

RESOLUTION 1/2020

COMMITTEE ON THE PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS

The 79th Kyoto Conference of the International Law Association, held online, 29 November-13 December 2020:

HAVING CONSIDERED the Final Report of the Committee on the Procedure of International Courts and Tribunals;

TAKES NOTE of the Final Report and **COMMENDS** it to all concerned with the law and procedure of inter-State courts and tribunals;

ENDORSES the recommendations of the Final Report for the procedure before the International Court of Justice, the International Tribunal for the Law of the Sea, inter-State Arbitral Tribunals and World Trade Organization Dispute Settlement Panels;

PROPOSES the following reforms for the consideration of the International Court of Justice pursuant to its ongoing review of its procedures and working methods:

- (a) amendments of the Rules of Procedure with respect to case management, jurisdictional objections, and evidence, as fully explained in the report;
- (b) amendment of Article 1 of its Resolution on Internal Judicial Practice and the addition of a provision to incorporate into the Resolution its decision of September 2018 regarding external appointments as arbitrators;
- (c) discontinuance of the practice of ‘phantom experts’ by appointing such individuals as assessors;
- (d) exercise of the Article 67 power to appoint expert witnesses *proprio motu* as the regular procedure for the taking of expert evidence;
- (e) adoption in judicial practice of a general rule of holding oral hearings no more than six months after the closure of the written phase of proceedings ;
- (f) issuance of procedural orders to parties, except for those supported by the Trust Fund of the UN Secretary-General, to proportionately contribute to extraordinary expenses, such as the taking of expert evidence by the Court *proprio motu*;
- (g) adoption of a Practice Direction on evidence containing a template of best practice, such as security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (h) negotiations with the Government of the host country to create a mechanism for the sanction of perjury by witnesses in the proceedings of the Court;
- (i) piloting of the organisation of oral hearings according to a set of issues for debate identified prior to the hearings;
- (j) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (k) piloting through practice of a ‘dialogue procedure’ for the disclosure of evidence between parties, inspired by the practice of the WTO Dispute Settlement System;
- (l) application of the power to draw adverse presumption from a refusal by a party to produce evidence upon the Court’s request;
- (m) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting party on procedural matters through irregular or ‘extra-procedural’ communication.

PROPOSES the following reforms for the consideration of the International Tribunal for the Law of the Sea:

- (a) amendments of certain provisions of the Rules of Procedure concerning case management, jurisdictional objections, and evidence, as fully explained in the report;
- (b) amendment of its Resolution on Internal Judicial Practice to prohibit Members of the Tribunal from accepting appointments in investment or commercial arbitration;
- (c) adoption of a Practice Direction on evidence containing a template of best practice for security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (d) negotiations with the Government of the host country to create a mechanism for the sanction of perjury by witnesses in their proceedings;
- (e) piloting of the organisation of oral hearings according to a set of issues for debate identified prior to the hearings;
- (f) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (g) the piloting through practice of a ‘dialogue procedure’ for the disclosure of evidence between parties, inspired by the practice of the WTO Dispute Settlement System;
- (h) application of the power to draw adverse presumption from a refusal by a party to produce evidence upon the Court’s request;
- (i) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting party on procedural matters through irregular or ‘extra-procedural’ communication.

PROPOSES the following reforms for the consideration of the Permanent Court of Arbitration:

- (a) amendments of the Arbitration Rules 2012 regarding appointments, working procedures, bifurcation and evidence, as fully explained in the report;
- (b) amendment and publication of the ‘Sample Procedural Order No. 1’ to provide for template provisions for bifurcation of jurisdictional objections as well as modalities for expert evidence;
- (c) amendment and publication of the ‘Sample Procedural Order No. 2’ to provide for template provisions for confidential and restriction information, admissibility of evidence allegedly obtained in violation of national law and participation of non-State actors as *amicus curiae*;
- (d) amendment and publication of the ‘Sample Procedural Order No. 2’ to provide a template of best practice on evidence containing security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (e) adoption of a Model Arbitration Clause prohibiting in principle *ex parte* communication between any party and any arbitrator on any matter relating to the proceedings, including the appointment the president;
- (f) review of internal security protocols to consider practical measures to strengthen the integrity of confidential evidence and judicial secrecy;
- (g) negotiations with the Host Countries to create a mechanism for the sanction of perjury by witnesses in their proceedings.

PROPOSES the following reforms for the consideration of appointing authorities:

- (a) to refrain from appointing themselves as arbitrators, even when invited by the parties;
- (b) to decline appointments as arbitrators, even when appointed by the designated authority;

- (c) to decline to exercise the powers vested in the appointing authority with respect to the specific set of proceedings, when designated as appointing authority while serving as arbitrator.

PROPOSES the following reforms for the consideration of Parties to an arbitration:

- (a) to include in arbitration agreements provisions designating an appointing authority;
- (b) to refrain from appointing as arbitrator an appointing authority;
- (c) to include in arbitration agreements a conflicts disclosure requirement for potential arbitrators based on the PCA Model ~~Declaration of Acceptance and~~ Statements of Impartiality and Independence.

PROPOSES the following options for the consideration of Arbitral Tribunals for the conduct of inter-State arbitration:

- (a) prescription in the rules of procedure of a mechanism for Parties to cooperate in the request and production of documents;
- (b) provision in the rules of procedure of modalities for the appointment of expert witnesses by the Arbitral Tribunal, particularly timing, terms of reference, consultation with the parties, duty of cooperation and opportunity for comment, and site visits;
- (c) inclusion in the rules of procedure of admissibility requirements for counterclaims and the applicable time-limits;
- (d) the piloting of the organisation of oral hearings according to a set of issues for debate;
- (e) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (f) prescription of modalities in the rules of procedure for the potential involvement of State or non-State actors;
- (g) the application of the power to draw adverse presumption from a refusal by a Party to produce evidence upon the Tribunal's request;
- (h) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting Party on procedural matters through irregular or 'extra-procedural' communication.

PROPOSES the following reforms for the consideration of World Trade Organization panels:

- (a) to endeavour to publish the procedural timetable within a week from composition, and the working procedures within a month therefrom;
- (b) to enlarge the set of procedural rights granted by default to third parties, to include the right to make oral and written submissions and be questioned by the panels, until the first substantive meeting, and to attend meetings and receive submissions subsequently;
- (c) to consider the interests of third parties in all procedural incidents, occurring at any stage of the proceedings;
- (d) to include in the working procedures dedicated provisions for the handling and admissibility of evidence, better standardised rules on the management of business and confidential information, the admissibility and use of unsolicited *amicus curiae* briefs;
- (e) to include in the Working Procedures dedicated provisions on the timetable and the procedure relating to incidental procedural questions, whether preliminary or otherwise and before they are raised, and in particular the coordination of preliminary objections with the procedure of Annex V of the Agreement on Subsidies and Countervailing Measures and the assessment of bifurcation requests.

PROPOSES the following reforms for the consideration of Parties to dispute settlement proceedings at the WTO:

- (a) to waive the rule preventing the appointment of panellists of the nationality of third parties in the proceedings;
- (b) to reserve the right to oppose proposed panellists for “compelling reasons” to exceptional situations regarding conflicts of interest and other serious doubts on the impartiality of the candidate;
- (c) to agree to the publication of all procedural decisions upon their adoption, rather than after the publication of the final panel report;
- (d) to agree to arrange a public streaming of meetings that are not confidential, including the segment with the questioning from the panels to the Parties.

PROPOSES the following reforms for the consideration of the WTO Secretariat:

- (a) publication of a set of template working procedures that would update the Appendix 3 to the DSU;
- (b) publication of a model text to provide template provisions for bifurcation of jurisdictional objections and modalities for expert evidence.

RECOMMENDS the International Court of Justice, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration, inter-State Arbitral Tribunals and World Trade Organization Dispute Settlement Panels to consider the recommendations set out in the Final Report;

FURTHER RECOMMENDS parties to inter-State adjudication and arbitration to consider the recommendations set out in the Final Report in their practice;

FURTHER RECOMMENDS the United Nations General Assembly and the States Parties of the United Nations Convention for the Law of the Sea to debate the recommendations set out in the Final Report in order to identify reforms intended to improve procedural integrity, procedural economy and the sound administration of justice;

REQUESTS the Secretary-General of the Association to transmit this Resolution together with the Final Report to the President of the International Court of Justice, the President of the International Tribunal for the Law of the Sea, the Secretary-General of the Permanent Court of Arbitration, the Director-General of the World Trade Organization and the Secretary-General of the United Nations for further distribution;

RECOMMENDS to the Executive Council that the Committee, having completed its mandate, be dissolved.

ANNEX 2

Draft Resolution **Resolution No. 2/2020** **GLOBAL HEALTH LAW**

The 79th Kyoto Conference of the International Law Association, held online, 29 November-13 December 2020:

HAVING CONSIDERED the Statement of the Global Health Law Committee of the International Law Association regarding the COVID-19 pandemic adopted by the Committee on 5 April 2020;

OBSERVING that developments since the adoption by the Committee of that Statement have reinforced the importance of its subject matter and recommendations;

TAKING NOTE of the Work Program and Reports of the Global Health Law Committee addressing preparedness and response to global health emergencies;

ADOPTS this Statement regarding the COVID-19 Pandemic.

Statement regarding the COVID-19 pandemic

The potential for virus-based pandemic outbreaks has long been anticipated by public-health specialists as well as by the World Health Organization (WHO). During the 2014-2016 Ebola outbreak attention was drawn to gaps in the preparedness of local health systems, to the scientific challenges of developing new treatments, vaccines and diagnostics in a sufficiently rapid manner to effectively confront large-scale virus outbreaks, and to the special difficulties confronted by low-resource environments in addressing pandemic outbreaks. In February 2015 the Global Health Law Committee of the International Law Association convened a meeting on Global Health Security in Geneva at which a substantial number of interested stakeholders shared concerns about these gaps. Following detailed preparatory work, the World Health Assembly met in May 2015 and decided that additional resources should be directed toward prevention of and response to pandemic outbreaks. Although the precise contours and the magnitude of the COVID-19 outbreak could not be foreseen at that time, the potential for such an event was widely understood, as was the need for further advance investment to address it.

Taking note of the global COVID-19 pandemic, the International Law Association wishes to restate fundamental principles and rules of international law important to containing and ending the pandemic, safeguarding the rights of individuals and groups, and ultimately returning international society to a normal functioning state:

- 1. Cooperation.** The International Law Association stresses the importance of cooperation among states and international institutions in addressing pandemic outbreaks. A pandemic outbreak is an opportunity to demonstrate the value of pooling scientific ingenuity and of

open cooperation among scientists and research institutions, for coordinating logistic and manufacturing capacity, for making available the financial resources necessary to purchase and distribute necessary health products (including vaccines, diagnostics, treatments and personal protective equipment), and for attempting to assure that individuals throughout the world have access to life-sustaining support, including adequate nutrition. A pandemic outbreak is not an occasion for seeking political or economic advantage. Uncoordinated travel and trade restrictions and, more generally, the perception that states can effectively protect themselves from a pandemic in isolation or competing with other states for limited resources, are counterproductive. Actions taken on such premises threaten to destabilize the existing multilateral regime and its institutions with long-term adverse consequences. The world needs more cooperation, coordination and solidarity at this critical time. The International Law Association therefore welcomes the United Nations General Assembly resolutions of 2 April 2020 ([A/RES/74/270](#) and [A/RES/74/274](#)) and 11 September 2020 ([A/RES/74/306](#) and [A/RES/74/307](#)) affirming its commitment to international cooperation and multilateralism. The International Law Association stresses the importance of universal participation in the United Nations system. Universality and inclusive dialogue are essential to comprehensively addressing the global transboundary threat posed by COVID-19.

2. **Support to the World Health Organization.** The WHO was established in substantial measure to provide a forum where the world community could meet and agree on the processes and substantive measures necessary to address international public health emergencies. It is critical that states support the central role of WHO in addressing the COVID-19 pandemic and in preparing for and confronting future public health crises. To this end, respecting the independence of the Secretariat and of the experts and enhancing financial support for WHO in a sustainable, predictable and flexible manner through voluntary contributions as well as a long-term increase of its assessed contributions are crucial. Even though the current state of the pandemic arguably exceeds the scope of the International Health Regulations (2005) (IHR), it still has an important role to play as the global legal framework to channel data and information and facilitate the coordination of response measures. Member states must pay due consideration to the recommendations made by WHO's Director-General on the advice of the IHR Emergency Committee and should avoid weakening the IHR through the proliferation of unilateral uncoordinated measures and comply with their obligations, in particular with regard to notifications, provision of information, mutual assistance and cooperation and refraining from restrictive measures not supported by a proper risk assessment.
3. **Independent evaluation.** The International Law Association welcomes the establishment of the Independent Panel for pandemic preparedness and response as called for by [World Health Assembly Resolution WHA73.1](#), and it commends the Panel Co-Chairs for the steps already taken, as detailed in their report to the WHO Executive Board ([EBSS/5/3](#)). The International Law Association also welcomes the establishment by the WHO Director-General, further to WHA73.1, of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response. This Committee is reviewing the functioning of the IHR during the COVID-19 response, as well as the status of implementation of the relevant recommendations of previous IHR Review Committees. The results of the work of the IHR Review Committee, including its recommendations, should be the subject of in-depth consideration by WHO member states as potential improvements in the functioning of the IHR are important to containing and addressing future disease outbreaks. The International Law Association reaffirms that the independence and impartiality of the Independent Panel and the IHR Review Committee must be guaranteed,

that they must be permitted to pursue their duties without external political interference, and that their work should be undertaken in as transparent a manner as possible.

4. **Fundamental human rights.** The rights to life, to health and to food are fundamental. As treatments, vaccines and diagnostics are introduced to address the COVID-19 pandemic, it is critical that the international community focus on assuring equitable access to all people, at all levels of income, wherever they may be located. The response to this pandemic must be grounded in the principle of nondiscrimination.
5. **Food security and trade.** The Committee applauds the joint statement by the heads of the UN Food and Agriculture Organization (FAO), the WHO and the World Trade Organization (WTO) of 31 March 2020 calling on states, as they move to enact measures aiming to halt the accelerating COVID-19 pandemic, to minimize potential impacts on the food supply or unintended consequences on global trade and food security. The Committee also welcomes the declaration by the G20 leaders to avoid unnecessary disruptions and interferences in international trade.
6. **Pooling and availability of technologies.** Exclusive rights to technologies such as those afforded by patents and regulatory-based market exclusivity may be useful in ordinary circumstances to promote the aggregation of capital necessary for private enterprise to engage in research and development (R&D). In the extraordinary circumstance of a global pandemic, however, where rapid, general and equitable access to treatments, vaccines and diagnostics is vital, technologies must be shared so that production, distribution and access are maximized. Technology should be pooled and made available at low cost. Exclusive intellectual property rights must not act as a constraint on access, especially as regards COVID-19 in a circumstance of ongoing international emergency. On 22 March 2020, the Global Health Law Committee joined with other stakeholders in supporting a proposal from Costa Rica to the WHO Director General to create a broad technology pooling arrangement to address the COVID-19 pandemic. The International Law Association recognizes that there are a number of collaborative projects underway directed toward the financing, development and testing, acquisition and distribution of health technologies and products needed to protect against, diagnose and treat COVID-19, including the ACT-Accelerator, the COVAX Facility and the C-TAP initiative. The International Law Association encourages strong support for these initiatives, including financial support from governments with adequate resources, as well as support for other initiatives being made by governments and groups to promote and assure timely and affordable access to health technologies and products to address COVID-19. The Global Health Law Committee should continue its role in developing and supporting proposals to further innovation and to assure equitable access.
7. **Temporary restrictions to rights and freedoms.** Some measures to curb the COVID-19 pandemic, including quarantines, are inherently at tension with a range of rights and freedoms guaranteed under human rights law, including the right to privacy and physical integrity, and freedom of movement. These measures must have a legal basis and be proportionate. They should be designed to minimize interference with human rights. Should a State decide to temporarily 'derogate' from human rights, such derogation should be formally proclaimed and notified to the competent international organizations and treaty bodies. Derogation requires careful monitoring to ensure that rights are not set aside unnecessarily. These extraordinary restrictions and derogations should be temporary and great caution and attention must be taken to assure they are lifted as soon as they become unnecessary and do not persist after the public health emergency has passed. A pandemic must not provide an ongoing basis for heightened and indefinite government intrusion in personal spheres of activity. International monitoring bodies should hold states accountable

for how they have implemented limitations and derogations to their human rights obligations as part of their fight against the COVID-19 pandemic, while fully taking into account the exceptional nature of the situation.

8. **Humanitarian assistance.** The Interagency Standing Committee (IASC) is the humanitarian coordination forum of the UN system. It brings together the executive heads of 18 UN and non-UN organizations and programs (including WHO, FAO, UNICEF and UNHCR) to ensure the coordination of humanitarian assistance during emergencies. After the Ebola outbreak in West Africa, IASC adapted its procedures to ensure a more effective response to infectious disease events. We welcome the adoption of the COVID-19 Global Humanitarian Response Plan launched on 25 March 2020. This plan is to be implemented by the IASC partners in selected vulnerable States already facing humanitarian crises because of conflict or natural disasters. It is thus essential that all member states of the United Nations, especially developed states, fully support the COVID-19 Global Humanitarian Response Plan through additional funding that should not be diverted from ongoing humanitarian operations. As requested in the plan, donor funding should maximize flexibility (across the board rather than project by project) to enable rapid adjustments of the response. The Committee notes that funding for the COVID-19 Global Humanitarian Response Plan will be complementary to the financing instrument launched by the UN Secretary General on 31 March 2020 for responding to the socio-economic impacts of the pandemic.
9. **Ongoing conflicts.** Parties to ongoing conflicts, whether internal or international, should immediately pursue ceasefires as requested by the UN Secretary-General so as to avoid magnifying the scale of human suffering. The United Nations organs such as the General Assembly and the Security Council, as well as the UN Secretary General, should demand that hostilities be suspended to stem the spread of the pandemic. Health has historically served as a humanitarian consideration during armed conflicts, including “days of tranquility” agreed between opposing combatants to allow for child vaccination. WHO, the UN, the ICRC and other international institutions should build on the value of health at this moment both to enable urgent health operations as well as to pursue de-escalation of current conflicts.
10. **Limitations to economic sanctions.** As part of the elementary considerations of humanity, unilateral and collective countermeasures (“sanctions”) should not interfere with access to food and should not prevent the circulation, export, import and purchase of goods required for humanitarian needs, such as medicines and medical devices.
11. **UN Security Council role.** The United Nations Security Council has discussed in the past the possible implications of certain diseases on international security, notably HIV-AIDS and Ebola. Given the unprecedented magnitude of the current crisis, the International Law Association considers that the Security Council has a central role to play in managing the political effects of the COVID-19 pandemic. In particular, the Security Council can and should monitor and address the impact of the pandemic on current crises and conflicts, peacekeeping operations and request cooperation and coordination among states and other actors when warranted by health considerations. The International Law Association welcomes adoption by the Security Council on 1 July 2020 of Resolution 2532 (2020) ([S/RES/2532 \(2020\)](#)) that acknowledges likely threats to international peace and security associated with the COVID-19 pandemic and demands the cessation of hostilities that jeopardize human health and humanitarian operations and that impose exceptional hardship on the most vulnerable populations.
12. **International financial institutions.** International financial institutions are positioned to attenuate the more vulnerable situation of developing countries facing economic shocks due to the pandemic. The International Law Association welcomes the recent announcements by

the International Monetary Fund (IMF) and the World Bank to authorize additional funding to developing countries aimed at mitigating the multidimensional economic impact of the COVID-19 pandemic. In the case of the IMF, the International Law Association takes note of its close collaboration with the WHO, which resulted in doubling the amount of available emergency response funds for strengthening healthcare systems. The International Law Association also notes the authorization by the World Bank of multiple projects for Emergency Health Support. The International Law Association encourages review of existing mechanisms such as the World Bank's Pandemic Emergency Financing Facility to identify gaps in pandemic response, and to address those gaps as appropriate.

