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The International Law Commission's Seventy-Fourth (2023) Session: General Principles of Law and Other Topics

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The International Law Commission (ILC or Commission) held its seventy-fourth session at its seat in Switzerland from April 24 to June 2 and from July 3 to August 4, 2023, and met fully in person for the first time since the COVID-19 global health pandemic. The Commission, which has had a gender imbalance in its composition, was chaired for the first time by two successive female chairs: Nilüfer Oral (Türkiye) for the first half session; followed by Patrícia Galvão Teles (Portugal) for the second half session.[1]

Significantly, the seventy-fourth session marked the beginning of a new quinquennium for the Commission, consisting of thirty-four members elected by the United Nations General Assembly on November 12, 2021, for the 2023 to 2027 term.[2] Notably, there were more incoming members (eighteen) than returning incumbent members (sixteen), a rarity in the Commission's history. Looking ahead, to 2024, the Commission will celebrate another milestone: its seventy-fifth anniversary, for which it decided to hold a commemorative event in Geneva. The Commission, which has been taking more steps to strengthen its interaction with states especially the Sixth (Legal) Committee of the UN General Assembly, decided to meet for part of its 2026 session in New York when conference facilities would be available at headquarters.[3]

Regarding its substantive work, the Commission completed the first reading of its topic general principles of law. Progress was also made in developing draft conclusions on subsidiary means for the determination of rules of international law, draft guidelines on settlement of disputes to which international organizations are parties and draft articles on prevention

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[1] The Commission elects a Bureau of five officers, based on a rotational geographic distribution, each year. For the 2023 session, they were the First Vice-Chair Marcelo Vázquez-Bermúdez (Ecuador), Second Vice-Chair Charles Chernor Jalloh (Sierra Leone), Chair of the Drafting Committee Mārtiņš Paparinskis (Latvia), and Rapporteur Hong Thao Nguyen (Vietnam).

[2] It is notable that of the forty-nine candidates nominated by states for the 2021 ILC elections, there were eight female candidates, three of whom were not elected, including the U.S. candidate. *See* ILC, *Membership, 2021 Election of the International Law Commission*, *at* https://legal.un.org/ilc/elections/2021election_outcome.shtml (last updated August 4, 2023).

[3] The Commission, despite its efforts to meet in New York early in the present quinquennium to enhance its interactions with the Sixth Committee of the General Assembly, was informed of logistical difficulties for conference rooms at the UN Headquarters during its typical meeting dates. It therefore settled on meeting in New York for the first part of its 2026 session, still a significant development considering the twenty-year gap between the time it last met in New York in 1998 (for its fiftieth anniversary) and 2018 (for its seventieth anniversary).

and repression of piracy and armed robbery at sea. Additionally, the Commission reconstituted its study group on sea-level rise in relation to international law. It also established an open-ended working group to consider the future of the topic succession of states in respect of state responsibility. As regards new topics, the Commission added a new topic to its *current* work program on non-legally binding agreements and appointed a special rapporteur. The Commission also made significant progress developing a structured process for the review of its working methods, over the next few years, including the preparation of an internal practice guide.

I. General Principles of Law

The topic "General principles of law" was added to the Commission's program of work at its seventieth session (2018). Marcelo Vázquez-Bermúdez (Ecuador) was appointed as special rapporteur.[4] The study, which builds on the Commission's previous work on sources of international law including most recently the 2018 Conclusions on identification of customary international law, aims to clarify practice regarding general principles of law under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute), which directs the Court when resolving disputes between states to apply, after treaties and customary international law, "the general principles of law recognized by civilized nations."[5]

Between 2019 and 2022, the Commission considered three separate special rapporteur reports on general principles of law.[6] Eleven draft conclusions were provisionally adopted during that period, some by the Commission as a whole and some by the Drafting Committee, a sub-body of the Commission.[7] Specifically, in 2021 the Commission provisionally adopted draft conclusions 1, 2, and 4, together with their commentaries. In 2022, the Commission provisionally adopted draft conclusions 3, 5, and 7 and their commentaries. Last year, due to time constraints, the Commission only took note of Conclusions 6 and 8 through to 11. The commentaries for the latter conclusions were scheduled for adoption during the 2023 session, meaning that the Commission was positioned to adopt this year the complete package of eleven draft conclusions on general principles of law on first reading, along with all their commentaries. It did so between July 24 and 26, 2023.[8]

The draft conclusions address key issues, namely: Conclusions 1 (scope); 2 (recognition); 3 (categories of general principles of law); 4 (identification of general principles of law derived from national legal systems); 5 (determination of the existence of a principle common to the various legal systems of the world); 6 (determination of transposition to the international legal system); 7 (identification of general principles of law formed within the international legal

[4] ILC, Report on the Work of Its Seventy-Fourth Session, at 10, para. 30, UN Doc. A/78/10 (2023) [hereinafter 2023 Report]. This report and other International Law Commission documents are available online at http://legal.un.org/ilc. In addition, UN documents are available online at https://documents.un.org/prod/ods.nsf/home.xsp.

