



NOTE ON OPTIONS TO ADDRESS GAPS UNDER RESOLUTION 72/277 (10 May 2018)  
“TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT

Submitted on behalf of the

**INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW (ICEL)**

FOR CONSIDERATION IN THE 2019 NAIROBI CONSULTATIONS - 19 FEBRUARY 2019

This Note is submitted to the Co-Chairs of the Ad Hoc Open Ended Working Group (OEWG) towards a Global Pact for the Environment. Its purpose is to give input into the UN General Assembly Consultations on “Towards a global pact for the environment” following the invitation to submit statements for consideration as of 20 February 2019. ICEL welcomes the invitation by the co-chairs of the OEWG established by General Assembly Resolution 72/277 to provide intersessional input for the second substantive session taking place in Nairobi, from 18 to 20 March 2019, focused on item 4 of the provisional agenda entitled “Discussion of possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate,” and complementary views on the first substantive session.

Since 1969, when it was established in New Delhi, the International Council of Environmental Law has advanced knowledge on international environmental law and the legal foundations for sustainable development.<sup>i</sup> As an international non-governmental organization accredited to the UN Economic and Social Council since 1973, ICEL has shared its expertise with ECOSOC, UN Members States, and international organizations. ICEL’s members are senior experts drawn from all of the UN regions and all legal traditions: civil law, common law, socialist law, Islamic law, and customary law.

This is ICEL’s third submission for consideration in the process launched by Resolution 72/277, to follow-up on the initial Note of 10 December 2018 on the Report of the Secretary-General entitled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment” (A/73/419), and a second Note on the agreed principles that provide a foundation for restating a common aspiration and global vision for sustaining Earth’s shared biosphere, dated 10 January 2019.<sup>ii</sup> ICEL urges study of the experts and scholars from developing nations, whose works predominantly are cited in the ICEL Notes. There is much wisdom and experience in those references.

***Process and Core Substantive Issues***

ICEL commends the process launched by Resolution 72/277, which has been constructive, open, transparent, and inclusive, with a view to making recommendations to the UNGA by the end of the first semester of 2019. Notably, two paramount consensus issues have emerged, and two other central issues identified, as a result of the first substantive session. First, consensus

that the ongoing consultations should not undermine existing instruments, bodies and processes. Second, agreement on basing the process on existing relevant political declarations — including the Stockholm Declaration, the Rio Declaration, the Rio+20 Declaration, and the Sendai Framework on Disaster Risk Reduction 2015-2030 — and on existing relevant UNGA resolutions — such as the 2030 Sustainable Development Agenda and the Addis Ababa Action Agenda.

A third key issue is “fragmentation of international environmental law”, which seems to have been sufficiently discussed and clarified.<sup>iii</sup> On the one hand, there is a recognition that fragmentation reflects the scope and inherent nature of international environmental law. On the other hand, it is also recognized that fragmentation becomes problematic when it creates a duplication of processes, lack of legal clarity and predictability, and that addressing fragmentation would facilitate the effective implementation of environmental law as well as the 2030 Agenda.

Consensus is still lacking on the meaning of the expression “gaps in international environmental law and environment-related instruments,” which is a fourth central issue. This key issue was considered during the first substantive session, in connection with the review of the Report,<sup>iv</sup> and is central to item 4 of the provisional agenda for the second substantive session, as well as to the principal mandate of the OEWG under Resolution 72/277. Therefore, this fourth central issue needs to be resolved.