Draft Resolution 3

ILA Committee on the Implementation of the Rights of Indigenous Peoples

Kyoto 2020

The 79th Kyoto Conference of the International Law Association, held online, 29 November – 13 December 2020:

HAVING CONSIDERED the Final Report of the Committee on the Implementation of the Rights of Indigenous Peoples;

REITERATES the Conclusions and Recommendations of the ILA Committee on the Rights of Indigenous Peoples set forth in ILA Resolution No. 5/2012;

CALLS on States to fully comply with their obligations relating to indigenous peoples' rights existing under customary and applicable conventional international law;

ENDORSES the following recommendations set forth in the Final Report of the Committee on the Implementation of the Rights of Indigenous Peoples:

(a) the international community, in all its components, ought to increasingly respect and recognize the rights of Indigenous peoples, especially through promoting and advancing the interrelated standards endorsed and affirmed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), primarily those concerning self-determination, autonomy, cultural heritage, land rights and free, prior and informed consent;

(b) the competent bodies, specialized agencies and mechanisms of the United Nations system – including the treaty bodies, the Human Rights Council, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples – are encouraged to continue and strengthen their activities, in cooperation with States and Indigenous peoples, in order to ensure further protection, promotion and improvement of Indigenous peoples' rights throughout the world, consistently with the relevant rules of international law, as identified in ILA Resolution No. 5/2012 and the minimum standards of human rights established by the UNDRIP;

(c) States ought to enhance their domestic legislation in the field of Indigenous peoples' rights, so as to ensure that, within their respective territories, human rights of Indigenous peoples are fully realized, and that the rules and standards established by UNDRIP are fully implemented;

(d) States ought to remove from their territories all social, cultural, structural and institutional obstacles hindering the actual realization of Indigenous peoples' rights;

(e) States ought to establish effective mechanisms for the demarcation, legal recognition and titling of Indigenous traditional lands, in accordance with the customary laws of the Indigenous peoples concerned and with their traditional use of the relevant territories, as well as to put such mechanisms in practice through formally establishing for such peoples property rights recognized pursuant to domestic law and enforceable in domestic courts in the event of competing claims over the lands concerned;

(f) States ought to adopt appropriate legislation explicitly recognizing the right of Indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs and to the ways and means for financing their autonomous functions;

(g) States ought to establish effective mechanisms in view of guaranteeing that Indigenous peoples are properly consulted before any kind of project of exploitation or use of their traditional lands, territories and

resources is started, as well as that their prior, free and informed consent is obtained before any activity which may have a significant impact on their rights and ways of life is carried out;

(h) States ought to establish effective mechanisms aimed at ensuring the participation of the Indigenous peoples concerned in decision-making concerning matters which would affect their rights, at all levels of the political and administrative organization of the State, through representatives chosen by themselves in accordance with their own procedures and customary laws;

(i) judges, administrators, and other competent State officials should be instructed and sensitized with regard to the rights of Indigenous peoples, especially those affirmed by the Indigenous specific international human rights instruments, with particular attention for the necessity to properly understand the specific features, needs and peculiarities characterizing each single Indigenous community;

(j) Indigenous peoples should be guaranteed a primary role in monitoring the steps towards the actual execution and implementation of judgements and other decisions concerning them;

(k) all relevant actors, at the international, regional and domestic level, ought to promote consciousness and awareness-raising on the rights of Indigenous peoples, to be conceived as an integral part of existing human rights standards, not only among State officials and members of the judiciary, but also among the general public, including all sectors of the civil society;

(l) valorisation of cultural diversity should be an integral element of adjudication and enforcement of Indigenous peoples' rights (at the domestic, regional and international level), following the example of, in particular, the Inter-American Court of Human Rights, as well as the African Commission and Court on Human and Peoples' Rights;

(m) all relevant actors ought to contribute to promoting a social and cultural environment characterized by full respect, understanding and appreciation for the richness of cultural diversity – in particular for the worth of Indigenous peoples and their cultures, worldviews, ways of life, values and interests – with no room for whatever form of racial or cultural discrimination, as well as for the positive role which may be played by Indigenous peoples to further sustainable life in the world;

(n) scholars and other actors concerned are encouraged to increase interdisciplinary research on the causes, consequences, and solutions regarding the deficits of implementation of national and international standards concerning Indigenous land rights and other Indigenous peoples' rights.

REQUESTS the Secretary-General of the International Law Association to transmit this resolution, together with the Committee's Final Report, to the Secretary-General of the United Nations for further dissemination;

ALSO REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution, together with the Committee's Final Report, to the UN Human Rights Council, the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples, the UN Special Rapporteur on the Rights of Indigenous Peoples, the Office of the UN High Commissioner for Human Rights, the Registrar of the International Court of Justice, the Secretary-General of the Permanent Court of Arbitration, the General Secretariat of the Organization of American States, the African Union Commission, the ASEAN Secretariat and the Secretariat of the Council of Europe;

RECOMMENDS to the Executive Council that the Committee on the Implementation of the Rights of Indigenous Peoples, having accomplished its mandate, be dissolved.

DRAFT RESOLUTION No. 4 /2020

THE ROLE OF INTERNATIONAL LAW IN SUSTAINABLE NATURAL RESOURCES MANAGEMENT FOR DEVELOPMENT

The 79th Kyoto Conference of the International Law Association held in Kyoto, Japan, 29th November to 13th December 2020;

TAKING INTO ACCOUNT with gratitude the ILA 2002 New Delhi Declaration;¹ the ILA 2012 Sofia Guiding Statements;² the final Report of the ILA Committee on the Legal Principles Relating to Climate Change;³ the Reports of the UN Special Rapporteur on Human Rights and the Environment;⁴ the IUCN Draft Covenant on Environment and Development;⁵ the UNEP Decision and Global Report on the Environment and the Rule of Law;⁶ the work of the World Bank on governance and the rule of law;⁷ the ILC Draft Principles on the Protection of the Environment in Relation to Armed Conflicts;⁸ and the FAO/UNEP Legislative approaches to sustainable agriculture and natural resources governance,⁹ among other important findings,

CONSIDERING that, in accordance with international law, all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction,

EMPHASIZING that States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development

¹ International Law Association – New Delhi Conference (2002): ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development. Also published as UN Doc. A/57/329, 31 August 2002, in both English and French. See N Schrijver, ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2002) 49:2 *Netherlands International Law Review* 299-305. doi:10.1017/S0165070X00000528 and his Hague Academy course, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status' (2007) 329 *Recueil des cours* 217-412. See also MC Cordonier Segger and A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (OUP 2004).

² International Law Association, '2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (Sofia Conference, Sofia, 2012); Also see MC Cordonier Segger and CG Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff / Brill 2005)

³ International Law Association, 'Legal Principles Relating to Climate Change' (Washington Conference, Washington, 2 July 2014) <<https://ssrn.com/abstract=2461556>> accessed 8 November 2020.

⁴ JH Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles* (24 January 2018) United Nations Human Rights Council, A/HRC/37/59. <<https://ssrn.com/abstract=3148450>> accessed 8 November 2020.

⁵ IUCN, *Draft International Covenant on Environment and Development - Implementing Sustainable Development - Fifth Edition: Updated Text (4th Revision)* (IUCN, 2015).

⁶ UNEP Governing Body (2013), *Advancing Justice, Governance and Law for Environmental Sustainability* Decision 27/9 <<https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0>> accessed 8 November 2020; UNEP (2019) *Environmental Rule of Law: First Global Report* ISBN: 978-92-807-3742-4 <<https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>> accessed 8 November 2020.

⁷ World Bank Group, *World Bank Group Strategy for Fragility, Conflict and Violence 2020-2025*; World Bank Group, *World Development Report 2017: Governance and the Law*; World Bank Group, *Strengthening Governance, Tackling Corruption: the World Bank Group's Updated Strategy and Implementation Plan* (World Bank Group, 2012); H Cisse, NR Madhava Menon, MC Cordonier Segger & VO Nmeihelle (eds), *World Bank Legal Review 5 Fostering Development through Opportunity, Inclusion and Equity* (World Bank Group, 2014).

⁸ For the text of the draft principles, see ILC, 'Report of the International Law Commission on the Work of its 71st Session' (29 April-7 June and 8 July-9 August 2019) UN Doc A/74/10 [211]-[15] <<https://undocs.org/en/A/74/10>> accessed 8 November 2020.

⁹ FAO & UNEP, *Legislative Approaches to Sustainable Agriculture and Natural Resources Governance*. FAO Legislative Study No. 114 (FAO/UNEP, 2020) <<https://www.unenvironment.org/resources/publication/legislative-approaches-sustainable-agriculture-and-natural-resources>> accessed 8 November 2020.

of their peoples, with particular regard for the rights of Indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems,

FURTHER EMPHASIZING that States must take into account the needs of future generations in determining the rate of use of natural resources, and that all relevant actors (including States and other stakeholders) are under a duty to avoid wasteful use of natural resources, promote waste minimization policies, and to implement the principle of sustainable use of natural resources,

RECALLING that the protection, preservation and enhancement of the natural environment requires global cooperation, and particularly that the change in the Earth's climate and its adverse effects, and the conservation of biological diversity, are the common concern of humankind, that the resources of the Moon and other celestial bodies and of the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind, and that the peaceful exploration and use of outer space is of common interest to all humankind,

RECOGNIZING that the principle of sustainable use of natural resources is intertwined with the principle of equity and eradication of poverty, including intra- and inter-generational equity and the right to development; the principle of common but differentiated responsibilities and capabilities; the principle of a precautionary approach to human health, natural resources and ecosystems; the principle of public participation and access to information and to justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives, and necessitates cooperation and action at all levels, in internal and external relations and involving all actors to ensure sustainable consumption and production patterns,

NOTING the existence of myriad binding multilateral, regional and bilateral treaties which directly ensure or relate to the sustainable management of natural resources for development, including those which are considered universal and reflect *erga omnes partes* obligations, as well as those reflecting *lex ferenda* principles of international law, as mentioned below,

RECOGNIZING that the role of international law in sustainable management of natural resources has changed over time, and can differ depending on the state of international collaboration with regards to the particular resource, the nature and location of the specific resource involved, the renewable or non-renewable character of the resource, the interdependence of ecological systems which sustain the resource, the best available science and technology, distributive justice, substantive equality and benefit-sharing considerations, and other important factors,

RECOGNIZING that advances in scientific understanding underscore the interconnectedness of environmental, animal and human health and well-being, and highlight hitherto unacknowledged or underacknowledged interconnections in the atmosphere-land-water-biodiversity nexus, as well as the need to respect ecological limits and planetary boundaries to avoid tipping points and reduce risks to society and nature,

TAKING into account the work of independent scientists and scientific bodies, including but not limited to the Intergovernmental Panel on Climate Change (IPCC), the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the UNCCD Science-Policy Interface (SPI), the Intergovernmental Technical Panel on Soils (ITPS), and the World Ocean Assessment (WOA), and the importance of work being done at the science-policy interface, including in relation to 'nature-based solutions,'

ACKNOWLEDGING also the increasing interest in systems thinking, including the ecosystem approach, as well as traditional and Indigenous knowledge and State practice and scholarship advocating ecocentric approaches in law,

RECOGNIZING the importance of effective governance and sustainable peace, including in conflict and post-conflict situations, and that sustainable natural resources management prioritizes equity and the interests of, and benefits for, all persons, including local communities and Indigenous peoples, and future generations, and ensures free, informed and meaningful participation in decision-making,

NOTING that care is required to ensure that even well-intentioned sustainable development policies are not enshrined in legislation in such a manner as to create perverse incentives that risk resulting in unsustainable natural resource use, including unsustainable land use or land use change or other forms of maladaptation,

ACKNOWLEDGING in the light of the above that the conservation and use of natural resources, which may be viewed as global, regional, transboundary or national resources based on their spatial attributes, raises cooperation and distributional issues of global relevance,

HIGHLIGHTING that the natural resources in each of these categories have been the subject of both hard and ‘soft’ rules of international law, including many binding international, regional and bilateral treaties, the principles of international law on sustainable development and, over time, related codes of practice between States, and have been considered by international courts and tribunals;

DOES HEREBY:

1. REAFFIRM the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development,

2. REAFFIRM the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development,

3. ADOPT the 2020 ILA Guidelines on the Role of International Law in Sustainable Natural Resources Management for Development, as annexed to this Resolution, which in accordance with the principles of international law on sustainable development, and supported by myriad international legal instruments, are found to be defining and guiding the sustainable management of natural resources in the world today, and also providing a roadmap for the progressive development of international law on the sustainable management of natural resources for development.

ANNEX I

INTERNATIONAL LAW ASSOCIATION

KYOTO CONFERENCE (2020)

2020 ILA GUIDELINES ON THE ROLE OF INTERNATIONAL LAW IN SUSTAINABLE NATURAL RESOURCES MANAGEMENT FOR DEVELOPMENT

In accordance with the principles of international law on sustainable development, and supported by myriad international legal instruments, these 2020 ILA Guidelines on the Role of International Law in Sustainable Natural Resources Management for Development are found to be defining and guiding the sustainable management of natural resources in the world today, and also providing a roadmap for the progressive development of international law on the sustainable management of natural resources for development.

These Guidelines reflect both established international law, including *lex lata* rules of treaty law that are binding on the Parties to key instruments and also customary rules, and also many norms that are still *lex ferenda*, with a view to future law. They are organized in three parts.

The First Part (I) presents, sector by sector in a non-exhaustive survey, certain guidelines for the sustainable management of global, regional, transboundary and national natural resources, covering: (1) global natural resources such as celestial bodies, the atmosphere and a stable climate system, biological diversity and ecological systems, and the ocean and its mineral and living resources; (2) regional and transboundary natural resources of global importance such as forests and landscapes as regional and transboundary natural resources, rivers and freshwater ecosystems as regional and transboundary natural resources, and migratory species as regional and transboundary natural resources; and (3) national natural resources of global relevance such as forests and landscapes, land and soil, mineral commodities, including precious minerals and sustainable energy.

The Second Part (II) addresses trends and innovations in international legal instruments and approaches in sustainable natural resources management for development, with a non-exhaustive selection covering: (4) trends from international human rights, economic, environmental, peacebuilding and post-conflict instruments related to the sustainable use of natural resources for development including human rights approaches; economic instruments; environment and sustainable development cooperation including scientific collaboration, financing mechanisms, monitoring, reporting and verification, and public participation and access to information and justice; also peacebuilding and post-conflict instruments; and secure land and water access. This Part also covers (5) innovative techniques and requirements in international instruments on sustainable management of natural resources for development, with a non-exhaustive selection including: sustainable resources management through transparency and stakeholder engagement, equitable benefit-sharing from sustainable natural resources management, legal indicators of effectiveness for sustainable natural resources management, and control of illicit flows for sustainable natural resources management. The Part further covers a brief, non-exhaustive update on (6) sustainable natural resources management in international dispute settlement.

Finally, in the Third Part (III), notes are provided for the interpretation and application of the 2020 ILA Guidelines on the Role of International Law in Sustainable Natural Resources Management for Development.

I. GUIDELINES FOR SUSTAINABLE MANAGEMENT OF GLOBAL, REGIONAL, TRANSBOUNDARY AND NATIONAL NATURAL RESOURCES

1. Global Natural Resources

1.1 Celestial Bodies

1.1.1 Outer space, including the Moon and other celestial bodies, is recognized as being the province of all humankind and its exploration and use for peaceful purposes the common interest of all humankind. The resources of the Moon and other celestial bodies are conferred the status of common heritage of humankind under the *Moon Treaty*, which envisaged a regime of non-appropriation and joint management.¹⁰ This system of non-appropriation and joint management is intended to address natural resources found in outer space, including their exploration and exploitation, as well as spaces of cultural heritage in space.

1.1.2 Several key treaties, instruments and standards offer important insights in the evolving role of international law in the sustainable management of celestial bodies.¹¹ International law promotes more sustainable management of celestial bodies by establishing several key norms. States should not take unilateral action regarding the exploitation of natural resources located on celestial bodies. Nor may States allow the use and deployment of satellites or other objects into space if they are likely to disintegrate and cause space junk, which can harm celestial and planetary resources as well as Earth itself. At the same time, international law requires that States must comply with the international regulatory system created under the jurisdiction of the *International Telecommunication Union* with regard to the launching and placement of satellites and celestial communications tools. Furthermore, the principle of equitable benefit forms part of the rules governing the sustainable management of outer space and celestial bodies.

1.2 The Atmosphere and a Stable Climate System

1.2.1 The atmosphere inextricably links States and individuals and cannot be contained by a border. Change in the Earth's climate and its adverse effects are recognized as a common concern of humankind.¹²

1.2.2 An important body of treaties, instruments and standards highlight the evolving role of international law in the sustainable management of the atmosphere and a stable climate system.¹³ International law regulates the

¹⁰ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies* (adopted 19 December 1966, entered into force 10 October 1967) RES (XXI) 2222 (Outer Space Treaty), art 2; *Agreement Governing the Activities of States on the Moon and Other celestial Bodies* (adopted on 18 December 1979, entered into force on 11 July 1984) 1363 UNTS 3 (Moon Agreement), art 11. The latter has however only been ratified by 18 States.

¹¹ In order to assess the evolving role of international law in the sustainable management of celestial bodies, the Committee surveyed the *Constitution and Convention of the International Telecommunication Union* (adopted on 22 December 1992, entered into force on 1 July 1994) 1825 UNTS 331/1825 UNTS 390; the Outer Space Treaty *supra* note 18; Moon Agreement *supra* note 18, arts 7(1) and 11(7); and the *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space*, endorsed with UN GA Res. 62/217 of 22 December 2007.

¹² *United Nations Framework Convention on Climate Change* (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) Preamble.

¹³ In order to assess the evolving role of international law in the sustainable management of the global atmosphere and a stable climate system, the Committee surveyed the global UNFCCC *supra* note 20, arts 2, 3.1, 3.4, 4.1(g), and 4.1(h); *Paris Agreement* (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev.1, 55 ILM 743 (Paris Agreement), art 2.1; *Vienna Convention on the Protection of the Ozone Layer and Protocols*, (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTC 293 Preamble, arts 2(1), 2(2)(a), and 2(2)(b); FAO, *Revised World Soil Charter* (adopted at 39th Session of the FAO Conference, 6-13 June 2015; FAO 2015); FAO, *Voluntary Guidelines on Sustainable Soil Management* (FAO 2017) (VGSSM); FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO 2012) (VGGT); *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bull. 59, 28 ILM 1382 (ILO No. 169) (CCITPIC); *United Nations Declaration on the Rights of Indigenous Peoples* (adopted 2 October 2007) A/RES/61.295 (UNDRIP) Preamble; *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (adopted 28 September 2018) A/HRC/RES/29/12 (UNDROP), art 18(3); *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*

anthropogenic emissions of greenhouse gases (GHG) to achieve a stabilization of GHG concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and promotes sustainable management of this resource by establishing several key norms. Specifically, States have committed to holding temperature increases to well below 2°C above pre-industrial levels, and to pursue efforts to limit temperature increases to 1.5°C above pre-industrial levels. States recognize that this requires global peaking of GHG emissions as soon as possible, rapid and sustained reductions thereafter in order to achieve a balance of anthropogenic emissions by sources and removals by sinks around 2050 (so called ‘carbon neutrality’ or ‘net zero emissions’).¹⁴ In order to reach this goal, States shall undertake domestic legal and policy measures to reduce GHG emissions. In this context, States should also take action to conserve and enhance GHG sinks and reservoirs, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems, including soils, wetlands, peatlands and mangroves, which pose risks of releasing GHGs on a significant scale when disturbed or not managed sustainably. Under the *United Nations Framework Convention on Climate Change* (UNFCCC) and the *Paris Agreement*, States must put forward progressive Nationally Determined Contributions (NDCs) every five years, which are to reflect their highest possible ambition, and need to report on the progress on implementation and achievement of their NDCs. Several international law instruments have established that States shall be subject to oversight committee review in instances of alleged failures to meet their treaty-based obligations, for example the Paris Agreement Implementation and Compliance Committee.

1.2.3 Further, States seeking to engage in the promotion and use of renewable energies should do so in a way that is sustainable and reduces GHG emissions into the atmosphere, as well as avoid the further degradation of biodiversity. Importantly, States may fulfil such obligations in a flexible and cost-effective way, also in keeping with the principle of sustainable development and the principle of common but differentiated responsibilities and capabilities, in the light of different national circumstances, and make use of domestic and international transfer or trading mechanisms to this end (e.g. International Emission Trading, Joint Implementation, Clean Development Mechanism or the new international carbon credit mechanism established by Article 6 of the *Paris Agreement*, which is still to be implemented). This requires coordination between international climate change regimes and international economic regimes, such as the international trade and investment regime, with a view to ensure mutual supportiveness. Procedures, including impact assessments and safeguarding mechanisms, must be put in place to avoid the risk of GHG emission leakage and maladaptation, double counting or other perverse incentives leading to unsustainable natural resource use, including unsustainable land use or land use change.

1.3 Biological Diversity and Ecological Systems

(adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 (UNCCD); *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (signed 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention) Preamble; *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS); Conference on the Establishment of the International Renewable Energy Agency, *Statute of the International Renewable Energy Agency* (Conference on the Establishment of the International Renewable Energy Agency, Bonn, 26 January 2009) (IRENA); *Stockholm Convention on Persistent Organic Pollutants* (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119, art 1 (Stockholm Convention); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (Basel Convention) and the *Protocol on the Control of Marine Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes* (signed 17 March 1998) 2417 UNTS 261; *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides*, (adopted 10 September 1998, entered into force 24 February 2004) 39973 (Rotterdam Convention); Vienna Convention on the Protection of the Ozone Layer and Protocols *supra* note 21; *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177 (Bamako Convention); and Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017) 55 ILM 582 (Minamata Convention); as well as regional instruments such the *Energy Charter Treaty* (adopted 17 December 1994) 2080 UNTS 95; *Convention on Environmental Impact Assessment in a Transboundary Context* (signed 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (Espoo Convention); and *Protocol on Strategic Environmental Assessment* (signed 21 May 2003, entered into force 11 July 2010) 2685 UNTS 140 (Kiev Protocol on SEAs).

¹⁴ *Paris Agreement supra* note 21, arts 2.1 and 4.1.