[5] *See id.* at 13 (draft conclusion 1, comment 1)

[6] *See* ILC, First Report on General Principles of Law, UN Doc. A/CN.4/732 (Apr. 5, 2019) (prepared by Special Rapporteur Marcelo Vázquez-Bermúdez); ILC, Second Report on General Principles of Law, UN Doc. A/CN.4/741 (Apr. 9, 2020) (prepared by Special Rapporteur Marcelo Vázquez-Bermúdez); ILC, Third Report on General Principles of Law, UN Doc. A/CN.4/753 (Apr. 18, 2022) (prepared by Special Rapporteur Marcelo Vázquez-Bermúdez).

[7] 2023 Report, *supra* note 4, at 10, paras. 30–34.

[8] *Id.* at 11, paras. 36–37

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system); 8 (decisions of courts and tribunals); 9 (teachings); 10 (functions of general principles of law); and 11 (relationship between general principles of law and treaties and customary international law).[9]

Conclusion 1 on scope specifies that the draft conclusions concern "general principles of law," described in French as *principes généraux du droit* and in Spanish as *principios generales del derecho*, as a source of international law.[10] Conclusion 2 provides that for a general principle of law to exist, it must be recognized by the community of nations. Recognition, as explained in the commentary, is "the essential condition for the emergence of a general principle of law."[11]

Importantly, the Commission departed from the terminology in Article 38(1)(c) of the ICJ Statute "recognized by *civilized nations*," instead employing the phrase "recognized by *the community of nations*"[12] borrowed from Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR), a treaty that enjoys broad support among states. The reference to "civilized nations" was nearly unanimously considered "anachronistic" and was rightly updated because all nations today participate equally in the formation of general principles of law. The new language rejects the pejorative colonial-era civilized states versus uncivilized states distinction that prevailed during the drafting of the Statute of the Permanent Court of International Justice in the early 1920s.[13] Indeed, the more modern ICCPR language is more consistent with the foundational principle of sovereign equality of all states under Article 2(1) of the UN Charter.[14]

Conclusion 3 on "categories of general principles of law" clarifies that general principles of law consist of two distinct groups: (a) those "that are derived from national legal systems"; and (b) those "that may be formed within the international legal system."[15] The former category enjoyed broad support within the Commission and among states, from the earliest stages of the topic, while the latter was more controversial.[16] This is reflected in the formula *derived from*, which applies to the first category of general principles derived from national legal systems, as opposed to the more flexible phrase that *may be formed*, which applies to the second category of general principles stemming from the international legal system.

[9] 2023 Report, *supra* note 4, at 11–13, para. 40.

[10] *Id.* at 11. There was some debate in the Commission regarding the correct formulation of the French and Spanish texts. The choice of the Commission to use this phrasing, which differed slightly from the formulation in the ICJ Statute but reflects the more recent practice of states and jurisprudence, was understood to not change, nor imply a change to, the substance of Article 38(1)(c) of the ICJ Statute.

[11] *Id.* at 14 (draft conclusion 2, comment 2)

[12] *Id.* at 13 (emphasis added). The Commission debates considered various possibilities, including simply referring to "States," "community of States," "the international community," "nations," "nation States," and "nations as a whole." Importantly, the Commission observed that the use of "community of nations" did not foreclose the possibility for international organizations also contributing, at least in certain circumstances, to the formation of general principles of law. *See* ICJ Statute, *at* https://www.icj-cij.org/statute (emphasis added).

[13] *See* Sienho Yee, *Arguments for Cleaning up Article 38(1)(b) and (1)(c) of the ICJ Statute*, 4 ROMANIAN J. INT'L L. 33–43 (2007).

[14] 2023 Report, *supra* note 4, at 14 (draft conclusion 2, comment 3). It is noted in the commentary that "The term 'community of nations' is found in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, a treaty to which 173 States are parties and which is thus widely accepted."

[15] *Id.* at 11 (draft conclusion 3).

[16] *See* Second Report on General Principles of Law, *supra* note 6, para. 16.