ICEL respectfully submits that, in a multilateral process of this nature, a broader meaning of “gaps” — including normative, institutional or as pertaining to implementation — must prevail over a narrow interpretation limited to normative ones. ICEL therefore welcomes the broad definition of “gaps” as adopted by the UN Secretary General, who defines a gap as “a lacune, void, defect or deficiency” and included regulatory as well, governance and implementation gaps in the scope of the Report.<sup>v</sup> In our view, a narrow view of “gaps” does not comport to the preambular or operative paragraphs of Resolution 72/277. To be sure, the preambular paragraphs recall specifically the UN Charter and “existing obligations and commitments under international environmental law.” But they also recall the existing relevant political declarations and the resolutions on the environment and sustainable development indicated above. Notably, the preambular paragraph just before the first operative paragraph stresses “*the need to continue to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development.*”

Thus, the process should continue to encompass a review of deficiencies of normative nature, institutional or as pertaining to implementation, in international environmental law and environment-related instruments, as appropriate, to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development. Furthermore, this process is “open to participation by all States Members of the United Nations and all members of the specialized agencies,” as well as “to relevant non-governmental organizations in consultative status with the Economic and Social Council and those accredited to relevant conferences and summits” related to sustainable development. In

sum, the mandate of Resolution 72/277 is a focused, but comprehensive and inclusive, review of the relevant “gaps” in the field. ICEL notes that the global consensus in favor of advancing the UN Sustainable Development Goals (SDGs) offers the appropriate context for analysis of “gaps.” Issues concerning “gaps” should be resolved in favor of the SDGs.

### ***Principles***

The importance of general principles as “building blocks” for international environmental law has been well recognized in the consultations, in particular the role of principles in promoting legal certainty and filling normative gaps. Significantly, many delegations have indicated that they are open to consider working on the consolidation of principles of international environmental law.<sup>vi</sup> At the second substantive session, the focus should be on how, not if, to clarify the principles of international environmental law with normative value that facilitate consistency of interpretation and implementation in the context of sustainable development.

An option that emerges is the possibility of developing a legislative declaration or instrument with that purpose, without prejudging its outcome. A debate on whether and how a resolution or instrument could contribute to strengthening environment protection is legitimate, particularly in the context of sustainable development as set forth in the SDGs and the UN 2030 Agenda, and in the Addis Ababa Action Agenda.<sup>vii</sup> In this respect, it is well understood that UN declarations are designed to influence the conduct of states directly and may be precursors to and guide a later treaty-making processes, as stated in ICEL’s Note on the Report.<sup>viii</sup> ICEL submits that the nature of any such instrument, if appropriate, including whether it should be legal in nature or not, binding or non-binding, need not be debated or resolved at this stage in the consultations.

On the methodology for consulting regarding codification of existing principles or the progressive development of emerging principles, one starting point can be with the principles of international environmental law already contemplated in existing instruments and political declarations as well as customary international law, including the principles of prevention, precaution, polluter-pays, common but differentiated responsibilities and respective capabilities, national sovereignty over natural resources, access to environmental information and environmental impact review.<sup>ix</sup> The work of the UN International Law Commission on such matters, as well as decisions of the International Court of Justice and relevant tribunals, can serve as basis to refining these principles. With broad consensus on guaranteeing that the ongoing consultations do not undermine existing instruments, bodies and processes, there is a no risk associated with refining existing principles.

ICEL further submits that the OEWG may usefully consider recommending further intergovernmental negotiations on the progression of principles of international environmental law. Such an exercise would be an opportunity to advance or update existing principles and include emerging principles in response to developments in the last decades, such as non-regression, progression, equity, resilience, and access to environmental justice.<sup>x</sup> The work must include the possibility of developing an additional declaration or instrument on the right to a

clean and healthy environment. ICEL reiterates that the principle of sustainable development implies that “the right to development is to be balanced with and constrained by the right to a clean, safe, healthy and sustainable environment,”<sup>xii</sup> embraced by at least 155 States. This would ensure that all UN Member States working towards the realization of the 2030 Sustainable Development Agenda apply this principle.