1.3.1 Biodiversity plays an important role in maintaining the life-sustaining systems of the biosphere, and its conservation is a common concern to humankind.¹⁵ International, regional and global cooperation among States and stakeholders, including intergovernmental organizations, civil society and the private sector, is essential for the conservation of biodiversity and the sustainable use of its components. Several key treaties, instruments and standards offer important insights in the evolving role of international law in the sustainable use of global biodiversity and ecological systems.¹⁶ International law regulates human activities affecting biodiversity and ecological systems to promote the conservation and sustainable use of these resources, as well as the fair and equitable benefit-sharing from the utilization of genetic resources, by establishing several key norms. States have sovereign rights over their own biological and genetic resources, and are responsible for conserving biodiversity and for sustainably using its components. States are encouraged, as far as possible and as appropriate, to cooperate with other States, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for conservation and sustainable use.

1.3.2 States should uphold the targets adopted and requirements identified for the protection of biodiversity and ecological systems found in the treaty regimes, associated protocols and other related instruments. States shall, in accordance with their conditions and capabilities, develop national strategies, action plans or programmes for the conservation and sustainable use of biodiversity, or adapt existing strategies, plans or programmes for this purpose. In accordance with their conditions and capabilities, States shall also integrate, as far as possible and as appropriate, conservation and sustainable use into relevant sectoral or cross-sectoral plans, programmes and policies. In this context, States should conserve biodiversity and sustainably use its components, both above and below ground, terrestrial and marine, and use an ecosystems approach.

1.3.3 Noting that *in-situ* conservation is a fundamental requirement for the conservation of biological diversity, States must, as far as possible and as appropriate, establish a system of protected areas or areas where special measures need to be taken to conserve biodiversity; regulate or manage biological resources important for the

¹⁵ *Convention on Biological Diversity* (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) Preamble.

¹⁶ In order to assess the evolving role of international law in the sustainable management of global biodiversity and ecological systems, the Committee surveyed the CBD *supra* note 23, Preamble and art 2 and its *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (23 December 2003) 2236 UNTS A-30619 (Cartagena Protocol) and *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (29 October 2010) 3009 UNTS A-30619 (Nagoya Protocol); UNCCD *supra* note 21; UNFCCC *supra* note 20, Preamble, arts 2, 3, and 4(1)(d); *Paris Agreement* *supra* note 21, Preamble and arts 7(2), 7(9)(c), and 7(9)(e); CCITPIC *supra* note 13; Ramsar Convention *supra* note 21, Preamble, arts 3(1) and 4; *Convention on the Law of the Non-Navigational Uses of International Watercourses* (signed 21 May 1997, entered into force 17 August 2014) (2017) 36 ILM 700 (New York Convention); *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (signed 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 (Helsinki Convention); *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* (adopted 2 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES) Preamble; *International Tropical Timber Agreement* (adopted 27 January 2006, entered into force 7 December 2011) UN Doc TD/TIMBER.3/12 (ITTA 2006); *Convention on the Conservation of Migratory Species of Wild Animals* (signed 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS); *FAO International Treaty on Plant Genetic Resources for Food and Agriculture* (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS 303 (ITPGRFA); UNDRIP *supra* note 21, arts 29 and 31; UNDROP *supra* note 13; the UN General Assembly Resolutions on Permanent Sovereignty over Natural Resources (14 December 1962, UNGA Resolution 1803 (XVII) and 25 November 1966, UNGA Resolution 2158 (XXI)); *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity* (Montréal 2004); United Nations Conference on Trade and Development, *BioTrade Principles and Criteria* (New York and Geneva 2007) UNCTAD/DITC/TED/2007/4; and the *Revised World Soil Charter* *supra* note 13; VGSSM *supra* note 13; VGGT *supra* note 13; as well as regional instruments such as the *Revised African Convention on the Conservation of Nature and Natural Resources* (adopted March 11 July 2003, entered into force 23 July 2016) 77 AU Treaties 0029 (Maputo Convention); *Convention for the Conservation of the Biodiversity and the Protection of Priority Wilderness Areas in Central America* (signed 5 June 1992, entered into force 20 December 1994); *South African Development Community Protocol on Forestry* (adopted 3 October 2002, entered into force 17 July 2009) (SADC Protocol on Forestry), Preamble and arts 2 and 3; and the *Protocol for the Implementation of the Alpine Convention Relating to the Nature Protection and Landscape Conservation* (adopted 20 December 1994, entered into force 18 December 2002) (Alpine Soil Convention). *Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution* (signed 24 April 1978, entered into force 1 July 1979) 1140 UNTS 133 (Kuwait Regional Convention); *Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf* (signed 29 March 1989, entered into force 17 February 1990) 2065 UNTS 68.

conservation of biodiversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; rehabilitate and restore degraded ecosystems and promote the recovery of threatened species through the development and implementation of plans or other management strategies; establish or maintain means to regulate, manage or control the risks associated with living modified organisms that are likely to have adverse environmental impacts that could affect conservation and sustainable use; prevent the introduction of, control or eradicate invasive alien species which threaten ecosystems, habitats or species; develop or maintain necessary laws and/or regulations for the protection of threatened species and populations; adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats; and, regulate or manage processes and categories of activities determined to have significant adverse effects on biodiversity.

1.3.4 States should integrate consideration of the conservation and sustainable use of biological resources into national decision-making; adopt measures on the use of biological resources to avoid or minimize adverse impacts on biodiversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use; support local populations to develop and implement remedial action in degraded areas; and encourage cooperation between governmental authorities and the private sector in developing methods for sustainable use. States should also introduce Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) or Sustainability Impact Assessment (SIA) procedures for projects that are likely to have significant adverse effects on biodiversity in order to avoid or minimize such effects, and allow for public participation. Finally, States must take appropriate legislative, administrative or policy measures for fair and equitable benefit sharing from the utilization of genetic resources with the providing country. Benefits should be shared with Indigenous peoples and local communities where they have the right to grant access to genetic resources under national law.

1.3.5 Beyond these requirements, States shall report on their activities, including those relating to protection of biodiversity and ecological systems. In conjunction with this, some international law instruments establish that States shall be subject to oversight committee review in instances of alleged failures to meet their treaty-based obligations, such as the *Convention on International Trade in Endangered Species of Flora and Fauna* (CITES), while others are based on the duty to cooperate, such as the *Convention on Biological Diversity* (CBD) or the *Convention on Migratory Species* (CMS), out of recognition *inter alia* of the different capabilities of States in enacting and enforcing implementing laws and policies. Additionally, States are encouraged to establish specialized collaborative regimes for the protection of particular migratory terrestrial or marine species and ecosystems, such as the CMS and the *UN Convention on the Law of the Sea* (UNCLOS) *Straddling Stocks Agreement*.

1.4 The Ocean, and its Mineral and Living Resources

1.4.1 The natural resources of the global ocean and its ocean basins are subject to overarching duties of conservation and cooperation. Mineral resources of the ‘Area’ (the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction).¹⁷ Marine biodiversity conservation is recognized as a common concern of humankind.¹⁸ Although oceans physically straddle international and national jurisdictions, their ecological connectivity makes them truly global resources. This is reflected in the existing instruments that address oceans as global resources, listed below, and in the current progressive development of international law and policy which is in the process of integrating the traditional law of the sea with science-based international environmental law, especially with respect to conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ).

1.4.2 In order to assess the evolving role of international law in the sustainable management of the global ocean, a collection of key treaties, instruments, and standards offers important insights.¹⁹ International law regulates

¹⁷ UNCLOS *supra* note 21, Preamble and Part XI s 2 art 136.

¹⁸ CBD *supra* note 23, Preamble and art 2.

¹⁹ In order to assess the evolving role of international law in the sustainable management of global oceans, the Committee surveyed the treaties such as the CBD *supra* note 23 and its Cartagena Protocol *supra* note 24 and Nagoya Protocol *supra* note 24; CITES *supra*

oceans to promote more sustainable management of these resources by establishing several key norms. States must respect the *res communis* nature of high seas resources; extraction of seabed minerals in areas beyond national jurisdiction is subject to international oversight. Under international treaty law and jurisprudence, States are required to undertake a number of activities – such as conservation, precaution, due diligence, EIAs and best environmental practices – to ensure sustainable management of oceans as natural resources. States should also apply concerted management and conservation of migratory fish stocks found within their territorial waters so as to protect them as an international resource rather than classify as them as purely domestic resources. Further, flag States are required to ensure that the vessels sailing under their jurisdiction follow sustainable management and conservation practices for fishing living resources found in international waters. Ocean governance also requires full and ambitious implementation of the UNFCCC and *Paris Agreement*.

2. Regional and Transboundary Natural Resources of Global Importance

2.1 Forests and Landscapes as Regional and Transboundary Natural Resources

2.1.1 Forests and landscapes are of global relevance for the atmosphere and a stable climate system, and for the conservation and sustainable use of biodiversity. Forests and landscapes, including wetlands and coastal areas, can be considered as regional or transboundary resources, located across States, bisected by State borders, but still functioning ecologically as a unified system. In this way, while forming part of the territory of a sovereign State, these resources have an additional impact and importance beyond national boundaries, and actions taken regarding them at the State level will have repercussions throughout a broader area. This is reflected in existing international law and policy instruments, as well as regional law instruments and policy mechanisms that address forests and landscapes.

2.1.2 In order to assess the evolving role of international law in the sustainable management of regional and transboundary forests and landscapes a collection of key treaties, instruments, and standards offers important insights.²⁰ International law regulates forests and landscapes as regional and transboundary resources to promote

note 24; and UNCLOS *supra* note 21. The Committee also surveyed *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (signed 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (Straddling Stocks Agreement); *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (signed 24 November 1993, entered into force 24 April 2003) 221 UNTS 91; *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea Convention on the Law of the Sea of 10 December 1982* (signed 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3 (Agreement Relating to Part XI of the Law of the Sea Convention); *International Convention for the Prevention of Marine Pollution from Ships* (signed 2 November 1973, entered into force 2 October 1983) 1522 UNTS 3 (MARPOL 73/78); *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120 (London Convention); *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (signed 7 November 1996, entered into force 24 March 2006) (1997) 36 ILM 7 (Protocol to the London Convention); UNFCCC *supra* note 20, art 4(1)(d); *Paris Agreement supra* note 21; the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (signed 22 November 2009, entered into force 5 June 2016) (2009) 55 ILM 1159 (PSMA); the *Code of Conduct for Responsible Fisheries* (1995), and the *FAO Voluntary Guidelines for Flag State Performance* (2015) <<http://www.fao.org/3/a-i4577t.pdf>>; UNGA Res 72/249 (24 December 2017) UN Doc A/RES/72/249 (UNGA Resolution 72/249); and the relevant decisions of international courts and tribunals including the International Tribunal on the Law of the Sea.

²⁰ In order to assess the evolving role of international law in the sustainable management of regional and transboundary forests and landscape ecosystems, the Committee surveyed the global CBD *supra* note 23, Preamble, arts 5 and 6; UNFCCC *supra* note 20, art 4; *Paris Agreement supra* note 21, art 5; UNCCD *supra* note 21; ITTA 2006 *supra* note 24; Ramsar Convention *supra* note 21, art 5; the *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage* (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (WHC), arts 2, 4, and, 11(4); CITES *supra* note 24; the CCITPIC *supra* note 21; the ‘Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests’ (New York 21 April 1992) UN Doc A/CONF.151/6 (NLBI); the *UN Forest Instrument* (16 February 2016) UN Doc A/RES/70/199 (UN Forest Instrument); *UN Strategic Plan for Forests 2017-2030*, adopted by UNGA (27 April 2017) UN Doc A/RES/71/285; UNDRIP *supra* note 21, art 25; UNDROP *supra* note 21; VGSSM *supra* note 21; VGGT *supra* note 21; *Revised Soil World*

more sustainable management of these resources by establishing several key norms. States should create and implement national forestry management policies, strategies and practices which recognize the varied nature of interests encompassed in forests and land management, including applying the ecosystem approach, and addressing GHG emissions and removals from land use, land-use change, and forestry. States should also prevent, and restore, land and forest degradation through sustainable management practices. States should factor the need for transboundary conservation and management into their plans and strategies, and enter into consultations to implement this in practice. In addition, States should identify, protect, conserve, present and pass to future generations, natural areas of outstanding universal value from the point of view of science, conservation or natural beauty. Further, States should ensure that regulatory actions related to forestry and land use also cover private and industry actors involved in extraction, harvesting and use of these resources and associated value chains. Additionally, States may enter into voluntary agreements on forests and landscapes which further collaboration with other States, international organizations and private actors in order to undertake actions to reduce emissions from deforestation and forest degradation, conserve forest carbon stocks, sustainably manage forests, and enhance forest carbon stocks.

2.2 Rivers and Freshwater Ecosystems as Regional and Transboundary Natural Resources

2.2.1 Many rivers and freshwater ecosystems, including groundwater and aquifers, transect or even form borders and boundaries, making them a legal and societal resource of more than a particular State. In this way, while these bodies of water might originate in the territory of a sovereign State, as resources they have an impact and import beyond national boundaries and actions taken regarding them at the State level will have repercussions throughout a broader area. This is reflected in the existing international law and policy instruments, as well as regional law instruments and policy mechanisms, that address rivers and freshwater ecosystems.

2.2.2 In order to assess the evolving role of international law in the sustainable management of regional and transboundary rivers and freshwater ecosystems, a collection of key treaties, instruments, and standards offers important insights.²¹ International law, in addition to applicable regional law, regulates rivers and freshwater

Charter supra note 21. The Committee also considered the work of the United Nations Forum on Forests and Collaborative Partnership on Forests; the policies of the **Forest Carbon Partnership Facility; the Forest Stewardship Council; the Programme for the Endorsement of Forest Certification**, and the Sustainable Forestry Initiative certification systems. Further, the Committee considered regional instruments such as the *Revised African Convention on the Conservation of Nature and Natural Resources* (adopted 11 July 2003, entered into force 23 July 2016) *supra* note 24; the *Convention for the Conservation of the Biodiversity and the Protection of Priority Wilderness Areas in Central America* *supra* note 24, art 14, see also arts 11 and 12; and the *Alpine Soil Protocol* *supra* note 24.

²¹ In order to assess the evolving role of international law in the sustainable management of regional and transboundary rivers and freshwater ecosystems, the Committee surveyed the global New York Convention *supra* note 24; ICESCR *supra* note 35; Helsinki Convention *supra* note 24; *Convention on the Rights of the Child* (signed 2 September 1990, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 24(2)(c); *Convention on Elimination of All Forms of Discrimination Against Women* (signed 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW), art 14(2)(h); *Revised Soil World Charter* *supra* note 21; VGSSM *supra* note 21; VGGT *supra* note 21; CCITPIC *supra* note 21, as well as the UNDRIP *supra* note 21, arts 25 and 32(2); UNDROP *supra* note 21; 'Agenda 21' United Nations Conference on Environment and Development (Rio de Janeiro 3 June-14 June 1992); Johannesburg Declaration on Sustainable Development in 'Report of the World Summit on Sustainable Development' (adopted 4 September 2002) UN World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002) UN Doc A/CONF.199/20 (Johannesburg Declaration on Sustainable Development); UNGA Res 19/2 'Programme for the Further Implementation of Agenda 21' (19 September 1997) UN Doc A/RES/S-19/2 (Programme for the Further Implementation of Agenda 21); Ramsar Convention *supra* note 21, art 5; the *Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities* (26 January 2012) UN Doc UNEP/GPA/IGR.3/5 (Manila Declaration); and 'The Future We Want' UNGA Res 66/288 (27 July 2012). The Committee also surveyed regional instruments such as the Southern African Development Community (SADC) *Revised Protocol on Shared Watercourses in the Southern African Development Community* (Windhoek 7 August 2000), arts 2(b) and 3(7)(a) and Water Charters of the Senegal and Niger Rivers and the Lake Chad Water Basin (2000); *Statute of the River Uruguay* (1975); *Acuerdo Sobre el Acuífero Guaraní* (The Guaraní Aquifer Agreement) (signed 2 August 2010) <<http://odd.senado.gov.py/archivos/file/Poder%20Ejecutivo%20Nro%20587.pdf>> accessed 8 November 2020 (GAA); *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (signed 5 April 1995, coming into force 5 April 1995) 2069 UNTS 3 (Mekong River Agreement); *China-Russia Agreement* (2008); Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for the Community Action in the Field of Water Policy (adopted 23 October

ecosystems as regional and transboundary resources to promote more sustainable management of these resources by establishing several key norms. States should ensure that there is harmonization in the legal and governance systems relating to transboundary and regional watercourses, including obligations to work together to ensure this harmonization. As part of this, States must include the duty to notify other riparian States of their development plans that may affect the rivers substantially and consult in their management of watercourse resources. Additionally, in managing transboundary and regional watercourses, States should include key sustainable development law principles, such as the no significant harm principle, the polluter pays principle and the precautionary principle, and adopting the ecosystem approach, States should include consideration of related land and soil use and management decisions, which impact water regulation and quality. When addressing the development of watercourses or wetlands directly or indirectly, States should use transboundary and domestic Environmental Impact Assessments (EIAs) or Sustainability Impact Assessments (SIAs) as tools to ensure that there is a full assessment of likely impacts, taking into account public concerns and contributions. Further, States should work together to create guidelines for the management of shared rivers and freshwater ecosystems.

2.3 Migratory Species as Regional and Transboundary Natural Resources

2.3.1 Many species are highly migratory as a matter of standard course and cross boundaries and regions, making them a legal and societal resource of more than a particular State. In this way, while these species might originate in the territory of a sovereign State, as resources they have an impact and import beyond national boundaries and actions taken regarding them at the State level will have repercussions throughout a broader area. This is reflected in the existing international law and policy instruments, as well as regional and bilateral law instruments and policy mechanisms, that address straddling stocks²² and highly migratory species.²³

2.3.2 In order to assess the evolving role of international law in the sustainable management of regional and transboundary migratory species, a collection of key treaties, instruments, and standards offers important insights.²⁴ International law regulates migratory species as regional and transboundary resources to promote

2000, entered into force 22 December 2000) OJ L 327 (*European Union Water Framework Directive*); and the *Kuwait Regional Convention supra* note 24 and its *Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf supra* note 24.

²² UNCLOS *supra* note 21, art 63.

²³ UNCLOS *supra* note 21, art 64 and Annex I. Also, see the Straddling Stocks Agreement *supra* note 19, which sets out principles for the conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information. The Straddling Stocks Agreement elaborates on the fundamental principle, established in the UNCLOS, that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone.

²⁴ In order to assess the evolving role of international law in the sustainable management of migratory species, the Committee surveyed the global CMS *supra* note 24; the CBD *supra* note 23; CITES *supra* note 24 Preamble; UNCLOS *supra* note 21, art 63; Straddling Stocks Agreement *supra* note 19; Ramsar Convention *supra* note 21, Preamble and art 2(6); and the *World Heritage Convention*. The Committee also surveyed regional instruments such as the *Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere* (signed 12 October 1940, entered into force 30 April 1942) 161 UNTS 193; *Revised African Convention on the Conservation of Nature and Natural Resources supra* note 24; *Convention on Conservation of Nature in the South Pacific* (signed 12 July 1976, entered into force 26 June 1990) [1990] ATS 41 (Apia Convention); *Convention on the Conservation of European Wildlife and Natural Habitats* (signed 19 September 1979, entered into force 1 June 1982) 1284 UNTS 209 (Berne Convention); *Protocol Concerning Protected Areas and Wild Flora and Fauna in the Eastern African Region* (adopted 21 June 1985, entered into force 30 May 1996); the *ASEAN Agreement on the Conservation of Nature and Natural Resources*; *Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific* (adopted 21 September 1989, entered into force 24 January 1995) *Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean* (adopted 18 January 1990, entered into force 18 June 2000); *Protocol on Environmental Protection to the Antarctic Treaty* (signed 10 April 1991, entered into force 14 January 1998) 2941 UNTS 3; the *Convention for the Conservation of the Biodiversity and the Protection of Priority Wilderness Areas in Central America supra* note 24; *EU Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora* (Habitats Directive); *Convention for the Protection of the Marine Environment of the North-East Atlantic* (signed 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67 (OSPAR Convention); *Alpine Soil Protocol supra* note 24; *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean* (signed 10 June 1995, entered into force 21 March 2000) 2102 UNTS 181; Southern African Development Community (SADC), *Protocol on Wildlife Conservation and Law Enforcement* (signed 18 August 1999, entered into force 30 November

more sustainable management of these resources by establishing several key norms. States are required to provide for the protection, conservation and management of migratory species which traverse their territories in any form (land, air or water). States may work together to establish and implement targeted agreements for handling the migration patterns of specific migratory species with the purpose of ensuring sustainable management of the species at the national and regional levels. Further, States are required to provide special protections for endangered migratory species that traverse their territory and to ensure that they are not targeted for poaching or other illegal activities.