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Conclusions 4 to 6 set out a methodology for the identification, determination, and transposition of general principles of law derived from national legal systems. Conclusion 4 contemplates a two-step process reflected in practice and literature for the "identification of general principles of law derived from national legal systems."[17] First, one must identify "the existence of a principle common to the various legal systems of the world,"[18] and second, one must assess whether it is capable of "transposition to the international legal system."[19] The first element requires a showing that a principle generally exists across legal systems of the world. The second element ("transposition") seeks to establish whether, and if so to what extent, a principle common to the various legal systems can be applied in the international legal system. The latter recognizes the possibility that a principle may be found to exist, at the national level, but in practice be unsuitable for application in the international legal system. It also recognizes that a principle may be deemed suitable for application at the international level, but only in a modified form.[20]

Conclusions 5 and 6 flesh out the two-step methodology for the identification of general principles of law derived from national legal systems. Conclusion 5, paragraph 1, requires "a comparative analysis of national legal systems" in order "[t]o determine the existence of a principle common to the various legal systems of the world."[21] The comparative analysis "must be wide and representative, including the different regions of the world," under paragraph 2, and "includes an assessment of national laws and decisions of national courts, and other relevant materials"[22] under paragraph 3.

The Commission deliberately decided not to specify what it means for a legal principle to be "common" to the various legal systems of the world. It reasoned that "since the content and scope of general principles of law derived from national legal systems may vary, it was appropriate not to be overly prescriptive in this regard, thus allowing for a case-by-case analysis."[23] As regards the breadth of the comparative analysis required, the Commission clarified that "while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of sovereign equality of States."[24] It is therefore insufficient to take a shortcut, as is often done in practice, to merely show that a legal principle exists in certain legal families such as civil law, common law, Islamic law or for that matter African customary law. Instead, for it to be found general enough, a legal principle must also be recognized widely in the various regions of the world, or as the International Court of Justice (ICJ) put it in *Barcelona Traction*, the principle must have been "*generally accepted* by municipal legal systems."[25]

[17] 2023 Report, *supra* note 4, at 16. As noted by the Special Rapporteur, "there was broad agreement that the basic approach for their identification consists of a two-step analysis to ascertain: (i) the existence of a principle common to the various legal systems of the world, and (ii) its transposition to the international legal system." Third Report on General Principles of Law, *supra* note 6, at 2, para. 2(d).

[18] 2023 Report, *supra* note 4, at 16.

[19] *Id.*

[20] *See id.* at 17 (draft conclusion 4, comment 7).

[21] *Id.* (draft conclusion 5).

[22] *Id.* (draft conclusion 5).

[23] *Id.* at 18 (draft conclusion 5, comment 3).

[24] *Id.* (draft conclusion 5, comment 4).

[25] *Id.* at 18–19 (draft conclusion 5, comment 4) (emphasis added); *see also* Barcelona Traction, Light and Power Company, Ltd. (Belg v. Spain), 1970 ICJ Rep. 3, 38, para. 50 (Feb. 5).

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Finally, as to the sources for the comparative assessment, the Commission provided an illustrative list indicating that national laws and decisions of courts will be among the relevant materials for the purpose of identifying a general principle of law.[26] In addition, since each national legal system has its own distinctive features, which must be assessed on its terms, different levels of weight may be assigned to legislation, decisions and other materials when identifying the existence, or not, of a certain general principle of law.

Conclusion 6 states: "[a] principle common to the various legal systems of the world *may be* transposed to the international legal system *insofar* as it is compatible with that system."[27] This language means that transposition of a general principle derived from national legal systems "may" take place (first precondition, indicating that applicability is not automatic) and "*insofar* as it is *compatible* with that system" (second precondition, leaving open the possibility of partial applicability of a principle). Designed to apply with a degree of flexibility,[28] compatibility is the key to transposition of a principle *in foro domestico* given the structural differences between national legal systems and the international legal system. For example, as the commentary explained, the right of access to courts is a widely accepted principle across national legal systems. But it may not be transposed to the international legal system since "it would be incompatible with the fundamental principle of consent to jurisdiction in international law, which underlies the structure and functioning of international courts and tribunals" and is thus "incapable of operating at the international level due to the absence of conditions for its application, i.e. a judicial body with universal and compulsory jurisdiction to settle disputes."[29]

Significantly, despite some initial controversy among members, the Commission adopted by consensus Conclusion 7 on general principles of law formed within the international legal system. The Commission offered three sound justifications for this second category of general principles of law: (1) judicial and state practice supports it; (2) the international legal system, like any other system, must necessarily be able to generate general principles; and (3) there is nothing in the text of Article 38(1)(c) or the drafting history to limit general principles to those derived only from national legal systems.[30]

Some literature casts doubt on the existence of general principles of law formed within the international legal system.[31] But there is also a settled body of literature possibly the majority

[26] *See* 2023 Report, *supra* note 4, at 17 (draft conclusion 4, comment 6).

