "Our Rights and Obligations to Future Generations for the Environment" 1990 *American Journal of International Law* 198 - 207

SOUTH AFRICAN CASE LAW

Bareki NO and Another v Gencor Ltd and Another 2006 (1) SA 432 (T)

BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (WLD)

Fuel Retailers Assocition of SA (Pty) Ltd v Director General Environmental Management, Mpumalanga and 13 Others 2006 SCA 109 (SA)

Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others 2004 (2) SA 393 (E)

MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd and Bright Suns Development CC (Unreported)

Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening 2001 (3) SA 1151 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Sasol Oil (Pty) Ltd and Another v Metcalfe NO 2004 (5) SA 161 (W)

SOUTH AFRICAN LEGISLATION

Atmospheric Prevention Pollution Act 45 of 1965

Constitution of the Republic of South Africa, Act 200 of 1993

Constitution of the Republic of South Africa of 1996

Environment Conservation Act 100 of 1982

Environmental Conservation Act 73 of 1989

Mineral and Mining Policy for South Africa, Department of Minerals and Energy, October 1998, N2359/1998 in Government Gazette 19344 dated 20 October 1998

Marine Living Resources Act 18 of 1998

Minerals and Petroleum Resources Development Act 28 of 2000

National Environmental Management: Protected Areas Act 57 of 2003

National Water Act 36 of 1998

National Environmental Management Act 107 of 1998

National Heritage Resources Act 25 of 1999

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Air Quality Act 39 of 2004

White Paper on an Environmental Management Policy for South Africa N/749 in Government Gazette No 18894 dated 15 May 1998

World Heritage Convention Act 49 of 1999

INTERNATIONAL CASE LAW

Asylum Case (Colombia v Peru) 1950 ICJ Reports 266

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v America) 1986 ICJ Reports

EC Measures Concerning Meat and Meat Products (Hereafter Hormones) AB 1997-4. WT/DS26/AB/R

Gabcikovo – Nagymaros (Hungary/Slovakia) 1997 ICJ Reports

Nuclear Tests (New Zealand v France) (Interim Protection) 1973 ICJ Reports

North Sea Continental Shelf Cases (1969) ICJ Reports

INTERNATIONAL LEGISLATION

Agreement on the Application of Sanitary and Phytosanitary Measures of April 15 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, Legal Instruments – Result of the Uruguay Round (1994)

Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations of 1969

DECLARATIONS AND CONVENTIONS

Bamako Convention on the Ban of Import into Africa and the Control of Transboundry Movement and Management of Hazardous Waste within Africa of 1991

Cartagena Biosafety Protocol to the Convention of Biological Diversity of 2000

Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes or the Convention for the Protection of the Marine Environment of the North East Atlantic or the Kyoto Protocol of 1992

OECD Council Recommendation of Guiding Principles Concerning the International Economic Aspects of Environmental Policies of 1772

OECD Council Recommendation on the Implementation of the Polluter-Pays Principle of 1974

Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1 (1973)

Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks of 1997

United Nations World Commission on Environment and Development, Our Common Future (1987)

United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/Conf. 151/5/Rev. 1 (1992)

United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/Conf.151/PC/100/Add.1 (1992)

United Nations Conference on Environment and Development, Convention on Biological Diversity, U.N. Doc. DPI/1307 (1992)

United Nations Conference on Environment and Development, Framework Convention of Climate Change, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992)

United Nations Conference on Environment and Development, Statement of Principles for a Global Consensus on the Management, Conservation and the Sustainable Development of all types of Forests (the Statement of Forest Principles) U.N. Doc. A/CONF.151/6/REF.1 (1992)

UN Framework Convention on Climate Change of 1992

World Heritage Convention of 1972

INTERNET SOURCES

Zuma J 2002 [Found on Internet] HYPERLINK http://greeffprop.co.za/ancdocs/history/zuma/2002/jz0818.html [date of use 6 Sept 2006].

Anon [Found on Internet] HYPERLINK http://www.earthcharter.org [date of use 20th Jul 2006].

Anon [Found on Internet] HYPERLINK http://www.earthcharter.org/innerpg.cfm?id_menu=19 [date of use 20th Jul 2006].

Anon [Found on Internet] HYPERLINK http://www.un.org/esa/sustdev/csd/aboutCsd.htm. [date of use 20th Jul 2006].

Anon [Found on Internet] HYPERLINK http://www.icj-cij.org [date of use 26th Jul 2006].