3. National Natural Resources of Global Relevance

3.1 Forests and Landscapes

3.1.1 In addition to their global relevance in relation to the sustainable management of the atmosphere and a stable climate system and the conservation and sustainable use of biodiversity, as well as transboundary or regional relevance, forests and landscape ecosystems within States are still considered to play a significant role in international environmental and socioeconomic concerns. They are thus subject to international laws and policies as well as national laws and enforcement mechanisms and, increasingly, an international human rights law lens, which impacts on their sustainable management. This is reflected in existing international law and policy instruments, as well as national law instruments and policy mechanisms that address forests and landscape ecosystems.

3.1.2 In order to assess the evolving role of international law in the sustainable management of national forests and landscape ecosystems, a collection of key treaties, instruments, and standards offers important insights.²⁵ Taken together, international law, in addition to applicable domestic law, regulates forests and landscape ecosystems as national resources to promote more sustainable management of these resources by establishing several key norms. States should implement national strategies to plan for the conservation and sustainable use of forests and landscapes, including, where appropriate, facilitating changes to existing laws and rules which could hinder these efforts.

2003); *Revised African Convention on the Conservation of Nature and Natural Resources* *supra* note 24; the *East African Community Protocol on Environment and Natural Resource Management*; FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) (IPOA-UUF); FAO, *International Plan of Action for Conservation and Management of Sharks* (FAO 1999) (IPOA-Sharks); FAO, *International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries* (FAO 1999) (IPOA-Seabirds); the *Protocol to the Carpathian Convention on Conservation and Sustainable Use of Biological and Landscape Diversity*; *Arab Declaration on Environment and Development and Future Perspective* (signed 10 September 1991) E/ESCWA/ENVHS/1992/1; and the *Arab Declaration to the World Summit on Sustainable Development* (24 October 2001) <https://www.hlrn.org/img/documents/Arab_Declaration_Sustainable_Dev.pdf> accessed 8 November 2020.

²⁵ In order to assess the evolving role of international law in the sustainable management of national forests and landscape ecosystems, the Committee surveyed the global CBD *supra* note 23, art 6; the UNFCCC *supra* note 20, art 4; *Paris Agreement* *supra* note 13; UNCCD *supra* note 21; the ITTA 2006 *supra* note 24; Ramsar Convention *supra* note 21, art 3(1); WHC *supra* note 27, arts 2, 4, 5, and 11(4); CITES *supra* note 24 Preamble; as well as the NLBI *supra* note 28; the UN Forest Instrument *supra* note 28; UN Strategic Plan for Forests 2017-2030 *supra* note 28; *Revised Soil World Charter* *supra* note 21; VGSSM *supra* note 21; VGGT *supra* note 21; CCITPIC *supra* note 13; UNDRIP *supra* note 13; and UNDROP *supra* note 13. Further, the Committee examined the work of the United Nations Forum on Forests and Collaborative Partnership on Forests; the policies of the **Forest Carbon Partnership Facility**; the Forest Stewardship Council; the Programme for the Endorsement of Forest Certification; and Sustainable Forestry Initiative certification systems.

3.1.3 States should, in particular, create and implement national strategies to reduce deforestation and forest degradation, as well as for the conservation of carbon sinks and reservoirs, sustainable management of forests, and enhancement of forest carbon stocks. They should adopt the ecosystem approach to the management of forests and wetlands, such as mangroves. In conjunction with this, States should work towards the wise use of wetlands to ensure maintenance of ecological character, through the ecosystem approach, and in the context of sustainable development. Furthermore, States should incorporate transparency and monitoring systems in their design and implementation of these strategies, including the use of reporting and verification mechanisms. In order to reduce forest-based emissions to prevent catastrophic climate change, developing States should also include actions for reducing emissions from deforestation and forest degradation, conservation of forest carbon stocks, sustainable management of forests and enhancement of forest carbon stocks (REDD+) in their NDCs and strengthen national institutions for the implementation of REDD+ strategies; regularly assess the potential for advancing holistic, durable solutions to the intertwined issues of tropical deforestation, rural livelihoods, and food security; and review the REDD+ monitoring, verification and reporting system in national institutional frameworks and policies in order to improve the technical management of forest and landscape ecosystems.

3.1.4 Lastly, States should also promote ways to adequately control international trade in tropical timber, to prevent illicit flows of illegal timber and foster trade only from sustainably managed and legally harvested forests, and promote the sustainable management of tropical timber producing forests.

3.2 Land and Soil

3.2.1 In addition to their global relevance in relation to the sustainable management of the atmosphere and a stable climate system, and conservation of biodiversity, as well as any transboundary or regional relevance, land and soils within States still play a significant role in international environmental, societal, cultural and security concerns and are thus subject to international laws and policies as well as national laws and enforcement mechanisms. Furthermore, land and soil are increasingly viewed through an international human rights lens, which impacts on their sustainable management.²⁶ These elements are reflected in existing international law and policy instruments, as well as national law instruments and policy mechanisms that address land and soil.

3.2.2 In order to assess the evolving role of international law in the sustainable management of national land and soil, a collection of key treaties, instruments, and standards offers important insights.²⁷ Taken together,

²⁶ Of note, a 'right to land' of peasants and other people living in rural areas has been proclaimed in the *Declaration on the Rights of Peasants and Other People Living in Rural Areas*, defined as the right 'individually and/or collectively [...] to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures' UNDROP *supra* note 13. Further, the 66th Session of the UN Committee on Economic, Social and Cultural Rights held a general discussion on land and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as part of an ongoing consultative process to draft a 'general comment' on this topic <<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/GeneralDiscussionLand.aspx>> accessed 8 November 2020.

²⁷ In order to assess the evolving role of international law in the sustainable management of land and soil, the Committee surveyed the global CBD *supra* note 23, arts 2 and 6; the UNFCCC *supra* note 20; *Paris Agreement supra* note 13; UNCCD *supra* note 21; UNCLOS *supra* note 21, art 56 1(a); Ramsar Convention *supra* note 21, art 3(1); WHC *supra* note 28, arts 2, 4, 5, and 11(4); CEDAW *supra* note 29, art 14(2)(g); the *International Covenant on Economic Social and Cultural Rights* (signed 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 11(2)(a); the Basel Convention *supra* note 21 and *Protocol on the Control of Marine Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes supra* note 13; Rotterdam Convention *supra* note 13; Stockholm Convention *supra* note 21, art 7; Minamata Convention *supra* note 13; Bamako Convention *supra* note 13; the *Convention on Long-Range Transboundary Air Pollution* (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217 and related protocols; the *FAO International Code of Conduct on Pesticide Management*; the *Strategic Approach to International Chemicals Management* (SAICM); the *IUCN World Charter for Nature*; CCITPIC *supra* note 13; the *ILO Convention on Safety and Health in Agriculture* (C184 Convention); *Revised World Soil Charter supra* note 13; VGSSM *supra* note 13; VGGT *supra* note 13; UNDRIP *supra* note 21, Preamble and art 25; and UNDROP *supra* note 13. The Committee also surveyed regional instruments such as the *Revised African Convention on the Conservation of Nature and Natural Resources* (adopted 11 July 2003, entered into force 23 July 2016) *supra* note 24; *European Soil Charter*, Ref: B(72)63, Strasbourg, June 1972, and the Committee for the activities of the Council of Europe in the field of biological and landscape diversity (CO-DBP) *Revised European Charter for the Protection and Sustainable Management of Soil* (28 May 2003) CO-DBP (2003) 10; *Alpine Soil Protocol supra* note 16; the *Escazu Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean* (adopted 4 March 2018) CN.195.2018 and the

international law, in addition to applicable domestic law, regulates land and soil as national resources to promote more sustainable management of these resources by establishing several key norms.

3.2.3 Nearly all States are required to create National Biodiversity Strategies and Action Plans (NBSAPs) for the sustainable use and conservation of biodiversity resources, which should include soil biodiversity. States should take action to restore, conserve and enhance terrestrial and coastal land and soils, including wetlands, peatlands and mangroves, in their function as GHG sinks and reservoirs, as part of the global efforts to mitigate climate change, through adequate mitigation actions at national level as well as international cooperative mechanisms. States should additionally contribute to enhancing adaptive capacity, including in relation to agricultural lands and food security, and seek a high level of ambition in their NDCs under the *Paris Agreement* in order to minimize the risks and impact to land and soil resulting from the effects of climate change. States shall also combat desertification and mitigate the effects of drought in areas experiencing serious drought and/or desertification through effective National Action Plans as well as through international cooperation and partnerships, including long-term integrated strategies focusing on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions. States shall strive to achieve a land degradation neutral world through setting land degradation neutrality (LDN) targets and collaboration. Further, States should designate wetlands of international significance within their territories, adopting an ecosystem approach, and identify areas of relevance under the *World Heritage Convention*.

3.2.4 States have a duty to prevent pollution of land and soils, including by chemical and other types of pollutants such as pesticides and fertilizers, or resulting from mining, and take appropriate measures to avoid the risks presented by such products or activities to human health and the environment, including through adequate legal and institutional measures at national level. They should implement regional conventions with provisions directed towards the sustainable management of soils, as well as sectorial treaties, dealing for example with water, air, protected areas and species, hazardous substances, pollution and waste, which implicitly have the objective of protecting land and soil.

3.2.5 States should recognize land as a multifaceted resource, including its economic, social, environmental, cultural and spiritual relevance, and as the basis of the livelihoods of millions of people worldwide. Further, States should recognize and respect all legitimate land tenure rights and their holders, including customary rights and other rights based on social legitimacy, safeguard legitimate tenure rights against threats and infringements, promote and facilitate the enjoyment of these rights and provide access to justice in case of their infringement, especially as secure tenure rights are key for more sustainable land and soil management. Non-state actors also have a responsibility to respect legitimate tenure rights, and States should take appropriate steps to protect against infringements and abuse of land tenure rights.

3.2.6 States should incorporate sustainable use and management of land and soil to promote food security and human nutrition as part of their agricultural, planning, and land management laws, policies and practices. States and non-state actors should promote responsible investments in land, agriculture and food systems, including through promoting the conservation and sustainable management of land and natural resources.

3.2.7 States should cooperate to implement the *Revised World Soil Charter*, as further elaborated in the *Voluntary Guidelines for Sustainable Soil Management* (VGSSM). In particular, States should pursue the overarching goal to ensure that soils are managed sustainably and that degraded soils are rehabilitated or restored, and that actions at all levels are informed by the principles of sustainable land and soil management and contribute to the achievement of a land-degradation neutral world in the context of sustainable development. States should promote sustainable soil management and strive to create socio-economic and institutional conditions favourable to sustainable soil management by removal of obstacles, in particular those associated with land tenure, the rights of users, access to financial services and educational programmes, taking into account the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in*

Kuwait Regional Convention *supra* note 24 and Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf *supra* note 24.

the Context of National Food Security (VGGT). They should participate in the development of multi-level, interdisciplinary educational and capacity-building initiatives that promote the adoption of sustainable soil management by land users; support research programs that will provide sound scientific backing for development and implementation of sustainable soil management relevant to end-users; and incorporate the principles and practices of sustainable soil management into policy guidance and legislation at all levels of government. States should develop a national soil policy, maintain a national soil information system and contribute to the development of a global soil information system, as well as developing a national institutional framework for monitoring implementation of sustainable soil management and the overall state of soil resources.

3.3 Mineral Commodities, including Precious Minerals

3.3.1 Mineral commodities, including precious minerals, can occur in terrestrial or marine jurisdictions, in the Area and in outer space. In the two latter cases, their status of common heritage of humankind is recognized in specific regimes (see above, Sections 1.1 and 1.4). In the former case, they serve as predominantly national natural resources. However, even within this context, it is important to note that mineral commodities and precious minerals within States are still considered to play a significant role in international environmental concerns due to the risks entailed in the extraction and trade of minerals and are thus subject to international laws and policies as well as national laws and enforcement mechanisms and, increasingly, an international human rights lens also impacts on their sustainable management. This is reflected in the existing international law and policy instruments that address mineral commodities, including precious minerals, as well as in national law instruments and policy mechanisms.

3.3.2 In order to assess the evolving role of international law in the sustainable management of national mineral resources, a collection of key treaties, instruments, and standards offers important insights.²⁸ Taken together, international law, in addition to applicable domestic law, regulates mineral commodities and precious minerals as national resources to promote more sustainable management of these resources by establishing several key norms and a wide range of standards targeting the private sector engaged in extractive resources. States shall gradually reduce and, when feasible, eliminate the extraction and use of minerals when it poses serious health and environmental threats, including in relation to GHG emissions, sinks and reservoirs, and the prevention of dangerous anthropogenic interference with the climate system.

3.3.3 States may restrict trade of and investment in mineral resources for overriding conservation, health and environmental protection interests.²⁹ Where States enter into agreements with private actors in the mineral

²⁸ In order to assess the evolving role of international law in the sustainable management of mineral commodities, including precious minerals, the Committee surveyed the global UNCLOS, *supra* note 21, Part XI s4(c) art 164; UNFCCC *supra* note 20, Preamble; *Paris Agreement* *supra* note 21; *Revised World Soil Charter* *supra* note 13; VGSSM *supra* note 13; VGGT *supra* note 13; the CCITPIC *supra* note 13; UNDRIP *supra* note 13; UNDROP *supra* note 21, arts 24 and 32(2); IRENA *supra* note 13; the *International Cyanide Management Code*; *Agreement Establishing the Multilateral Trade Organization* [World Trade Organization] (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154; (1994) 33 ILM 13 (WTO Agreement); the *International Commodity Agreements*; *Convention on the Regulation of Antarctic Mineral Resource Activities* (adopted 2 June 1988) SATCM IV-12-10 (Wellington 1988) (CRAMRA); the *ILO Safety and Healthy in Mines Convention*; Minamata Convention *supra* note 13; *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 17 December 1997, entered into force 15 February 1999) 2802 UNTS 225; *United Nations Convention Against Corruption* (signed 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41; the *UN Guiding Principles*; the *OECD Guidelines for Multinational Enterprises and the framework of the United Nations Conference on Trade and Development*. The Committee also considered the findings of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development; the findings of the International Lead and Zinc Study Group; the findings of the International Nickel Study Group; the findings of the International Copper Study Group; the Kimberley Process Certification Scheme; the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*; the framework of the *Global Acid Rock Drainage Guide*; the *Ababa Action Agenda of the Third International Conference on Financing for Development*; the *OECD/G20 Inclusive Framework on Tax Base Erosion and Profit Shifting*; and the *Naimey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector*; ACHPR Res 367 *Resolution on the Protection of Sacred Sites and Territories* (LX) (2017) ACPHR Doc Res.372(LX)2017.

²⁹ China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum.

commodities and extractives industries, they should create and implement practices and principles to ensure fiscal transparency, contain bribery, corruption and money laundering, combat tax avoidance and evasion and, ultimately, seek a more equitable distribution of financial and economic benefits arising out of extractive activities, especially for what concerns artisanal mining. Further, States and private actors should work together to ensure that guidelines and recommendations for sustainable management of minerals, including precious minerals, are developed and implemented at the national level. This includes a reporting requirement and the establishment of governmental and industry-based oversight mechanisms, such as the Extractive Industries Transparency Initiative (EITI).

3.3.4 As noted in the *African Commission's Resolution on Illicit Flight of Capital from Africa*, African States should examine their domestic tax laws and policies in order to prevent illicit financial flows.³⁰ Similarly, as noted in the *Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector*,³¹ there is a lack of transparency, accountability and public participation in African extractive industries, and several steps can be taken to transform national legal and governance frameworks to address illicit financial flows. As recognized in the *2012 African Union's Resolution on Human Rights-Based Approach to Natural Resource Governance*,³² transparency, accountability and public participation in the extractive sector is key.³³ The three elements of transparency, accountability and public participation are intricately intertwined, and must be present for resource governance programs and policies to be effective at regional, national and local levels, natural resource driven conflicts, States are encouraged to ensure that “transparency and accountability mechanisms are in place prior to, and during, initiatives to develop and exploit natural resources.”³⁴ There is a need for full reporting on revenues collected from natural resource activities and on how such revenues have been allocated to programs, governments and communities, and to address governance secrecy or information monopolisation by advancing public availability, accessibility and accuracy of information on relevant laws, regulations and policies.

3.3.5 States should ensure that there are adequate certification and customs screening systems in place to recognize and prevent the trafficking in conflict diamonds. In this context, States should ensure that there are measures in place to enforce bans on these products where an exporting State cannot meet the internationally required standards for certification of minerals.

3.4 Sustainable Energy

3.4.1 The promotion of sustainable energy markets may be international or regional, while many of the rules governing generation of sustainable, clean energy are national, and subject to provincial, cantonal or other municipal laws and policies. This noted, both sustainable energy generation and transmission, as well as energy efficiency, have important transboundary and international environmental implications, and are thus subject to international rules and regimes, as well as domestic laws and enforcement mechanisms. This is reflected in the existing international law and policy instruments, as well as national and sub-national legal instruments and mechanisms that address sustainable energy.

3.4.2 In order to assess the evolving role of international law in the sustainable management of national energy resources, a collection of key treaties, instruments, and standards offers important insights.³⁵ Taken together,

³⁰ ACHPR/Res.236 (LIII) 2013.

³¹ *Resolution on the Protection of Sacred Sites and Territories* *supra* note 36.

³² ACHPR/Res.224 (LI) 2012.

³³ African Union, Resolution on a Human Rights-Based Approach to Natural Resources Governance - ACHPR/Res.224 (LI) 2012.

³⁴ African Union (2019) Report of the African Union Panel of the Wise on Improving the Mediation and Resolution of Natural Resource-Related Conflicts Across Africa, 5th Thematic Report of the African Union Panel of the Wise, October 2019 <<http://wedocs.unep.org/bitstream/handle/20.500.11822/31043/AUP.pdf?sequence=1&isAllowed=y>> accessed 8 November 2020.

³⁵ In order to assess the evolving role of international law in the sustainable management of clean and renewable energy, the Committee surveyed the global IRENA *supra* note 13; the UNFCCC *supra* note 20 Preamble; *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (signed 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (Kyoto

international law, in addition to applicable domestic law, regulates clean energy as a national resource to promote more sustainable management of this resource by establishing several emerging key norms. States are encouraged to use trade and investment policy instruments as leverage for stronger sustainable and renewable energy-related activities and governance systems while still ensuring they align to applicable trade and investment law obligations at the international, regional and bilateral levels. States should ensure that their domestic legal and regulatory systems for energy promote and incentivize the generation and use of sustainable and renewable energy across all sectors and the economy as a whole, and support energy citizenship. There is a need to address the interconnectedness between sustainable energy and the management of food and water resources through a nexus governance approach. There is also a need to consider activities in relation to ocean resources such as methane hydrates. States should ensure that there is transparency and oversight in the regulation and management of sustainable and renewable energy as a sector. Procedures, including impact assessments and safeguarding mechanisms, must be put in place to avoid the risk of maladaptation, for example resulting from well-intentioned policies creating perverse incentives leading to unsustainable natural resource use including unsustainable land use or land use change.

Protocol) and the *Paris Agreement* *supra* note 13; UNCLOS *supra* note 21; the WTO Agreement *supra* note 36. The Committee also considered a number of regional instruments including the Energy Charter Treaty *supra* note 21 and *Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects* (signed 17 December 1994, entered into force 16 April 1998) 2081 UNTS 3 (Energy Charter Protocol on Energy Efficiency); *APC-EU Cotonou Partnership Agreement* (signed 23 June 2000) 2000/483/EC; OJ EU L 209, 11 August 2005 p 27 (Cotonou Partnership Agreement); Kuwait Regional Convention *supra* note 24 and *Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf* *supra* note 24; the *Pan-Arab Renewable Energy Strategy 2030 of the League of Arab States*; *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 24 and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988); ICESCR *supra* note 35; as well as applicable national laws and cases, where relevant.

II. TRENDS AND INNOVATIONS IN INTERNATIONAL LEGAL INSTRUMENTS AND APPROACHES IN SUSTAINABLE NATURAL RESOURCES MANAGEMENT FOR DEVELOPMENT

4. Trends from International Human Rights, Economic, Environmental, Peacebuilding and Post-Conflict Instruments related to the Sustainable Use of Natural Resources for Development

4.1 Human Rights Approaches

4.1.1 International human rights instruments provide protection for individuals in terms of rights that are linked to the ability to access natural resources and the ability to enjoy natural resources that are not degraded, polluted or otherwise threatened. Many regional human rights conventions and national constitutions³⁶ and the UN Special Rapporteur on Human Rights and the Environment has highlighted human rights linkages to other global agendas including climate change and biodiversity. The majority of human rights treaties contain reporting requirements that obligate States to disclose their compliance with the terms of the applicable treaty. This is coupled with the creation of a designated treaty oversight mechanism, which reviews and evaluates State compliance with treaty terms and provides guidance on treaty application. Through these oversight systems, there have been innovative treaty interpretations, which have increasingly entrenched the sustainable use of natural resources, particularly in human rights law jurisprudence.