[27] *Id.* at 20 (emphasis added).

[28] *Id.* at 22 (draft conclusion 6, comment 6) ("The use of these words ('insofar as') is meant to highlight that there is a degree of flexibility when determining transposition.").

[29] *Id.* at 21 (draft conclusion 6, comment 5).

[30] *Id.* at 22–23 (draft conclusion 7, comment 2).

[31] *See, e.g.*, Michelle Biddulph & Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 PACE INT'L L. REV. 286, 292 (2014) (arguing that there is a purely "domestic approach" and a "hybrid approach" to analyzing general principles, with most deriving general principles from domestic legal systems and some also taking account the structure of the international system itself); JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 97–98, 171 (2011) (referring only to general principles of law as derived from domestic law); Jaye Ellis, *General Principles and Comparative Law,* 22 EUR. J. INT'L L. 949, 953 (2011) ("[G]eneral principles of international law are today understood as principles derived from municipal law."); *see also* Sean D. Murphy, *Peremptory Norms of General International Law (*Jus Cogens*) and Other Topics: The Seventy-First Session of the International Law Commission*, 114 AJIL 68 (2020).

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arguing to the contrary.[32] Indeed, some commentators—like some members of the Commission—found it "surprising"[33] that there was a debate in the Commission about the existence of the second category within the meaning of Article 38(1)(c). Nearly a century ago, Anzilotti, who was one of the drafters of Article 38, wrote that "not only were general principles of law formed within the international legal system part of the category of Article 38(1)(c), but that the rubric referred *first and foremost* to such principles, giving only second place to principles recognized in domestic legal systems."[34] Anzillotti's view is also supported by other scholars, and is also reflected in state and international tribunal practice.[35]

Entitled "identification of general principles of law formed within the international legal system," Conclusion 7 as adopted by the Commission provides that:

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.
2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.[36]

Paragraph 1 contemplates a narrower category of general principles of law that are *intrinsic* to the international legal system as compared to the general principles applicable in national legal systems. By identifying them as "intrinsic," the Commission emphasized that "the principle is specific to the international legal system and reflects and regulates its basic features."[37] For example, although agreement could only be reached on their inclusion this year, consent to jurisdiction, *uti possidetis juris* as elaborated by the ICJ in *Frontier Dispute (Burkina Faso/Mali)* and respect for human dignity in the *Furundžija* judgement of the International Criminal Tribunal for the former Yugoslavia were found to be general principles of law intrinsic to the international legal system.[38]

[32] *See, e.g.*, Rüdiger Wolfrum, *General International Law (Principles, Rules, and Standards)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 28 (2010) ("On the basis of the wording of Art. 38(1)(c) ICJ Statute, its legislative history, as well as its object and purpose, the view seems to be more tenable that general principles may be derived not only from municipal law, but also from international law. This reasoning is enforced by Art 21 ICC Statute, which clearly distinguishes between general principles derived from international and those from national law."); William A. Schabas, *Genocide Convention, Reservations (Advisory Opinion)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 10 (2010) ("the language used clearly alludes to Art. 38(1)(c) rather than Art. 38(1)(b) ICJ Statute, and therefore refers to general principles of law"); Giorgio Gaja, *General Principles in the Jurisprudence of the ICJ*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 37 (Mads Andenas, Malgosia Fitzmaurice, Attila Tanza & Jan Wouters eds., 2019); *see also* First Report on General Principles of Law, *supra* note 6, at 68–73, paras. 235–53.

[33] Eirik Bjorge, *General Principles of Law Formed Within the International Legal System*, 72 INT'L & COMP. L. Q. 845, 850 (2023).

[34] *Id.* at 6.

[35] First Report on General Principles of Law, *supra* note 6, paras. 231–523; *see also* Bjorge, *supra* note 33, at 6–11.

[36] 2023 Report, *supra* note 4, at 22.

[37] *Id.* at 23 (draft conclusion 7, comment 4).

[38] *Id.* (draft conclusion 7, comment 6) (*citing* Frontier Dispute (Burk. Faso v. Mali), 1986 ICJ. Rep. 554, 565, para. 20 (Dec. 22) ("[*U*]*ti possidetis* . . . is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.").