### ***Existing Regulatory Regimes***

On existing regulatory regimes, there is broad agreement on the importance of not undermining specific regulatory regimes and avoiding duplication. Thus, the OEWG should work on reaffirming this notion, and reiterating that any deficiency identified under specific regimes are addressed in the context of each specific agreement. A possible way to avoid duplication and backsliding is an explicit recognition that existing sector-specific agreements present *lex specialis* and therefore have priority and should not be undermined. Any codification is without prejudice to the specific expression of principles already established in international treaty law. A multifaceted response is called for and ICEL encourages the several conferences of the parties under international agreements, as well as the UNGA, to address the gaps identified where they have authority to do so.<sup>xiii</sup>

Moreover, an adequate response to this topic requires substantially more time than provided for the Nairobi consultations in 2019. ICEL supports what some delegations have stressed, that the OEWG “could provide a momentum by sending a strong message from the General Assembly encouraging such structures to address gaps”, which seems a sensible, constructive approach.<sup>xiii</sup>

### ***Environment-related Instruments***

Environment-related instruments, understood as covering those international legal instruments that have an environmental dimension but do not have an environmental protection objective per se, should be approached in similar fashion as possible gaps in existing regulatory regimes. On trade and investment instruments, to continue refining methods that can take into account environmental considerations in these sectors. And, on intellectual property rights, to encourage more attention in this area, to ensure capacity building and the availability of new technologies in ways that further the 2030 Sustainable Development Agenda.

In this regard, the Secretary-General’s assessment on the lack of coherence and synergy among environment-related instruments, concluding that “the articulation between multilateral environmental agreements and environment-related instruments remains problematic owing to the lack of clarity, contentwise and status-wise, of many environmental principles,”<sup>xiv</sup> remains a valid proposition that may usefully be addressed. In particular, the intrinsic connection between a healthy environment, sustainable development and the effective enjoyment of human rights, and the undeniable fact that many human rights cannot be fully enjoyed without a clean and healthy environment, needs to be considered under a UN declaration or instrument without further delay.

## **Governance Structure**

ICEL commends the general consensus to support the strengthening of the governance structure of international environmental law, while preserving the independence of each Multilateral Environmental Agreement (MEA) and respecting ongoing processes. The role of the United Nations Environment Programme (UNEP) as the global authority on environment in the UN system and the role of United Nations Environment Assembly (UNEA) in addressing governance gaps. Further, there is broad consensus on the urgent need to fully implementing paragraph 88 of the Rio+20 Declaration. Similarly, on the need to strengthen synergies and promote better coordination and cooperation between MEAs, bodies and processes, building on ongoing initiatives.

In this regard, as many delegations have supported, the OEWG should consider further work on the proposals made in the paragraph 83 of the Secretary-General's Report, as follows: *Institutional fragmentation and weak coordination between treaties can be addressed through various means, such as:*

- (a) creating clusters and synergies between conventions;*
- (b) mapping existing global and regional action plans and agreements to create an overview of coverage and identify interlinkages;*
- (c) avoiding duplication of reporting and/or monitoring processes by using the same reporting channels and not creating additional burdens ("integrated reporting");*
- (d) sharing lessons learned and best practices;*
- (e) developing implementation guidelines for multilateral environmental agreements; and*
- (f) sharing information among the different scientific bodies that support the work of related multilateral environmental agreements.<sup>xv</sup>*

Finally, there is a broad understanding regarding the importance of non-State actors' participation in governance, including major groups, indigenous people and local communities, youth, women, NGOs, and the business sector. Therefore, the OEWG may wish to consider and make appropriate recommendations for a more coherent and pro-active approach to the participation of stakeholders in the different MEAs, reflecting the particularities in each MEA. The UNEP has provided useful coordination among MEAs and other international environmental agreements, and its capacity to do so may be enhanced.

## **Implementation and Effectiveness**

Gaps relating to the implementation of international environment law exist and need to be addressed. Indeed, there is a broad understanding that States face many challenges for implementing their obligations under the different MEAs, and that here is a need to strengthen capacities of the actors in charge of implementing environmental obligation at all levels.<sup>xvi</sup> And many delegations have called for supporting UNEP, which in turn supports strengthening the capacities of national systems under the Montevideo Programme (Programme of Development and the Periodic review of Environmental Law).