4.1.2 The application of the human rights instruments by international courts and tribunals, and particularly by the regional courts, such as Caribbean Court of Justice, European Court of Human Rights and the Inter-American Human Rights system, represents significant innovation for the protection of natural resources. Innovating by extensive and evolutive interpretation of treaties, these courts demonstrate a deeper understanding of the ways in which natural resources and human rights are linked and contribute to reaffirming, acknowledging or developing the scope of rights and duties related to the enjoyment of natural resources from hard and soft law. Among these rights and duties is the right of Indigenous peoples to enjoy the natural resources in their traditional lands as well as the right of both current and future generations to derive a benefit from the protection of natural resources confirmed, by the Inter-American Court of Human Rights. Further, there is the recognition of the duty to conduct EIAs or reviews and the right of prior consultation and to free, prior and informed consent for transfers and/or exploitation of territory and natural resources. In the application of international law, courts have innovated by expanding the scope of their jurisdiction going beyond the individual rights and acknowledging these rights to communities and groups of peoples, notably Indigenous peoples. The work of the quasi-judicial jurisdiction in the application of human rights law, such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination at the international level, at regional level the Inter-American Commission on Human Rights and the African commission on human and peoples' rights, and national courts (*e.g.*, Colombian Constitutional Court) and arbitrations, has also played a crucial role in recognizing rights to access and enjoyment of natural resources, as well as regarding the imputation of responsibility for the violation of these rights, including putting at stake the responsibility of private corporations in international and transnational matters.

4.2 Economic Instruments

4.2.1 In recent years, there has been an increasing recognition of the links between international trade and sustainable development, including in the context of continuing debates in the World Trade Organization (WTO) and the implementation of trade rules. Certain progress has been achieved in, for instance, trade negotiations on the liberalization of environmental goods and services (ESG) which aim to enhance the potential of trade to foster rather than frustrate more sustainable management of natural resources.

³⁶ See *African Charter on Human and Peoples' Rights* *supra* note 44; and *Arab Charter on Human Rights* (adopted 23 May 2004), art 38. Note also ongoing discussions on a "Global Pact for the Environment" which may provide a "right to an ecologically sound environment" and a "duty to care for the environment," Global Pact for the Environment, 'The Pact — Content' (*Global Pact Environment*, 2020) <<https://globalpactenvironment.org/en/the-pact/content/>> accessed 8 November 2020.

4.2.2 Regional and bilateral economic agreements, such as Regional Trade Agreements (RTAs), are also being adopted, integrating and accompanied by specific measures promoting sustainable development. Many such agreements include, for instance, interpretive statements, reservations or general exceptions similar or broader than those found in the *General Agreement on Tariffs and Trade* under the WTO, deployed with increasing frequency to ensure that the trade agreements do not unintentionally constrain environmental, social or sustainable development measures, such as the adoption of rules to prevent unsustainable exploitation of natural resources, to incentivize green procurement, or to provide subsidies for more sustainable development. Further, in a new generation of regional and bilateral trade and investment agreements, many States are adopting explicit provisions to avoid negative material or normative impacts arising from trade and investment liberalization, encouraging and structuring collaboration for more optimal or sustainable use of natural resources.³⁷ In certain inter-regional, regional and bilateral economic agreements, Parties are adopting specific chapters on “Trade and Sustainable Development” and other relevant arrangements such as work programmes for collaboration of the Parties to implement mutual commitments on the environment or sustainable development.³⁸ Additionally, economic agreements have begun to include a number of more specialized provisions which protect the environment and natural resources, such as climate finance mechanisms, the promotion of trade in sustainable products, services or technologies, disaster risk reduction collaboration, commitments to encourage subsidies for clean and renewable energy resources or organic agriculture, the inclusion of standard setting for low-carbon development, and the use of monitoring and assessment mechanisms to review the impacts of trade agreement implementation. Further, regional and bilateral trade agreements now increasingly scrutinized through mechanisms such as environmental, human rights or sustainability impact assessments and public consultations, both during negotiations and throughout their implementation.

4.2.3 Further, IIAs, as well as international investment guidance, have also begun to include significant aspects of environmental protection and conservation, particularly those which relate to the sustainable management of natural resources. IIAs are increasingly incorporating commitments to promote sustainable development, and reaffirming State rights and duties to regulate in relation to sustainable development. Additionally, IIAs are including environmental, social and other sustainability concerns in their definitions and application of the scope of investment, like circumstances designations and market access and expropriation, among other points. As one example of international guidance in this area, the *Principles for Responsible Investment in Agriculture and Food Systems*, adopted by the Committee on World Food Security, promote ‘responsible investments’ that contribute to food security and nutrition, including through conservation and sustainable management of natural resources.

4.2.4 Finally, innovative economic instruments are being adopted in international agreements on sustainable development, for instance through provisions to redirect financial flows in the objectives of the *Paris Agreement* under the *United Nations Framework Convention on Climate Change*, and the implementation of access and benefit-sharing arrangements under the *Nagoya Protocol* to the *Convention on Biological Diversity*, and should assist in realigning economic incentives with sustainable resources management imperatives.

4.3 Environment and Sustainable Development Cooperation

Scientific Collaboration

4.3.1 Treaty regimes, particularly those focused on understanding and resolving quickly changing environmental problems and related opportunities for sustainable natural resources management, often develop inter-actionally, building on the foundations of inter-governmental and also independent scientific collaboration mechanisms, such as the Intergovernmental Panel on Climate Change (IPCC), the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the UNCCD Science-Policy Interface (SPI), the Intergovernmental Technical Panel on Soils (ITPS), and the World Ocean Assessment (WOA), to generate new and innovative solutions to persistent and emerging issues on the international scale. States and coalitions

³⁸ Certain Committee Members were supportive of such sustainable development measures adopted in chapters and cooperation arrangements, including those of the European Commission with developing countries, while others were critical, noting that such measures may not be subject to the treaty dispute settlement mechanisms nor envision sanctions for non-compliance.

of like-minded States, and also the work of broader epistemic communities in supporting treaty negotiation and implementation, have worked to better define the contours of the principle of sustainable use to ensure sustainable natural resources management.

4.3.2 There are many developments that have occurred in the last few years to secure more sustainable management of natural resources in multilateral environmental agreements (MEAs) and other treaties on sustainable development. In transboundary problem identification and scientific collaboration, for instance, States are now coordinating international scientific scans and studies, or attempting to provide independent and relatively neutral summaries and compilations of scientific data. Often, in environmental matters, it is a question of sounding the alarm on problems. Data is shared with State decision-makers and, in certain instances, becomes the platform for States and non-State actors to reach consensus on environmental problems and work to address them together, using, for example, Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) or Sustainability Impact Assessment (SIA) procedures. In some cases, cooperation arrangements have also supported efforts to ‘fail forward’ into cooperative instruments to address them.

Financing Mechanisms

4.3.3 The establishment of effective and reliable financial bodies to support activities agreed in international treaties, and therefore, also compliance, is crucial. Increasingly ambitious financial mechanisms are being established as States and others start to invest more deeply in addressing environmental problems. For instance, the Global Environment Facility has supported projects on sustainable resources use and has sought assurances that projects will not harm natural resources. Similarly, new methods of financing for clean development and renewable energy were tested in the UNFCCC through the *Kyoto Protocol*, and a sustainable development mechanism is included in the *Paris Agreement*. These funds are being set in place to implement the law, convening and facilitating the engagement of States which guide and contribute to the funds, and providing guidance to ensure adherence to agreed principles, rules and procedures.

Monitoring, Reporting and Verification

4.3.4 Transparent reporting, monitoring and verification practices have also become more common in international law, having arguably been piloted by State Parties to the treaties discussed herein. For instance, the adoption of operational information-sharing arrangements, such as regular peer-reviewed monitoring, reporting and verification (MRV) systems, public online databases, and clearinghouses for information-sharing have engaged States and non-State actors in the international community in treaty implementation. By encouraging greater transparency in the treaty negotiation and implementation process, in part through the provision of important national information, international law and procedures have advanced. Regular submission of ‘national communications’ has become nearly a standard obligation for States under treaties on the environment.

Public Participation and Access to Information and Justice

4.3.5 Treaty regimes on the environment rely upon public participation and dissemination of information to generate awareness, ownership and support for their work on all levels, and to increase the availability of relevant scientific information, and the UN assists in this process. In the treaties, Parties commit to promote public participation within their decision-making regimes, for instance through the granting of Observer status to non-governmental organizations with an interest in the subject matter, encouraging multilateral engagement of stakeholders in a manner similar to the Observer status granted to ECOSOC-accredited organisations. Public access to information through technology and media is generating new potentials for meaningful public participation and engagement (e.g., UN’s Papersmart online tool). International and national registries are being increasingly encouraged, serving to increase citizen knowledge and awareness of science, law and other developments related to the treaty’s subject matter. Many agencies work to provide independent, accessible information in relation to the objectives and obligations of the agreements. This public engagement in turn supports States efforts to comply with treaty obligations, encouraging partners and stakeholder to contribute to the treaty.

4.3.6 Treaties on the environment and sustainable development support States in resolving disputes on treaty interpretation peacefully, both through the inclusion of dispute settlement and advisory opinion provisions in the accords, and through the encouragement of their appropriate use. Dispute settlement mechanisms, such as the International Court of Justice, the International Tribunal on the Law of the Sea and others, are constituted by treaty regimes. The awards and decisions of these bodies not only resolve disputes that might otherwise further degrade the contested areas, but also assist States to understand their binding obligations and principles, interpreting the treaty law with an independent and respected voice in both contentious and advisory cases. Under these treaties, partners assist States to comply with their treaty obligations, providing analysis, technical knowledge, and training, and hosting forums for judges and officials to discuss new developments in international law that affect environmental protection. There are also increasing opportunities, on a procedural and substantive level, for non-state actors, including individuals as well as groups and peoples, to rely on internationally derived law relating to the sustainable management of natural resources.

4.3.7 Generally, treaties on the environment and on sustainable development have assisted in giving normative effect to the principles that underpin sustainable management in both procedural and substantive ways.³⁹

4.4 Peacebuilding and Post-Conflict Instruments

4.4.1 In recent decades, the promise of international law in post-conflict contexts and environmental peacebuilding has come to the forefront, with significant developments in forums including the International Law Commission (ILC). Environmental peacebuilding has been defined as integrating natural resources and the environment in conflict prevention, mitigation, resolution, recovery, cooperation and peacebuilding. Principle 1 of the ILA New Delhi Principles sets out State responsibility “to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction” and the “duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.” Sustainable use in the context of environmental peacebuilding may refer to the obligation to prevent transboundary environmental damage resulting from the use of natural resources, as well as sustainability with respect to the use of the natural resources themselves, e.g. preventing over-exploitation and ensuring sustainable livelihoods.

4.4.2 New Delhi Principle 6 notes that “good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development.” Principle 24 of the 1992 Rio Declaration states that: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.” Principle 23 notes that, in situations of occupation, “The environment and natural resources of people under oppression, domination and occupation shall be protected.” In addition, Principle 25 of the Rio Declaration states that peace, development and environmental protection are interdependent and indivisible.

³⁹ The Committee considered, *inter alia*, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (30 October 2001) 2161 UNTS 447 (Aarhus Convention); *Convention on Long-Range Transboundary Air Pollution* (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217 and *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions* (adopted 14 June 1994, entered into force 5 August 1998) 2030 UNTS 122; UNCLOS *supra* note 21, s 4(a) art 157; CBD *supra* note 23, Preamble and art 6 and Cartagena Protocol *supra* note 24); the UNFCCC *supra* note 20, art 4(1)(d); Kyoto Protocol *supra* note 35; the *Paris Agreement* *supra* note 21 Preamble, arts 2(1), 12, and 15; the UNCCD *supra* note 13; the *International Tropical Timber Agreement* (adopted 27 January 2006, entered into force 7 December 2011) UN Doc TD/TIMBER.3/12 (ITTA 2006; the Espoo Convention *supra* note 21; the *Vienna Convention on the Protection of the Ozone Layer and Protocols* *supra* note 21, art 2 and *Montréal Protocol on Substances that Deplete the Ozone Layer* *supra* note 21; London Convention *supra* note 27; Stockholm Convention *supra* note 13; *World Trade Organization Agreement on Sanitary and Phytosanitary Measures* (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493 (SPS Agreement); the Helsinki Convention *supra* note 24; *Convention on Transboundary Effects of Industrial Accidents* (adopted 17 March 1992, entered into force 19 April 2000) 2105 UNTS 457; the London Convention *supra* note 27 and the Protocol to the London Convention *supra* note 19; and also the Kuwait Regional Convention *supra* note 24 and *Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf* *supra* note 24.

4.4.3 As outlined in the ILC's analysis on this topic, the 1977 *Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques* prohibits the military or other hostile use of environmental modification techniques that have "widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (Article 1). In addition, Article 35 and Article 55 of the 1977 *Additional Protocol I to the 1949 Geneva Conventions* prohibit warfare that may cause "widespread, long term and severe damage to the natural environment." The duty to not cause significant damage is also referenced in the 1998 *Rome Statute of the International Criminal Court*, which states that "intentionally launching an attack in the knowledge that such attack will cause incidental [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" constitutes a war crime (Article 8(2)(b)(iv)). In 2016, the ICC Office of the Prosecutor issued a *Policy Paper on Case Selection and Prioritisation*, explaining "the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land." In addition to the work of the ILC on protection of the environment in relation to armed conflicts (see e.g. Draft principle 21 on Sustainable use of natural resources in situations of occupation), the UN Environment Assembly (UNEA) is also increasingly addressing links between conflict, peacebuilding and the environment (UNEA Res. 2/15 and 3/1). Furthermore, the Sustainable Development Goals (SDGs) aim to both mitigate fragility, corruption and environmental hazards on the one hand (e.g. SDGs 3.9, 15.7, 16.4, 15.2), and enable good governance on the other (e.g. SDG 16.7, 5.a, 2.3, 12.2, 16.8), meaning that their effective implementation could further the objectives of environmental peacebuilding.

Secure Land and Water Access

4.4.4 Recognizing that access to land and natural resources are key to the lives and livelihoods of millions of people worldwide, secure land tenure, also recognition, promotion and protection of all legitimate tenure rights (as per the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT)), including for women, along with access to water, are key to secure sustainable use of natural resources. They are vital in post-conflict situations, as lack of access to such resources can exacerbate the tensions giving rise to the conflict, and the failure to adequately address concerns in the peacebuilding process can contribute to the renewal of armed conflict. At the same time, in many States emerging from conflict, agriculture, and thus access to land, soil and water resources, plays a critical role in survival. In the context of these competing concerns, recognizing the pressing need to avoid a renewal of hostilities in order to construct a durable peace, sustainable use of land, natural resources and access to water should be addressed. While approximately half the peace agreements concluded between 1989 and 2004 referred to natural resources, nearly all major agreements from 2005 onwards contain explicit provisions. Recent examples, such as the 2016 *Peace Agreement between Colombia and the FARC-EP*, recognize the inherent necessity of including sustainable use of natural resources as a cornerstone in building post-conflict society.

5. Innovative Techniques and Requirements in International Instruments on Sustainable Management of Natural Resources for Development

5.1 Sustainable Resources Management through Transparency and Stakeholder Engagement

5.1.1 In the context of international agreements on sustainable development, reporting requirements are increasingly becoming a standard method through which the terms of the agreement are implemented and oversight is provided. Reasons for this trend include the necessity of creating a compliance assessment structure for the agreement and the requirement that the international community and stakeholders, especially civil society members at all levels, have access to information on environmental progress, further environmental and other threats, including threats to natural resources. In addition, the requirement for publicly available EIA promotes transparency and stakeholder participation, and provides an anchor for review. These forms of assessment are innovative in that they attempt to create regulatory processes regarding the sustainable use of natural resources at the national and international levels.

5.1.2 Another critical aspect of oversight in the context of international agreements on sustainable development is the focus on inclusion, transparency and the promotion of public awareness of the potential environmental and natural resource impacts of activities subject to the terms of the treaty. Included in these areas are, increasingly, efforts to foster public empowerment and engagement in the discussions and debates regarding proposed activities falling within the ambit of the agreement. By bringing the voices of individuals and civil society into a realm which was formerly reserved for national and international actors, these provisions are innovative. For example, the *Minamata Convention on Mercury*, one of the newest MEA instruments in international law, requires States to generate information on mercury stocks and mercury production in their territories, as well as to regulate these production and storage of mercury in their jurisdiction. At the same time, the *Minamata Convention* provides for significant control and oversight of mercury transportation, import and export within and between States.

5.1.3 In terms of generating transparency within certain sectors, the corporate social responsibility initiative the Extractive Industry Transparency Initiative (EITI) serves as an example of a transnational framework for enhancing transparency in revenue flows to the governments of resource States. The EITI requires disclosure of revenue flows to the governments of resource States and disclosure of contracts, as well as the disclosure of beneficial owners of companies. By generating these forms of transparency requirements at the national and sectoral levels, governments and corporations can be held accountable to the public for their actions and decisions as well as for the financial distributions they make as a result of resources generated in this context. In addition, transparency measures such as those under the EITI structure are also intended to serve as a counterweight to the potential for companies to commit acts of bribery and/or illicit influence peddling as well as for government actors to misuse profits from the trade in and licensing of natural resources. This method of including transparency as a core element of accountability and anti-corruption is innovative as a means to promote the sustainable use of natural resources.

5.2 Equitable Benefit-Sharing from Sustainable Natural Resources Management

5.2.1 A growing number of treaties and other legal instruments refer to benefit-sharing from the use of natural resources. Benefit-sharing emerged as a manifestation of the international legal principles of equity and international cooperation, evolving at the intersection of natural resources governance and human rights law – particularly the right to development. The principle may, depending on the resource, promote procedural fairness and/or equitable outcomes in the sustainable management of natural resources. It may also require the sharing of monetary and/or non-monetary benefits, including economic, environmental, social and intrinsic benefits. It has been applied to relationships between States, within States, and between generations.

5.2.2 The application of the benefit-sharing principle varies depending on the natural resource involved, as well as its nature and location. The principle's best known expression is in the biodiversity regime, which calls for the fair and equitable sharing of the benefits resulting from the utilization of genetic resources and associated traditional knowledge held by sovereign States or their indigenous peoples and local communities, and in the associated regime addressing plant genetic resources for food and agriculture. It is also present as a voluntary mechanism in the climate regime, namely REDD+. Furthermore, it forms part of the rules governing the sustainable management of outer space, an area of common interest, and celestial bodies, to which the common heritage of humankind is applicable. Additionally, it is being addressed in the emerging rules governing deep sea bed mining in the Area under UNCLOS, which is also the common heritage of humankind.

5.2.3 Binding commitments on equitable benefit-sharing are challenging to negotiate. For example, negotiations have been particularly complex on potential benefit-sharing from 'digital sequence information' in the CBD, and benefit-sharing from marine genetic resources in ABNJ under the oceans regime. Negotiations on intellectual property rights over genetic resources and traditional knowledge, folklore and genetic resources have not produced a treaty after nearly twenty years of negotiations. Yet, the principle will remain relevant to debates and negotiations in international fora given the economic and social inequalities between and within States recognized in the New Delhi Declaration, which will likely grow due to the global economic impact of the COVID-19 pandemic. As such, benefit-sharing may be used as an innovative requirement in future treaties and instruments addressing sustainable resources management.

5.3 Legal Indicators of Effectiveness for Sustainable Natural Resources Management

5.3.1 Assessing the effectiveness of international law related to sustainable development is an essential task, particularly in the context of sustainable use of natural resources, and yet it remains somewhat difficult to implement. In this context, the creation of legal indicators for effectiveness of international law related to sustainable development is critical, although questions as to how to collect information and convert data into indicators and the need to avoid misuse of data remain. The innovative idea of developing and applying these legal indicators offers the chance to generate a larger system in which assessment of sustainable use of natural resources can be conducted.

5.3.2 In this context, a potential approach to analysis could build on the existing systems in place for establishing legal indicators in other fields that link to MEAs and natural resource governance, including three measures of effectiveness: (i) legal effectiveness, which focuses on the issue of compliance; (ii) behavioural effectiveness, which focuses on the role of international law in influencing and even changing actors' behavior towards achieving the treaty's objectives; and (iii) problem-solving effectiveness, which focuses on the ability of the legal rule to solve or mitigate the problem it was designed to address.

5.4 Control of Illicit Flows for Sustainable Natural Resources Management

5.4.1 The control of illicit flows of natural resources, including flows of endangered species, wildlife, fisheries resources, timber and minerals, and the attendant human rights abuses and loss of biodiversity, is a significant element of promoting and ensuring the sustainable use of natural resources at the international and national levels. Methods of control have been crafted as national and international law, each form containing innovative elements in terms of the obligations placed on actors throughout the international and national systems involved and the ways in which these actors can be held accountable.

5.4.2 A number of States, such as the United Kingdom and France, have enacted legislation addressing and banning conflict minerals of various forms as well as the forced labor used to extract them. Further, under the Dodd Frank Act enacted by the United States and subsequent regulations enacted by the US Securities and Exchange Commission, there is an obligation for companies to disclose if they are using minerals originating in the Democratic Republic of Congo or neighboring States. Additionally, the EU has established regulations requiring that EU importers of tin, tantalum and tungsten, related ores and gold from conflict areas follow certain due diligence obligations. Perhaps the best-known binding instrument in this regard is the Kimberley Process Certification Scheme for Rough Diamonds, which establishes a series of requirements for the certification of diamonds as non-conflict diamonds and the ability to trace diamonds to the source of their extraction. Additionally, inspired by non-binding instruments such as the United Nations Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance for Responsible Mineral Supply Chains of Minerals from Conflict Affected and High-Risk Areas, States have gradually started to adopt binding legislation on the regional and national levels to address the application of disclosure and due diligence to corporate practice and regulation in the context of conflict minerals and other resources which can be yielded through illicit activities.

6. Sustainable Natural Resources Management in International Dispute Settlement

6.1 In recent years, a number of international courts and tribunals, as well as arbitral bodies and other international dispute settlement mechanisms, have addressed issues relating to sustainable management of natural resources. The decisions of these dispute settlement mechanisms demonstrate openness to the recognition of sustainable management of natural resources as a principle, if not indeed a duty, that is justiciable across a variety of jurisdictional competencies in a variety of specific contexts.

6.2 At the international level, decisions such as those issued by the International Court of Justice in the *Case Concerning the Project*,⁴⁰ *Pulp Mills on the River Uruguay*,⁴¹ *Whaling in the Antarctic (Australia v Japan)*,⁴² and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*⁴³ demonstrate a certain level of recognition, in international law, of the principle that shared natural resources should be managed sustainably in certain conditions. This includes the recognition of shared fishing rights in the *Pulp Mills on the River Uruguay*⁴⁴ case and of species such as whales in *Whaling in the Antarctic*,⁴⁵ and the sustainable use of shared natural resources in *Gabcikovo-Nagymaros*, particularly the separate opinion of Justice Weeramantry.⁴⁶ Similar trends can be observed in the Permanent Court of Arbitration's *Abyei-Sudan* case,⁴⁷ relating to recognition and protection of Indigenous knowledge of and interests in natural resources, *Iron Rhine (Belgium v Netherlands)* case,⁴⁸ recognizing the obligation of Belgium to undertake environmental impact assessments,⁴⁹ and *Indus Waters Arbitration (Pakistan v India)* case,⁵⁰ recognizing the importance of shared waterways and to achieve development while minimizing impacts on water flow diversion, decisions of the International Centre for Settlement of Investment Disputes (notably *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*,⁵¹ relating to the ability of States to abrogate contracts relating to the exploitation of national oil resources, and *Gauff (Tanzania) Ltd v United Republic of Tanzania*,⁵² relating to contractual obligations of a State stemming from water and sewerage contracts with foreign entities), and the International Tribunal on the Law of the Sea in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,⁵³ establishing State requirements to use the precautionary principle in the conduct of contract-based exploration for natural resources in the Area and *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, establishing flag-State responsibility to prevent, detect, report and investigate illegal, unreported and unregulated fishing, including in the EEZs of third-party States.⁵⁴

6.3 The latest WTO reports, in particular, show an increasing receptivity towards accommodating for sustainable natural resources management concerns, even when this entails restricting international trade, via conservation-related exceptions. In *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* and *China – Measures Related to the Exportation of Various Raw Materials*, WTO adjudicators have in particular recognized Members' right to design broad natural resources conservation programmes in a way that responds to their own concerns and priorities in light of the principle of sustainable development and the principle of sovereignty over natural resources.⁵⁵ In *US – Import Prohibition of Certain Shrimp and Shrimp Products* and *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Article 21.5)*, they clarified that Members can legitimately pursue conservation policies for the sake of

⁴⁰ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 7.

⁴¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14.

⁴² *Whaling in the Antarctic (Australia v Japan) (Judgement)* [2014] ICJ Rep 226.

⁴³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Judgement)* [2018] ICJ Rep 15. Appeal No: 205/19 (31 July 2020).

⁴⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgement)* [2010] ICJ Rep 14.

⁴⁵ *Whaling in the Antarctic (Australia v Japan) (Merits)* [2014] ICJ Rep 226.

⁴⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry) [1997] ICJ Rep 7.

⁴⁷ *Abyei v Sudan*, Permanent Court of Arbitration (2009) 48 ILM 1258.

⁴⁸ *Iron Rhine Arbitration, Belgium v Netherlands*, Award, ICGJ 373 (PCA 2005).

⁴⁹ *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Procedural Order No 10 (15 September 2016).

⁵⁰ *Indus Waters Kishenganga Arbitration, Pakistan v India*, Final Award, ICGJ 478 (PCA 2013).

⁵¹ *Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II)*, PCA Case No. 2009-23 (25 January 2012).

⁵² *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July 2008).

⁵³ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case 17, Advisory Opinion (1 February 2011).

⁵⁴ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, ITLOS Case 21, Advisory Opinion (2 April 2015).

⁵⁵ WTO, *China: Measures Related to the Exportation of Various Raw Materials – Reports of the Panels* (22 February 2012) WT/DS394/R Add.1 and Corr.1, WT/DS395/R Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1 [7.377]-[7.381]; WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum – Reports of the Panels* (29 August 2014) WT/DS431/R and Add.1, WT/DS432/R and Add.1, and WT/DS433/R and Add.1 [7.262].

protecting both non-living and living natural resources,⁵⁶ even when they are not endangered or threatened by extinction,⁵⁷ and even if such policies have extraterritorial effects.⁵⁸

6.4 At the regional level, key decisions have come from the *African Charter on Human and Peoples' Rights* system, Caribbean Court of Justice, European Court of Human Rights and the Inter-American Human Rights system.⁵⁹ Further, a number of quasi-judicial and other bodies have issued findings and decisions that are critical in entrenching the sustainable management of natural resources in organizational and as well as international, regional and national legal practice. The bodies include the World Bank Inspection Panel,⁶⁰ Inter-American Development Bank Independent Consultation and Investigation Mechanism,⁶¹ Committee on the Elimination of Racial Discrimination,⁶² Human Rights Committee,⁶³ and multilateral environmental agreement enforcement mechanisms such as those associated with the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*⁶⁴ and the *North American Agreement on Environmental Cooperation*.⁶⁵

6.5 At the national level, the seminal *Minors Oposa* case from the Philippines opened a new way of thinking about the ability of current generations to assert their rights and the rights of future generations in the context of climate change and natural resources.⁶⁶ The trend has continued through to the 2019 *Urgenda* decision in the Netherlands, which saw the Supreme Court uphold a determination that the State was not complying with the obligations it had undertaken regarding climate change.⁶⁷ Since the months since *Urgenda*, a spate of similar climate litigation claims have been brought around the world, and additional courts, such as the Irish Supreme Court, have endorsed this line of reasoning.⁶⁸

⁵⁶ In *United States – Standards for Reformulated and Conventional Gasoline*, the WTO adjudicators have also considered that clean air qualifies as an exhaustible natural resource: WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of Panel* (20 May 1996) WT/DS2/R [6.36].

⁵⁷ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Panel* (6 November 1998), WT/DS58/AB/R [128]–[132]; WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico) – Report of the Appellate Body* (3 December 2015) WT/DS381/RW and Add.1 [7.521].

⁵⁸ See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights (Communication No. 276/2003 (2010); Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria (Communication No. 155/96) (2002); Fishermen and Friends of the Sea v Environmental Management Authority and Atlantic LNG, [2018] UKPC 24; Depalle v France, ECtHR (no. 34044/02) (2010); Tatar v Romania, ECtHR (no. 670321/01) (2009); Mayagna (Sumo) Awas Tingi Community v Nicaragua, IACHR Series C No. 79, [2001] IACHR 9, IHR 1462 (IACHR 2001), 31 August 2001; Saramaka People v Suriname, IACHR Series C No. 185, IHR 13058 (IACHR 2008), 12th August 2008.

⁵⁹ See discussions in MC Cordonier Segger with HE CJ Weeramantry (eds), *Sustainable Development in International Courts and Tribunals* (Routledge 2017).

⁶⁰ See Cambodia - Forest Concession Management and Control Pilot Project: Request for Inspection - Inspection Panel Report and Recommendation, Report 31862 (2005); Chad-Cameroon Pipeline Project - Outcome of the Inspection Panel's Investigation, Report 36569-TD (2006).

⁶¹ See *Marena Renovables Wind Project Review*, Case No. ME-MICI002-2012 (2016); *Panama Canal Expansion Program*, Case No. PN-MICI002-2011-31 (2011).

⁶² Decision 1 (68) (United States of America) (2014).

⁶³ *Ilmari Lansman v Finland*, U.N. Doc. CCPR/C/83/D/1023/2001 (2015); *Ivan Kitok v Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988); *Jouni E. Lämsman et al. v Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

⁶⁴ Aarhus Convention Compliance Committee Case Concerning Armenia, ACCC/C/2016/138 Armenia (2016); Aarhus Convention Compliance Committee Case Concerning the European Union, ACCC/M/2017/3 European Union (2018); Aarhus Convention Compliance Committee Case Concerning France, ACCC/C/2007/22 France (2009); Aarhus Convention Compliance Committee Case Concerning Romania, ACCC/C/2012/69 Romania (2015).

⁶⁵ *BC Salmon Farms*, SEM-12-001 (2014); *Metales y Derivados*, SEM-97-007 (1998); *Migratory Birds*, SEM-99-002 (2001); *Ontario Logging II*, SEM-04-006 (2007).

⁶⁶ *Minors Oposa v Factoran*, G.R. No. 101083 (224 SCRA 792) (1993).

⁶⁷ *Urgenda Foundation v State of the Netherlands*, ECLI:NL:HR:2019:2007 (2019).

⁶⁸ See *Friends of the Irish Environment v The Government of Ireland, Ireland and the Attorney General*, Appeal No: 205/19 (31 July 2020). WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (6 November 1998), WT/DS58/AB/R [133] and WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico) – Report of the Panel* (3 December 2015) WT/DS381/RW and Add.1 [7.521].

III. INTERPRETATION AND APPLICATION OF THESE GUIDELINES

7. In their interpretation and application, the 2020 ILA Guidelines on the Role of International Law in Sustainable Natural Resources Management for Development are inter-related and each of them should be read in the context of the other Guidelines provided, in the context of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, other relevant Resolutions of the ILA, and the international legal instruments on sustainable development mentioned herein. Nothing in these Guidelines shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations and the rights of peoples under that Charter.

Draft Resolution 5/2020 on Legal Issues of Nuclear Weapons, Nuclear Non-Proliferation and Peaceful Uses of Nuclear Energy

The 79th Kyoto Conference of the International Law Association, held online, 29 November-13 December 2020,

HAVING CONSIDERED the Reports of the Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law,

EMPHASIZING the importance of legal issues of nuclear security, nuclear non-proliferation and the use of nuclear energy for peaceful purposes, and considering the contribution the Association can make to the study and clarification of these issues,

RECOGNIZING the assessment of relevant law and best practices conducted by the Committee,

ACKNOWLEDGING in particular the interrelationship between the three pillars of the Treaty on the Non-Proliferation of Nuclear Weapons – i.e. non-proliferation of nuclear weapons; the right to develop research, production and use of nuclear energy for peaceful purposes; and nuclear disarmament – emphasized by the Committee,

CONCERNED about challenges for nuclear non-proliferation, international cooperation to ensure nuclear safety, and nuclear disarmament under strict and effective international control,

THANKING the Chair, the Rapporteur and all contributors for the valuable work done,

ENDORSES the Recommendations annexed to this Resolution,

COMMENDS these Recommendations to States, the United Nations, the International Atomic Energy Agency, and non-governmental organizations working in these fields,

ENCOURAGES the Committee to continue its work, focusing on emerging challenges, open issues and concerns identified in its Report.

Recommendations to Ensure Compliance with Legal Obligations concerning Nuclear Weapons, Nuclear Non-Proliferation and Peaceful Uses of Nuclear Energy with Commentary

A. Nuclear Non-Proliferation

(A 1) To effectively ensure non-proliferation of nuclear weapons and other nuclear explosive devices, both legally binding regulation and politically binding commitments are necessary.

Commentary

(1) The Nuclear Non-Proliferation Treaty (NPT)¹ and treaties on nuclear-weapons-free zones² require the application of comprehensive safeguards by their States Parties.

(2) With respect to implementation of safeguards agreements based on the NPT, the International Atomic Energy Agency (IAEA) is fully authorised to verify the correctness and completeness of declarations made by States.

(3) Nuclear-test-ban verification, for which the IAEA is not mandated, is conducted by a special organization under the Comprehensive Nuclear Test Ban Treaty (CTBT).³ Whilst the entry into force of the CTBT still depends on ratification by another eight States, one of the Treaty requirements, stipulating that at entry into force of the Treaty the verification regime shall be capable of meeting the verification requirements of this Treaty, is already met.⁴ Verification activities conducted by the Preparatory Commission are based on a shared interest of participating States.

(4) The CTBT in its Annex 2 lists 44 States that participated in the negotiations of the Treaty and possessed nuclear power or research reactors at the time. In accordance with Article XIV CTBT these 44 States must become Parties for the Treaty to enter into force. Three of these States (the Democratic People's Republic of Korea, India, and Pakistan) have not yet signed the Treaty and an additional five States (China, Egypt, Iran, Israel, and the United States) have signed but not yet ratified it.

(5) Even after the Treaty's entry into force disputes on the assessment of certain activities may arise. Any successful dispute settlement will depend on international cooperation.

(6) To assure the non-diversion of nuclear material from declared activities, cooperation between States and the IAEA is necessary (Art. 3 INFCIRC/153 and Art. 1 INFCIRC/540).⁵ Rights and obligations specifically agreed in

¹ Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968), 729 *UNTS* 161. The treaty has 191 State Parties, see <https://www.un.org/disarmament/wmd/nuclear/npt/>. The NPT is the world's most widely adhered to international nuclear arms control and nuclear disarmament treaty, yet three nuclear-armed States, India, Israel and Pakistan, never became Parties, and North Korea had announced its withdrawal on 12 March 1993, suspended this declaration on 11 June 1993, but declared an immediate effectuation of its withdrawal on 10 January 2003. SC Res 1695 (2003) and various subsequent resolutions have requested North Korea to retract its withdrawal and abandon all nuclear weapons and weapons programs in a complete, verifiable and irreversible manner.

² Treaty for the Prohibition of Nuclear Weapons in Latin America – Treaty of Tlatelolco – (14 February 1967), 634 *UNTS* 326; South Pacific Nuclear Free Zone Treaty – Rarotonga Treaty – (6 August 1985), 1676 *UNTS* 223; Treaty on the South-East Asia Nuclear Weapon Free Zone – Bangkok Treaty – (15 December 1995), 1981 *UNTS* 129; African Nuclear-Weapon-Free Zone Treaty – Pelindaba Treaty – (11 April 1996), 35 *ILM* 698; Treaty on a Nuclear-Weapon-Free Zone in Central Asia – Semipalatinsk Treaty – (8 September 2006), http://www.opanal.org/NWFZ/CentralAsia/canwzf_en.htm; Declaration by Mongolia of its nuclear-weapon-free status (25 September 1992), and the Law of Mongolia on its Nuclear-Weapon-Free Status which entered into force on 3 February 2000, <http://www.nti.org/treaties-and-regimes/nuclear-weapon-free-status-mongolia/>, recognized by UNGA Res 55/33 S (20 November 2000). A Middle East Zone Free of Nuclear Weapons and Other Weapons of Mass Destruction is subject of a long-standing proposal of the UN General Assembly and NPT Review Conferences, see <http://www.fas.org/nuke/control/menwzf/index.html>.

³ Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted by General Assembly Resolution 50/245 (10 September 1996).

⁴ See Sabine Bauer and Cormac O'Reilly, 'The Comprehensive Nuclear-Test-Ban Organization (CTBTO): Current and Future Role in the Verification Regime of the Nuclear Test-Ban-Treaty', in Jonathan L. Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law. Vol. II: Verification and Compliance* (The Hague/Berlin/Heidelberg: Asser Press/Springer, 2016), 131-150, at 142-143.

⁵ IAEA, The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/153 (Corr.), June 1972.

IAEA, Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corr.), September 1997. See SC Res 1887 (2009), para. 15.

Comprehensive Safeguards Agreements and Additional Protocols require States Parties to cooperate with the IAEA. These treaties are not limiting the mandate of the Agency as confirmed in its Statute, in decisions taken by its Governing Bodies, and in consistent practice endorsed by the Security Council on numerous occasions. The ability of the IAEA to draw sound and independent conclusions about the correctness and completeness of States' declarations and thereby provide all States credible assurance of the non-diversion of nuclear material and the absence of undeclared nuclear material or activity is an indispensable predicate of nuclear cooperation.

(7) Special and supplementary safeguards systems are in effect to ensure nuclear non-proliferation for the 28 Member States of the European Atomic Energy Community (EURATOM) and for the two States cooperating under the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC).

(8) There are also bilateral safeguards which complement obligations of States Parties under the NPT and IAEA safeguards agreements.⁶

(9) To appropriately reduce proliferation risks associated with certain nuclear activities, civil use of nuclear-weapon-usable nuclear material should be regulated and international control of uranium enrichment and reprocessing of spent fuel should be ensured. Relevant measures need to be harmonised, while assuring fuel supply for peaceful purposes and preventing unbalanced or discriminating interference with international trade.

(10) Cooperation on and control of dual-use technology transfers are complementary (and not conflicting) elements of effective non-proliferation.

(A 2) States ought to create a universal nuclear security regime.

Commentary

(1) Efforts for developing such a regime could be based on an endeavour to universalize existing legally binding instruments, such as the Convention on the Physical Protection of Nuclear Material (CPPNM),⁷ or the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).⁸ They should also involve measures to reinforce existing mechanisms, such as the Global Initiative to Combat Nuclear Terrorism (GICNT),⁹ or the Nuclear Energy Agency of the OECD (NEA),¹⁰ aiming at making the nuclear security regime more transparent through further legally binding commitments. Industry bodies such as the World Institute of Nuclear Security (WINS) may be helpful to provide know-how and assistance. IAEA Nuclear Security Recommendations¹¹ need to be implemented in national responsibility.

(2) The CPPNM was amended on 8 July 2005.¹² There are 156 States Parties to the original CPPNM and 123 States Parties to the CPPNM Amendment.¹³ The ICSANT has 117 States Parties.¹⁴

(3) The challenge of nuclear terrorism requires cooperative responses by States implementing their non-proliferation obligations and ensuring law enforcement and criminal prosecution.

(4) Synergy effects between non-proliferation controls and measures to ensure nuclear safety and security should be used. In an environment of increasing terrorist activity nuclear safety and nuclear security must be treated together.

(A 3) Cooperation by States to implement and support the work of the 1540 Committee of the Security Council should be intensified.

Commentary

(1) Effective implementation by all States of their obligations under Security Council Resolutions 1540 (2004)

⁶ See e.g. for Australia The *Nuclear Non-Proliferation (Safeguards) Act 1987*, the *Nuclear Non-Proliferation Regulations 1987*, the *Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Act 1993*, and the *Civil Nuclear Transfers to India Act 2016*, <http://search.dfat.gov.au/s/search.html?collection=dfat&form=simple&query=non-proliferation-disarmament-arms-control&profile=dfat>

⁷ Convention on the Physical Protection of Nuclear Material – CPPNM – (1 November 1979), 1456 *UNTS* 125, INFCIRC/274.

⁸ International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT), adopted on 13 April 2005), 2445 *UNTS* 89.

⁹ Global Initiative to Combat Nuclear Terrorism (GICNT), <http://www.gicnt.org>.

¹⁰ Nuclear Energy Agency (NEA), <https://www.oecd-nea.org>.

¹¹ Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities, INFCIRC/225/Revision 5, IAEA Nuclear Security Series No.13, http://www-pub.iaea.org/MTCD/publications/PDF/Pub1481_web.pdf.

¹² Amendment to the Convention on the Physical Protection of Nuclear Material (8 July 2005), INFCIRC/274/Rev.1/Mod.1, the amendment entered into force on 8 April 2016.

¹³ See https://www-legacy.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf.

¹⁴ See https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtmsg3&clang=en.

and 2325 (2016) can make a significant contribution to strengthening the cause of nuclear non-proliferation, enhancing nuclear security world-wide, and reducing the risk of nuclear terrorism.

B. Use of Nuclear Energy for Peaceful Purposes

(B 1) The right to develop research, production and use of nuclear energy for peaceful purposes without discrimination entails a responsibility to ensure nuclear security and nuclear safety, including a safe radioactive waste management system.

Commentary

(1) The right to peaceful use of nuclear energy is subject to verification and control of compliance with nuclear security and non-proliferation obligations. Nuclear non-proliferation agreements and the relevant Security Council Resolutions 1540 (2004) and 2325 (2016) do not conflict with, or alter the rights and obligations of States Parties to the NPT.

(2) Clarifications are needed under what conditions enrichment and reprocessing may be considered peaceful use.