Accordingly, specific ways to strengthen the means of implementation to implement international environmental law in line with Agenda 2030 and the Addis Ababa Action Agenda should be addressed towards making recommendations, including a renewed call for developed countries to increase their support to developing countries through increased financial resources, capacity building and technology transfer, as well as for developing a tracking mechanism in this regard. ICEL recommends that this topic be referred, with specific recommendations, to the High Level Political Forum on Sustainable Development, which this year meets at the level of Heads of State and Government under the auspices of the UN General Assembly.

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ICEL commends the constructive spirit of the OEWG convened pursuant to Resolution 72/277 (10 May 2018), and the guidance of the co-chairs in the Nairobi consultations, and looks forward to another productive substantive session in March 2019.

### **International Council of Environmental Law**

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<sup>i</sup> ICEL was founded in New Delhi in 1969, and is constituted under Article 60 of the Swiss Civil Code (Canton of Geneva). It maintains representatives in Bonn, Geneva, Nairobi and New York. It sponsors the Journal *Environmental Policy & Law*. It is a Member of IUCN. Contact via ICEL Executive Governor at [nrobinson@law.pace.edu](mailto:nrobinson@law.pace.edu). Website: <https://www.iceleinternational>

<sup>ii</sup> The ICEL Notes may be accessed on the website of the Law Library at the Elisabeth Haub School of Law, New York (<https://libraryguides.law.pace.edu/icele>); see also, <https://www.iceleinternational>.

<sup>iii</sup> Summary of the First Substantive Session by the Co-Chairs, Introduction, at [https://globalpact.informea.org/sites/default/files/meetings/29-Jan-3-Oral-summary\\_-version-for-circulation\\_25January\\_0.pdf](https://globalpact.informea.org/sites/default/files/meetings/29-Jan-3-Oral-summary_-version-for-circulation_25January_0.pdf).

<sup>iv</sup> Id.

<sup>v</sup> UN Secretary-General's Report (A/73/419), Introduction, ¶ 7.

<sup>vi</sup> Summary of the First Substantive Session by the Co-Chairs, Principles.

<sup>vii</sup> Id.

<sup>viii</sup> See ICEL Note on the Secretary-General's Report, p. 10.

<sup>ix</sup> See Training Manual on International Environmental Law (UNEP, 2006), ISBN 92-807-2554-8, at <https://digitalcommons.pace.edu/lawfaculty/791/>; ICEL Note on the Secretary-General's Report, p. 11.

<sup>x</sup> See ICEL Note on the Secretary-General's Report, p. 15. See, e.g., Parvez Hassan, "Role of the South in the Development of International Environmental Law," *Chinese Journal of Environmental Law* 1 (2017) 133–157 (noting that developing nations have played a leading role in the design and implementation of new environmental law as they have seen factual evidence of environmental harm).

<sup>xi</sup> See ICEL Note on the Secretary-General's Report, p. 15. As stated by ICEL member Ben Boer in "Environmental principles and the right to a quality environment", in Principles of Environmental Law, Elgar Encyclopedia of Environmental Law, Volume VI, p. 73 (2018).

<sup>xii</sup> See ICEL Note on the Secretary-General's Report, p. 11.

<sup>xiii</sup> Summary of the First Substantive Session by the Co-Chairs, Regulatory regimes.

<sup>xiv</sup> UN Secretary-General's Report (A/73/419), Summary.

<sup>xv</sup> UN Secretary-General's Report (A/73/419), ¶ 83. Also noting that: "Potential conflicts between treaty regimes can be managed by using legal means, including conflict clauses, mutual supportiveness or the application of the general rule of treaty interpretation contained in article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties."

<sup>xvi</sup> Summary of the First Substantive Session by the Co-Chairs, Implementation and effectiveness.