(3) The use of nuclear energy presents major challenges for the natural environment, which are caused by the discharge of radioactive materials into the environment in the course of the production process of uranium and plutonium, by accidents or malfunctioning of nuclear installations, by nuclear-propelled vehicles, during nuclear transports, and radioactive waste disposal. These challenges, coinciding with health risks for humans, are not fully met by applicable treaty law. The basic rule in customary law is the prohibition to cause significant transborder harm (no-harm rule), recognized in the *Trail Smelter*¹⁵ arbitration. Any of these challenges affect the fate of future generations and are prompting an enhanced responsibility for relevant decision-makers. This underlines the need for international standard setting procedures creating soft law in this field.¹⁶

(4) The IAEA, as confirmed by its mandate, has a central role in supporting States in meeting their nuclear safety and security responsibilities.¹⁷ The IAEA's functions in this area are clearly and inextricably linked to its work on non-proliferation of nuclear weapons and facilitating the peaceful uses of nuclear energy. While the term 'security' is not explicitly mentioned in the IAEA Statute, there are certain statutory functions of the IAEA to which the Agency's role in nuclear security is attributable. These include *inter alia* provisions concerning training and technical advice, or provision of equipment or supplies, as well as the facilitation of information exchange and related services.¹⁸

(5) Under the IAEA's auspices, guidance for the establishment, development and maintenance of States' nuclear security regimes has been and continues to be developed. While not legally binding, these guidance instruments, contained in the IAEA *Nuclear Security Series*, address a range of issues related to nuclear security – from laying out general goals of a State's nuclear security regime, to presenting recommendations on measures that should be taken by States to achieve and maintain effective national nuclear security regimes. They provide technical guidance to assist States with implementing the measures contained in the recommendations, thereby elaborating on, for instance, technical aspects of border monitoring equipment or identifying vital areas at a nuclear facility.

(B 2) Storage and disposal of radioactive waste should be regulated by binding rules of universal application.

Commentary

(1) It should be mandatory to employ common standards and the most developed technologies to this effect.

¹⁵ *Trail Smelter Case (U.S., Canada)* (16 April 1938 and 11 March 1941), *Reports of International Arbitral Awards* (RIAA), Vol. III, 1905-1982.

¹⁶ See Michael Bothe, 'The Peaceful Use of Nuclear Energy and the Protection of the Environment', in Black-Branch and Fleck (eds), *Nuclear Non-Proliferation in International Law: Vol. III Legal Aspects of the Use of Nuclear Energy for Peaceful Purposes* (Asser Press/Springer, 2016), 295-310.

¹⁷ Statute of the International Atomic Energy Agency – IAEA Statute – (26 October 1956), 276 UNTS 4, amended 1963, 1973, 1989, and 1999, Article II; see OECD Nuclear Energy Agency (NEA), *International Nuclear Law: History, Evolution and Outlook* (2010), including the following contributions: Carlton Stoiber on Nuclear Security (pp 219-242), Laura Rockwood on IAEA Safeguards (pp 243-270), Quentin Michel on Control of Nuclear Trade (pp 271-306), Odette Jankowitsch on Transport of Nuclear Materials (pp 187-218).

¹⁸ IAEA Statute Articles III.A.1-4 and VIII; see 'The International Legal Framework for Nuclear Security,' IAEA International Law Series, No. 4, 2011, pp. 1-3.

Determined efforts need to be made towards sustainable radioactive waste management, including through technological solutions based on future innovations that may help in addressing challenges, which may appear to be irresolvable at the present stage. A warning sign to protect and assist human beings in effectively identifying radioactive waste even after thousands of years should be considered.

(2) To ensure the good functioning of relevant treaty systems and assist States in effective implementation, mandatory international review mechanisms, as they already exist under the Convention on Nuclear Safety (CNS)¹⁹ and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,²⁰ are desirable.

(3) Multilateral arrangements could help to improve cooperation on safe and secure uses of nuclear energy for peaceful purposes. This applies to the handling of nuclear material and the operation of nuclear facilities as well as to enrichment activities.

(B 3) A global nuclear liability regime based on worldwide treaty relations would be desirable. Such regime should accurately reflect the physical environment. As long as it is not in force, regional harmonisation remains imperative.

Commentary

(1) Considering the likelihood of serious harm being caused by explosive devices combining radioactive material with conventional explosives, tighter regulation regarding access to radioactive materials is an important method in the prevention of nuclear terrorism.

(2) All Governments should address the issue of international nuclear liability and consider becoming party to one of the relevant conventions, i.e. the Paris Convention or the Vienna Convention.^{21, 22} They should also adopt appropriate national legislation.²³

(3) Full support needs to be given to the IAEA's incident and emergency system including its assessment and prognosis mandate.

C. Nuclear Disarmament

(C 1) The obligations recognised in Article VI NPT to reach

- the cessation of the nuclear arms race at an early date,
- nuclear disarmament, and
- general and complete disarmament.

require negotiations to be pursued in good faith and implementation measures under strict and effective international control.

Commentary

(1) Article VI NPT is far from conditioning nuclear disarmament on the achievement of general and complete

¹⁹ Convention on Nuclear Safety – CNS – (20 September 1994), 1963 *UNTS* 293, *see* INF/CIRC/449.

²⁰ Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, adopted on 29 September 1997, IAEA Document GOV/INF/821-GC (41)/INF/12, INF/CIRC/546.

²¹ Paris Convention on Third Party Liability in the Field of Nuclear Energy (29 July 1960), 956 *UNTS* 251, amended by the Additional Protocol of 28 January 1964, 956 *UNTS* 335, and the Protocol of 16 November 1982, 1650 *UNTS* 444; Brussels Convention Supplementary to the Paris Convention (31 January 1963), 1041 *UNTS* 358, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, 1941 *UNTS* 358; Vienna Convention on Civil Liability for Nuclear Damage (21 May 1963), 1063 *UNTS* 293 with the Protocol of 12 September 1997 to Amend the Vienna Convention on Civil Liability for Nuclear Damage, 36 *ILM* 1454, 1462 (1997), INF/CIRC/556; Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention (21 September 1988), 1672 *UNTS* 302; and the Convention on Supplementary Compensation for Nuclear Damage (12 September 1997), INF/CIRC/567 (22 July 1997), 36 *ILM* 1454. Two Protocols of 12 February 2004 (not yet in force) were adopted under the auspices of the OECD/NEA, in particular to increase the liability amounts of the 1960 Paris Convention and the 1963 Brussels Supplementary Convention to not less than €1.5 billion, *see* www.oecd-neo.org/law/paris-convention-protocol.html and www.oecd-neo.org/law/brussels-supplementary-convention-protocol.html.

²² The Paris Convention now covers 110 of the world's 447 operable nuclear power plants; the Vienna Convention covers 75; the Convention on Supplementary Compensation covers 191; and the Joint Protocol covers 113. The 78 plants in China, Iran, South Korea, South Africa and Switzerland (the latter until it becomes party to the 2004 Paris Convention) are not covered by any Convention.

²³ *See* Norbert Pelzer, 'Facing the Challenge of Nuclear Mass Tort Processing', 99 *Nuclear Law Bulletin* (2017), 45-69.

disarmament. Rather, it requires States Parties to take effective steps to end the nuclear arms race and to enhance international security at lower levels of armament.

(2) To reach these objectives the States Parties must pursue negotiations on effective measures in good faith. This obligation goes beyond a mere obligation of conduct in that it includes an obligation to achieve a precise result.²⁴

(3) Subsequent practice during the last four decades has not weakened the aforementioned legal obligations, but confirmed a growing need for a legal instrument that will prohibit the use of nuclear weapons and lead to their elimination under strict and effective international control, even if that process takes time.

(C 2) All nuclear-armed States and non-nuclear-weapon States should increase cooperation to achieve nuclear security.

Commentary

(1) The Treaty on the Prohibition of Nuclear Weapons²⁵ shows a concern by many States and civil societies to which the nuclear-armed States should respond.

(2) A development towards mutually verifiable nuclear disarmament requires

- confidence-building measures and a review of military doctrines, force structures and alert levels;
- joint action on interim steps including a comprehensive nuclear test ban and the termination of the production of weapons-usable fissile material except under appropriate international control;
- cooperative approaches to anti-ballistic missile defence; and
- further limitations to the use of outer space for military purposes.

In this context it should be considered that (1) fissile material and other naval applications can be repurposed for weapons; and (2) existing stockpiles of fissionable material will have to be covered.

(3) Negative security assurances by nuclear-weapon States are to be reviewed and further developed, including by the establishment of further nuclear-weapon-free zones.

(4) A repository of information on measures taken by States in furtherance of nuclear disarmament and non-proliferation should be established. It should include information on the role of remaining nuclear weapons and their alert status.

(5) National headquarters of nuclear-weapon States might consider exchanging liaison officers with appropriate working conditions as a confidence-building measure.

(C 3) Until such time as stricter legal rules may be accepted by them, nuclear-armed States are under a legal obligation to review their relevant strategies and ensure that the threat or use of such weapons is a means of last resort in an extreme circumstance of self-defence in which the very survival of the State would be at stake.

Commentary

(1) This obligation flows from the ICJ Advisory Opinion on *Nuclear Weapons*.²⁶ It applies to nuclear-weapon States under the NPT and other nuclear-armed States alike.

(2) States modernising their nuclear arsenals must be aware of their responsibility to maintain and strengthen nuclear safety in accordance with existing obligations under international humanitarian law, human rights law and environmental law.²⁷

(C 4) States Parties to the NPT should cooperate with one another as well as with non-

²⁴ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 99, 105 (2) F.

²⁵ Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8 (7 July 2017); UNGARES 43/78 (12 December 2018). The Treaty will enter into force 90 days after the 50th instrument of ratification, acceptance, approval or accession has been deposited. This quorum has been fulfilled on 24 October 2020, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVI-9&chapter=26.

²⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 67, 95-97, 105 (2) E.

²⁷ See Dieter Fleck, 'Legal Aspects of Nuclear Weapons Doctrines', in Black-Branch and Fleck (eds), *Nuclear Non-Proliferation in International Law, Vol. V: Legal Challenges for Nuclear Security and Deterrence* (Asser Press/Springer, 2020), 351-391, at 387-388.

Parties to implement these obligations.

Commentary

(1) The NPT is based on the requirement to achieve a political solution for problems arising from the existence of nuclear armament. It creates obligations for nuclear-weapon States and non-nuclear-weapon States alike.

(2) The ICJ has confirmed this obligation as an obligation that is not limited to the Parties of the NPT.²⁸

D. Compliance with and Enforcement of Nuclear Non-Proliferation Obligations and Commitments

(D 1) Extensive international exchange and cooperation remains essential to ensure compliance with non-proliferation obligations.

Commentary

(1) Nuclear disarmament, deterrence, confidence-building, non-proliferation, security, and even the safe use of nuclear energy for peaceful purposes are interconnected. This remains essential for any convincing approach to effectively control nuclear armament. Similarly, nuclear safety, security and non-proliferation, albeit subject to different legal regimes, are directly and inextricably linked to each other. If these issues were dealt with separately, neither the cessation of the nuclear arms race nor substantive nuclear disarmament could be achieved, and neither safety nor security of the use of nuclear energy could be effectively ensured. The use of nuclear energy for peaceful purposes under sound non-proliferation conditions that do not involve sensitive nuclear activities can and should be supported regardless of progress in disarmament. Denial of such use, absent indications of non-compliance with non-proliferation obligations, may undermine nuclear non-proliferation.

(D 2) Treaty review conferences should serve the objective to review the implementation of the treaty and its adequacy as concerns the preamble, the operative part and any annexes in the light of the then prevailing situation.

Commentary

(1) This objective, confirmed in Article 16 of the amended CPPNM, likewise applies to review conferences of other treaties.

(2) Decisions adopted by treaty review conferences may constitute subsequent practice or subsidiary means of interpretation under Articles 31 (3) and 32 of the Vienna Convention on the Law of Treaties.²⁹

(D 3) In the event of withdrawal from the NPT States Parties are bound to fully comply with their obligations under Article X (1) NPT.

Commentary

(1) Article X (1) NPT obliges the State declaring its intention to withdraw from the Treaty to fully state the extraordinary events it regards as having jeopardized its supreme interests, so that States parties could undertake consultations immediately, and the Security Council could take measures entrusted to it under the UN Charter.³⁰

(2) To help ensure compliance with arms control and disarmament obligations States may utilise exploratory tasks, and negotiations, pursue long-term settlements, and cooperate, as appropriate. When the Security Council has

²⁸ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 99-103, 105 (2) F.

²⁹ Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331.

³⁰ See 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document (NPT/CONF. 2010/50), vol. I, 19.

taken measures under Chapter VII of the UN Charter to ensure compliance with arms control and disarmament obligations, States will still have to pursue long-term settlements that should endure daily pressure and co-operate towards this end. Specific cases need to be considered to discuss whether the pertinent obligations stem from treaties like the NPT or from Chapter VII decisions and whether this makes any difference.

(D 4) States must cooperate in the peaceful settlement of disputes related to nuclear non-proliferation, the use of nuclear energy for peaceful purposes, or nuclear disarmament.

Commentary

(1) States directly or indirectly involved in a nuclear dispute are under an obligation to cooperate in this context as required under Articles 2 (3) and 33 of the UN Charter. Non-compliance with pertinent obligations could affect much wider regions even beyond neighbouring States.

(D 5) Measures by the Security Council, including measures under Chapter VI and VII of the UN Charter, may help to ensure nuclear non-proliferation, support strict and effective export controls and provide transparent procedures for pertinent activities.

Commentary

(1) Security Council measures under Article 36 of the UN Charter remain necessary, even if measures under Chapter VII have proven to be less than effective.

(D 6) Implementation of General Assembly recommendations with regard to principles of cooperation in the maintenance of peace and security and principles governing disarmament and the regulation of armaments may add to transparency in nuclear-non-proliferation.

Commentary

(1) While the Security Council is responsible for formulating plans for the establishment of a system for the regulation of armaments (Article 26 of the UN Charter), the General Assembly with its permanent First Committee on disarmament and international security and its Special Sessions on Disarmament may discuss any questions relating to the maintenance of international peace and security and call the attention of the Security Council to situations which are likely to endanger international peace and security (Articles 10 and 11 of the UN Charter).

(2) The Disarmament Commission (UNDC), established in 1978³¹ as a deliberative body mandated to recommend elements of a comprehensive programme for disarmament to the General Assembly and through it to the Conference on Disarmament (CD), is instrumental to support transparency and progressive development in arms control.

(3) The United Nations Office for Disarmament Affairs (UNODA), established in 1982 upon the recommendation of the General Assembly's second Special Session on Disarmament (SSOD II),³² supports multilateral efforts deriving from the priorities established in General Assembly resolutions and decisions in the field of disarmament.

(D 7) Reporting activities by the UN Secretary-General and the exercise of his or her right of initiative may be essential for nuclear non-proliferation initiatives taken by the General Assembly, the Security Council, and by States.

³¹ UNGA Res S-10/2 (30 June 1978), para. 118.

³² See Report of the Ad Hoc Committee of the Twelfth Special Session, UN Doc A/S-12/32 (9 July 1982), pp 48-49 (Annex I, Section VI, para. 12), <https://www.undocs.org/en/A/S-12/32>. This Report was approved by decision of the General Assembly S-12/24 (10 July 1982).

Commentary

(1) To ensure compliance with existing rules and best practice, incentives may be more effective and more important than enforcement measures.

(2) Incentives should be developed through international cooperation. This may lead to a prioritisation of lawful means available and may entail the development of new legal principles and rules.

(D 8) Procedures and objectives of verification should be continuously scrutinised.

Commentary

(1) Cooperative action should be taken to reach nuclear balance at lower levels of nuclear armament, ensure non-proliferation of nuclear weapons and nuclear explosive devices, and abolish chemical and biological weapons.

(2) Incentives for compliance may be an important tool at all stages of peaceful dispute settlement. Different forms of cooperation may be required at different stages.

(3) The lack of judicial control of enforcement measures implemented on behalf of the United Nations remains an important issue for further legal development in this field.

(D 9) Whilst international organizations may take such measures as envisaged in the UN Charter and applicable constituent instruments, States retain the primary responsibility for taking appropriate action in accordance with international law to ensure compliance with the NPT and other relevant nuclear obligations.

Commentary

(1) The primary responsibility of States parties flows from Article 26 of the Vienna Convention on the Law of Treaties.

(D 10) Essential obligations of nuclear security, non-proliferation of nuclear weapons and nuclear disarmament have an *erga omnes* character.

Commentary

(1) As obligations concerning the basic rights of the human person these principles and rules are owed to the international community as a whole, rather than to individual States or groups of States party to a particular treaty. This follows from the trans-border effect of severe nuclear damage and the fact that the obligations so created go beyond a *quid pro quo* in that they are part of an international responsibility. In particular the three pillars of the NPT – non-proliferation of nuclear weapons, peaceful and secure use of nuclear energy, and nuclear disarmament – are interrelated, and they are creating rights and obligations for nuclear-weapon States and non-nuclear-weapons States alike. These fundamental rules definitely go beyond a mere *quid pro quo*; they are not just part of a deal between Parties to an international treaty, but are part of an international responsibility considering the trans-border effects of severe nuclear damage. The NPT cannot be reduced to a give-and-take between nuclear-weapon States and non-nuclear-weapon States. It is an expression of global security concerns that were central for the negotiating States and have not lost their relevance for our time.³³

(2) The aforementioned legal obligations are valid *erga omnes*, as are other obligations outlawing of acts of aggression and genocide, principles and rules concerning the basic rights of the human person, respect for the right to self-determination, and relevant obligations determined by international humanitarian law.³⁴ They affect the international community as a whole rather than a particular State or group of States. As part of customary international law or at least evolving customary norms they are not limited to States Parties to the NPT.

³³ See e.g. John Baylis and Yoko Iwama (eds), *Joining the Non-Proliferation Treaty. Deterrence, Non-Proliferation and the American Alliance* (Routledge, 2019).

³⁴ See ICJ, *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*, ICJ Reports 1970, 3, para. 34; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2005, para. 157; Jochen A. Frowein, 'Obligations erga omnes', *MPEPIL* (December 2008), paras. 3-4; James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (OUP, 2012), at 578.

(3) All States are to cooperate through lawful means to bring an end to violations of such obligations. Even if a State is not directly injured itself, it is entitled to invoke the responsibility of another State and may be eligible to take lawful measures against that State to ensure cessation of the breach and reparation (Arts. 48, 54 ARSIWA).³⁵ Other consequences, including the possibility of the award of punitive damages, have seen only sparse practice and remain *de lege ferenda*. As confirmed in the Commentary (para. 7) to Article 54 ARSIWA, this rule does not ‘prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole’.

(4) Likewise, international organizations may have a right to take such measures subject to their constituent documents and existing principles and rules of international law (Arts. 22, 49, 51-57 DARIO).³⁶

(D 11) No State shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law, nor render aid or assistance in maintaining that situation. All States have a *droit de regard* to follow and invoke compliance with these obligations and a right to react in case of breaches. Appropriate action includes cooperative measures to ensure compliance, retorsions, and countermeasures.

Commentary

(1) This obligation is confirmed in Article 41 (2) ARSIWA. It applies to ‘serious breaches of obligations under peremptory norms of general international law’, as defined in Article 40 ARSIWA.

(2) As stated in the Commentary (para. 7) to Article 12 ARSIWA, a peremptory norm of general international law is defined in Article 53 of the Vienna Convention on the Law of Treaties as ‘one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”’. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts’.

(3) The International Law Commission (ILC), when introducing the concept of peremptory norms (*jus cogens*) in 1966, had acknowledged that the emergence of such rules was comparatively recent. The ILC decided against including any examples of rules of *jus cogens* in its Commentary to the Convention of the Law of Treaties, to avoid misunderstanding as to the position concerning other rules.³⁷ It was aware that new peremptory norms could emerge in general international law, an idea that was addressed in draft Article 61 (now 64) of the Vienna Convention. The ILC has confirmed the basic rules of international humanitarian law and the prohibition of crimes against humanity as ‘norms previously referred to by the ILC as examples of peremptory norms’, emphasising that this is without prejudice to the existence or subsequent emergence of other such norms.³⁸

(4) Conventional and customary norms created to ensure nuclear security, non-proliferation of nuclear weapons and nuclear disarmament fulfil the requirements defined in Article 53 of the Vienna Convention. The fundamental rules which had been introduced for the first time in the NPT, as well as general obligations to ensure nuclear security, are fully comparable to the examples mentioned above. Accompanied by a wealth of technical provisions, they represent internationally accepted norms forming core principles of the law of nuclear non-proliferation. Successfully integrating political factors in the interest of survival of mankind, these norms form ‘a regime that is somehow more than the sum of its parts’.³⁹ The peremptory character of those fundamental rules should not be disputed even despite the fact that four nuclear-armed States still abstain from the NPT. Rights and obligations under the NPT are those of the international community as a whole rather than certain groups of States. In fact, non-

³⁵ Draft articles on Responsibility of States for Internationally Wrongful Acts - ARSIWA - UN Doc A/56/10 (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two; see Jochen A. Frowein, *loc. cit.*, para. 9; Crawford, *op. cit.*, 578-579; Jonathan L. Black-Branch, ‘Countermeasures to Ensure Compliance with Nuclear Non-Proliferation Obligations’, in Black-Branch and Fleck (eds), *Nuclear Non-Proliferation in International Law, Vol. II: Verification and Compliance* (Asser Press/Springer, 2016), 351-387, at 363.

³⁶ Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts - DARIO - UN Doc A/66/10 (2011), *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

³⁷ Draft Articles on the Law of Treaties with commentaries 1966, *Yearbook of the International Law Commission*, 1966, vol. II., Commentary, para. 3 to the then Art. 50.

³⁸ ILC, Report on the work of the seventy-first session, A/74/10 (2019), Chapter V: Peremptory norms of general international law (*jus cogens*), submitted to Governments for comments by 1 December 2020, Conclusion 23, commentaries, paras. 2 *et seq.*

³⁹ See Tom Coppen, *Preventing the Spread of Nuclear Weapons. The Law of Arms Control and the International Non-Proliferation Regime* (Proefschrift, Universiteit Utrecht, 2015), 293.

nuclear-weapon States may draw a particular security benefit from the NPT system, as it contributes to a balance of power as long as nuclear weapons exist. And it is due to the fundamental rules underlying the NPT that all States are bound to cooperate, if nuclear security, peaceful uses of nuclear energy, and nuclear disarmament should be achieved.

(5) In case of breaches of these obligations, any injured State, a term not narrowly to be defined in the law of nuclear non-proliferation, is entitled to invoke the responsibility of another State and claim cessation of the wrongful act, assurances and guarantees of non-repetition and reparation in the interest of the injured State.

(D 12) Retorsions, i.e. lawful acts or omissions (such as export limitations, traffic controls, travel restrictions and criminal prosecution to ensure compliance with non-proliferation obligations), deserve more attention in current discussions on compliance with arms control obligations.

Commentary

(1) It is important for retorsions as for all other sanctions that they need to be proportionate to their intended outcome, continuously scrutinised and terminated as soon as they have fulfilled their purpose.

(D 13) Countermeasures may only be taken as a last resort.

Commentary

(1) Countermeasures must be in conformity with existing legal standards. The obligations in question must be clearly defined.⁴⁰

(2) Countermeasures are not meant to punish a State, but are aimed at bringing about compliance with an international obligation. They must be proportionate, temporary in nature, be based on a will to cooperate, need to be continuously scrutinised, and must be withdrawn when the act in question ceases.

(D 14) States and international organizations should consider the relationship between sanctions, countermeasures and the peaceful settlement of disputes.

Commentary

(1) Sanctions and countermeasures may facilitate, but cannot replace dispute settlement by cooperative means, as required under Article 2(3) and Chapter VI of the UN Charter.

(2) Under SC Res 1540 (2004) States are obliged to criminalise, establish appropriate penalties and prosecute actions by non-State actors that undermine the effectiveness of the nuclear non-proliferation regime.

(3) The Security Council has developed its own procedures for reviewing sanctions and delisting persons where individual repressions may not or no longer be justified.⁴¹ More specific legal standards may become necessary over time.

(4) The efforts declared by the EU to ensure transparency in this field require continuous monitoring of pertinent parameters and procedures in accordance with legal principles and rules.

(5) States adopting autonomous sanctions are responsible to review all measures taken in light of their obligations under international law.

⁴⁰ See *Handbook on Nuclear Law*. Part V of the Handbook specifically deals with Non-Proliferation and Physical Protection (Chapter 12 on Safeguards, Chapter 13 on Export and Import Controls and Chapter 14 on Physical Protection).

⁴¹ SC Res 1904 (2009), 1989 (2011), 2083 (2012).

DRAFT RESOLUTION 6/2020

COMMITTEE ON INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW

The 79th Kyoto Conference of the International Law Association, held online, November 29 – December 13, 2020:

RECOGNIZING that the enforcement of intellectual property rights in the global context of the information society raises new challenges to the traditional models of structuring transactions and adjudicating international disputes;

APPRECIATING the importance and benefits of providing legal certainty with regard to the jurisdiction of courts and the law applicable, as well as fostering cooperation to enhance the cross-border recognition and enforcement of judgments in civil and commercial matters involving intellectual property claims;

BELIEVING that the adoption of model provisions on the private international law aspects of intellectual property, which may guide the interpretation and reform of national legislation and international instruments, contributes to the building of a more reliable and predictable legal framework;

TAKING INTO ACCOUNT the development of international, regional and national rules, as well as the previous efforts to draft model provisions in this field, especially those undertaken by the American Law Institute, the European Max Planck Group on Conflicts of Laws in Intellectual Property, the Japanese Transparency Project, and members of the Private International Law Association of Korea and Japan;

HAVING CONSIDERED the reports of the Committee on Intellectual Property and Private International Law;

ADOPTS the Kyoto Guidelines on Intellectual Property and Private International Law annexed to this Resolution;

COMMENDS the Guidelines to organizations, States and interested groups that are working on national, regional or international initiatives in the field, with a view to foster international cooperation, achieve greater legal certainty and an adequate balance of all interests involved;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and its annex to appropriate international organizations, in particular the Hague Conference of Private International Law and WIPO;

RECOMMENDS to the Executive Council that the Committee on Intellectual Property and Private International Law, having accomplished its mandate, be dissolved.

ANNEX

Guidelines on Intellectual Property and Private International Law (“Kyoto Guidelines”)

GENERAL PROVISIONS

1. Scope of the Guidelines

- (1) These Guidelines apply to civil and commercial matters involving intellectual property rights that are connected to more than one State.**
- (2) These Guidelines may be applied mutatis mutandis to claims based on unfair competition, if the matter arises from the same set of facts as relating allegations involving intellectual property rights, and on the protection of undisclosed information.**

2. Definitions

- (1) “Intellectual property right” means copyright and related rights, patent, utility model, plant breeder’s right, industrial design, layout-design (topography) of integrated circuits, trademark and similar rights.**
- (2) “Judgment” means any judgment rendered by a court or tribunal of any State, irrespective of the name given by that State to the proceedings that gave rise to the judgment or the name given to the judgment itself, such as decree, order, decision, or writ of execution. “Judgment” also includes court-approved settlements, provisional and protective measures, and the determination of costs or expenses by an officer of the court.**

JURISDICTION

Basic Forum

3. Defendant’s Forum

Unless otherwise provided for in these Guidelines, the defendant should be subject to the jurisdiction of the courts of the State in which he or she is habitually resident. The courts' jurisdiction shall be territorially unlimited.

Alternative Fora

4. Contracts

In disputes concerning intellectual property license or transfer contracts, a person may be sued in the courts of the State for which the license is granted or the right is transferred; the court's jurisdiction shall be territorially limited to the State in which the court is situated.

5. Infringements

In a case of an alleged infringement a person may be sued:

- (a) In the courts of the States where the alleged infringer has acted to initiate or further the alleged infringement; the courts' jurisdiction to award remedies arising from those acts shall be territorially unlimited; or**
- (b) In the courts of the States where the infringement may have caused direct substantial harm unless it could not be anticipated that the infringement would cause that harm there; the courts' jurisdiction shall be territorially limited to the State in which the court is situated.**

6. Statutory Remuneration for the Use of Works or Subject-Matter of Related Rights

In cases concerning disputes on a statutory remuneration for the lawful use of copyrighted works or the subject-matter of related rights, a person may be sued in the courts of the State where the right to remuneration accrues; the court's jurisdiction shall be territorially limited to the State in which the court is situated.

7. Consolidation

A plaintiff bringing an action against a defendant in a court of the State in which the defendant is habitually resident in accordance with Guideline 3 may proceed in that court against other defendants not habitually resident in that State if –

- (a) The dispute involves the same or substantially related intellectual property rights granted for one or more States, and**

- (b) The claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and**
- (c) As to each defendant not habitually resident in that State, there exists a substantial connection between the intellectual property rights at issue and the dispute involving that defendant.**

8. Title and Ownership

In cases concerned only with title and ownership, the court of the State where the intellectual property right exists or for which application is pending shall have jurisdiction.

Other Fora

9. Choice of Court

The parties to a particular relationship may designate in an agreement a court to have jurisdiction over any dispute that has arisen or may arise in connection with that relationship. The chosen court shall have jurisdiction to decide all contractual and non-contractual obligations and all other claims arising from that legal relationship unless the parties express their intent to restrict the court's jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

10. Submission and Appearance

A court shall have jurisdiction if the defendant appears and does not contest jurisdiction in the first defense.

11. Validity Claims and Related Disputes

- (1) In proceedings which have as their main object the grant, registration, validity, abandonment, or revocation of a registered intellectual property right the court of the State of registration shall have exclusive jurisdiction.**

- (2) Any other court having jurisdiction may decide on these matters when they arise in proceedings other than those referred to in paragraph 1. However, the resulting decision shall not have any effect on third parties.

12. Declaratory Actions

A court may hear an action for a negative or a positive declaration on the same ground as a corresponding action seeking substantive relief.

13. Provisional and Protective Measures

- (1) A court having jurisdiction as to the merits of the case shall have jurisdiction to order provisional and protective measures.
- (2) Other courts shall have jurisdiction to order provisional and protective measures within their territory.

14. Scope of Injunctions

The scope of an injunction is limited by the extent of the jurisdiction of the court. In addition, the scope shall not be broader than necessary to protect the intellectual property rights enforced.

15. Counterclaims

A court which has jurisdiction to determine a claim under these Guidelines shall also have jurisdiction to determine a counterclaim arising out of the same set of facts on which the original claim is based.

16. Insufficient Grounds for Jurisdiction

Insufficient grounds for exercising jurisdiction include *inter alia*:

- (a) the presence of (any) assets, physical or intellectual property, or a claim of the defendant in a State, except when the dispute is directly related to that asset;
- (b) the nationality of the plaintiff or the defendant;

- (c) the mere residence of the plaintiff in that State;
- (d) the mere conduct of commercial or other activities by the defendant in that State, except when the dispute is related to those activities;
- (e) the mere presence of the defendant or the service of process upon the defendant in that State; or
- (f) the completion in that State of the formalities necessary to execute an agreement.

Coordination and Cooperation

17. Proceedings Between the Same Parties on the Same Cause of Action

- (1) Where proceedings between the same parties on the same cause of action are brought in the courts of more than one State, such courts shall consider the coordination of proceedings in the following terms:
 - (a) Where the court that is not first seized has authority to suspend its proceedings on grounds of *lis pendens*, it shall do so until such time as the jurisdiction of the court first seized is established, and thereafter it shall terminate its proceedings. A suspension may be lifted if the proceedings in the court first seized does not proceed within a reasonable time or this court concludes that it is not the appropriate forum to hear the dispute.
 - (b) Where the court that is not first seized has authority to dismiss on *forum non conveniens* grounds or to transfer to a more convenient forum, it shall consider which court is the most convenient forum, taking into account the private interests of the litigants, the interests of the public, and administrative issues. If the court first seized is more convenient, the court second seized shall dismiss or transfer the case unless the court first seized has dismissed or transferred the case.
- (2) This Guideline does not apply if:
 - (a) the proceeding is within the exclusive jurisdiction of the court subsequently seized;

- (b) the proceeding is for provisional or protective measures; or**
- (c) it is shown by the party invoking the jurisdiction of the court subsequently seized that a judgment of the court first seized would not be recognized in the State of the court subsequently seized.**

18. Related Proceedings

Where related proceedings are pending in the courts of more than one State, any of the courts may take any step permitted by its own procedures that will promote the fair and efficient resolution of the related proceedings considered as a whole. The scope of this guideline includes both consolidating proceedings in one court and coordinating the conduct of proceedings in different courts.

APPLICABLE LAW

General Rules

19. Existence, Scope and Transferability (*lex loci protectionis*)

The law applicable to determine the existence, validity, registration, duration, transferability, and scope of an intellectual property right, and all other matters concerning the right as such, is the law of the State for which protection is sought.

20. Initial Ownership and Allocation of Rights

- (1) (a) Initial ownership in registered intellectual property rights, unregistered trademarks and unregistered designs is governed by the law of the State for which protection is sought.**
- (b) In the framework of a contractual relationship, in particular an employment contract or a research and development contract, the law applicable to the right to claim a registered intellectual property right is determined in accordance with Guidelines 21 to 23.**
- (2) (a) Initial ownership in copyright is governed by the law of the State with the closest connection to the creation of the work. This is presumed to be the State in which the person who created the subject-matter was habitually resident at the time of creation. If the protected subject-matter is created**

by more than one person, they may choose the law of one of the States of their habitual residence as the law governing initial ownership. This paragraph applies mutatis mutandis to related rights.

- (b) If the underlying policy of the law of the State for which protection is sought so requires even in international situations, the allocation of rights which cannot be transferred or waived is governed by the law of that State.

Contracts

21. Freedom of Choice

- (1) Parties may choose the law governing their contractual relationship.
- (2) Such a choice of law shall not, however, have the result of depriving the creator or performer of the protection afforded to him/her by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to Guideline 22.

22. Absence of Choice

- (1) In the absence of choice of law by the parties pursuant Guideline 21, a contract other than an employment contract shall be governed,
 - (a) if the contract deals with intellectual property granted for one State only, by the law of this State, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another State. Then the law of that other State shall apply;
 - (b) if the contract deals with intellectual property granted for more than one State, by the law of the State with which the contract is most closely connected; in determining this State, the court shall take into consideration among other possible factors:
 - the common habitual residence of the parties;
 - the habitual residence of the party effecting the performance characteristic of the contract;
 - the habitual residence of one of the parties when this habitual residence is located in one of the States covered by the contract.
- (2) For the purpose of this provision, the habitual residence of a party shall be determined at the time of conclusion of the contract.

23. Employment Contracts

- (1) An employer and its employee whose efforts give rise to an intellectual

property right may choose the law governing their contractual relationship in accordance with Guideline 21.

Such a choice of law shall not, however, have the result of depriving the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would be applicable pursuant to paragraphs 2 and 3.

- (2) In the absence of choice of law by the parties, the contractual relationship between employer and employee shall be governed by the law of the State in which or, failing that, from which the employee habitually carries out his work in performance of the contract.

The State where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another State.

- (3) Where it is clear from all the circumstances of the case that the contract is more closely connected with a State other than that indicated in paragraph 2, the law of that other State shall apply.

24. Formal Validity

- (1) Any contract dealing with intellectual property rights shall be formally valid to the extent that it satisfies the formal requirements:

(a) of the law of the State which governs the contract pursuant Guidelines 21-23, or

(b) of the law of the State in which either of the parties has its habitual residence at the time of the conclusion of the contract, or

(c) of the law of any other State with which the contract is connected.

- (2) This provision shall not deprive creators, performers and employees of the protection resulting from Guideline 21 paragraph 2 and Guideline 23, paragraph 1.

Infringements

25. Basic Rule on Infringement

- (1) The law applicable to the infringement of an intellectual property right is the law of each State for which protection is sought.
- (2) The law applicable to the remedies for the infringement may be chosen by the parties.

26. Law Applicable to Ubiquitous or Multi-state Infringements

- (1) When the infringement in multiple States is pleaded in connection with the use of ubiquitous or multinational media, the court may apply to the infringement as a whole the law or laws of the State(s) having an especially close connection with the global infringement. Relevant factors to determine the applicable law (or laws) in these situations include:**
 - the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety;**
 - the parties' habitual residences or principal places of business;**
 - the place where substantial activities in furthering the infringement have been carried out.**
- (2) In situations where paragraph (1) is applied, any party may prove that, with respect to particular States covered by the action, the solution provided by any of those States' laws differs from that obtained under the law(s) chosen to apply to the case as a whole. The court must take into account such differences when fashioning the remedy.**
- (3) Paragraphs (1) and (2) above may apply mutatis mutandis in cases of secondary or indirect infringements of intellectual property rights.**

27. Collective Rights Management in the Field of Copyright and Related Rights

- (1) The law of the State where a collective rights management organization has its actual seat of administration shall govern**
 - (a) the requirements for the specific corporate structure of collective rights management organizations;**
 - (b) the rights, conditions and principles concerning the relationship of the right holder, as well as of another collective rights management organization representing right holders, vis-à-vis a collective rights management organization, such as**
 - (i) the right and conditions for becoming a member of this organization;**

- (ii) the right and conditions for entrusting rights to this organization;
 - (iii) the rights and conditions for withdrawing the management of rights from this organization;
 - (iv) the requirements regarding the calculation and distribution of the organization's revenue to the right holders and other collective rights management organizations representing right holders; and
 - (v) the rights and conditions on access to alternative dispute resolution to be offered by the collective rights management organization; and
 - (c) in absence of a choice of law by the parties, the contract under which the right holder entrusts rights to this organization.
- (2) The law of the State for which protection is sought shall govern**
- (a) the presumption that a collective rights management organization is empowered to seek protection for certain works or subject-matter of related rights;
 - (b) mandatory collective rights management;
 - (c) the power of an individual collective rights management organization to grant licenses or collect statutory remuneration without prior consent of the right holder;
 - (d) the issue of whether and under which conditions a collective rights management organization has to license rights to users; and
 - (e) the requirements regarding the calculation of the royalty rates and statutory remuneration.
- (3) The law of the forum shall govern legal standing of a collective right management organization before a court.**
- (4) This guideline applies without prejudice to the applicable competition law rules.**

Other Provisions

28. Public Policy

The application of the law determined under these Guidelines may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

29. Overriding Mandatory Provisions

- (1) Nothing in these Guidelines shall restrict the application of the overriding mandatory provisions of the law of the forum.**
- (2) When applying under these Guidelines the law of a State to a contract, the court may give effect to the law of another State where the obligations arising out of the contract have to be or have been performed.**

30. Renvoi

The application of the law of any State determined under these Guidelines means the application of the rules of law in force in that State other than its rules of private international law.

31. Arbitrability

When assessing the arbitrability of disputes concerning intellectual property rights, courts and arbitral tribunals shall take into consideration the law of the arbitration, to the extent that the rights in dispute have a close connection with it, and that of the State of protection, particularly insofar as the award has to be recognized and enforced in that State.

RECOGNITION AND ENFORCEMENT

32. Object of Recognition and Enforcement

- (1) A foreign judgment may be recognized and enforced in accordance with this part of the Guidelines.**
- (2) If a judgment is still subject to appeal in the State of the rendering court, or if the period for launching ordinary review has not expired in that State, the requested court may stay the recognition and enforcement until the appeal**

is decided or the period expires, or may make it a condition of the recognition and enforcement that the party seeking it provide security.

- (3) Provisional and protective measures adopted without prior hearing of the adverse party and enforceable without prior service of process to that party shall not be recognized or enforced.

33. Effects of a Foreign Judgment

The effects of a foreign judgment, including its enforceability, in the requested State shall to the extent possible be the same, and under no circumstances greater, than in the State of origin.

34. Grounds for Non-Recognition and Non-Enforcement

- (1) A court shall not recognize and enforce a foreign judgment if:
- (a) such recognition or enforcement would be manifestly incompatible with a fundamental public policy of the requested State;
 - (b) the proceedings leading to the judgment were manifestly incompatible with the fundamental principles of procedural fairness of the requested State;
 - (c) the judgment was rendered by default where
 - i) the defendant to the proceeding was not adequately and timely notified of the proceeding, or
 - ii) the defendant was deprived of an adequate and meaningful opportunity to present its case before the rendering court;
 - (d) the judgment is inconsistent with a prior judgment rendered in the requested State that has preclusive effect;
 - (e) the judgment is inconsistent with an earlier judgment given in another State between the same parties and having the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State;
 - (f) the rendering court exercised jurisdiction in violation of the rules of jurisdiction under these Guidelines.
- (2) A court may decline to recognize and enforce a foreign judgment if the rendering court designated the applicable law in violation of the rules in Guidelines 20 – 24 protecting creators, performers and employees.

- (3) In assessing the rendering court's jurisdiction, the requested court is bound by the findings of fact made by the rendering court in the original proceeding.**
- (4) Without prejudice to such review as may be necessary for the application of Guidelines 33 and 34, the requested court shall not review a foreign judgment as to its merits.**

35. Partial and Limited Recognition and Adaptation

- (1) If a foreign judgment contains elements that are severable, one or more of them may be separately recognized and enforced.**
- (2) If a foreign judgment awards non-compensatory, including exemplary or punitive, damages that are not available under the law of the requested State, recognition and enforcement may be refused if, and only to the extent that, the judgment awards damages that do not compensate a party for actual loss or harm suffered and exceed the amount of damages that could have been awarded by the courts of the requested State.**
- (3) If a judgment contains a measure that is not known in the law of the requested State, that measure shall, to the extent possible, be adapted to a measure known in the law of the requested State that has equivalent effects attached to it and that pursues similar aims and interests.**
- (4) If a foreign judgment includes a decision concerning the validity of a registered intellectual property right and the rendering court is not a court of the State of registration, the decision on the validity shall be effective only between the parties to which the foreign judgment pertains.**

DRAFT RESOLUTION 7/2020
STUDY GROUP ON THE CONTENT AND EVOLUTION OF THE
RULES OF INTERPRETATION

The 79th Kyoto Conference of the International Law Association, held online, 29 November – 13 December 2020:

ACKNOWLEDGING the continuing relevance of and reliance on interpretation, in both law-making and adjudication;

NOTING that such rules of interpretation are in a continuous state of development;

DESIRING to assist in the further clarification of the content of these interpretative rules across different judicial and quasi-judicial bodies;

TAKES NOTE of the suggestion of the Study Group that the Executive Council of the ILA establish a Committee on interpretation of non-treaty rules, instruments and acts;

COMMENDS the Final Report of the Study Group;

RECOMMENDS to the Executive Council that the Study Group, having completed its mandate, be dissolved.