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Paragraph 2 was a savings clause to address the concern of some members that there may exist additional general principles of law that form part of the international legal system. The latter members, which included the present author, did not wish to foreclose the possibility that there may be general principles of law formed within the international legal system despite apparently bearing a non-intrinsic character. In other words, this paragraph was meant to preserve the possibility of a much wider category of general principles of law that can be formed within the international legal system. That said, the link between the conditions contained in paragraph 1 and the text and caveat in paragraph 2 has been criticized as unclear by some Sixth Committee delegations, for example, the Nordic Countries.[39]

Conclusions 8 and 9 adopt the Commission's approach to customary international law and applies it to the determination of general principles. Specifically, the weight given to decisions of courts and tribunals and teachings, in the determination of general principles of law, mirrors the weight afforded to those subsidiary means in the determination of customary international law.[40] Conclusion 8 distinguishes between decisions of international courts and those of national courts. The decisions of the former, particularly those of the ICJ, concerning the existence and content of general principles of law are subsidiary means for the determination of general principles of law. By contrast, the decisions of national courts regarding the existence and content of general principles of law "may be" referred to, "as appropriate," as subsidiary means for the determination of such principles. Here, in the text as well as in the commentary to Conclusion 8, the Commission makes clear there are qualitative differences between the decisions of international courts compared to those of national courts. The decisions of latter courts may reflect the parochial views of one state or the peculiarities of its own legal system. In addition, when assessing all decisions, one must have regard to what I call the internal (such as the quality of the reasoning) and external factors (e.g., the reception of the decisions by others including states) that ought to be taken into account in assessing the value of decisions and points to several examples from the ICJ, the European Court of Human Rights, and the Inter-American Court of Human Rights.[41]

Conclusion 9 provides, in language that closely tracks Article 38(1)(d) of the ICJ Statute, that "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law." The commentary makes clear that, like decisions of courts and tribunals, "teachings" are not sources of law in and of themselves but that they may offer useful guidance, when used cautiously, for the determination of the existence and content of general principles of law.[42] It is notable that, in relation to Conclusions 8 and 9, the Commission now has a more specific project that it added to the program of work in 2022 on "subsidiary means for the determination of rules of international law." One might therefore wonder, as some states suggested in the Sixth Committee's 2022 debate, whether the general principles of law topic should decline to address those elements. This is because part of the approved work program for the latter topic will address the relationship between subsidiary means and the sources of international law, including general

[39] *See* Statement by Norway on Behalf of the Nordic Countries (Cluster III), General Assembly Seventy-Seventh Sess., Sixth C'ee (Nov. 2, 2022), *at* https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/29mtg_nordic_3.pdf.

[40] 2023 Report, *supra* note 4, at 25–28.

[41] *Id.* at 25–36 (draft conclusion 8, comments 2–3).

[42] *Id.* at 28 (draft conclusion 9).

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principles of law. On the other hand, since the latter topic will engage in more focused analysis of the subsidiary means for determining the rules of international law, having a starting point in the work of the Commission that is already familiar to states upon which to develop the new topic could prove useful.

Conclusion 10 concerning "functions of general principles of law," recognizes that for any category of general principles concerned, "general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part."[43] The Commission, in paragraph 2, highlights that "general principles of law contribute to the coherence of the international legal system."[44] As part of this, they may serve as a basis "to interpret and complement other rules of international law" and "as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules."[45] The commentary provides examples of various types of complementary general principles of law, such as *pacta sunt servanda*, good faith, and elementary considerations of humanity as well as those found in legal instruments and judicial decisions giving rise to substantive obligations that may lead to international responsibility for their breach such as the prohibition of unjust enrichment and the prohibition of crimes under international law.[46]

Finally, Conclusion 11 deals with the "relationship between general principles of law and treaties and customary international law."[47] Although paragraph 1 provides that "general principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law,"[48] the Commission reiterated, as explained in the prior draft conclusion, that general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.[49] Paragraph 2 of Conclusion 11 specifies that "[a] general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law." The commentary explains that the intention was to underline "that general principles of law are a separate source of international law, with their own requirements for identification, and that their existence and applicability as part of general international law is not affected if a treaty rule or a rule of customary international law addresses the same or a similar subject matter."[50]

The third paragraph of Conclusion 11 states that "[a]ny conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law." The commentary explains that this provision should be read in conjunction with the conclusion of the Study Group on the fragmentation of international law upon which it builds. In this regard, the commentary explains that "[t]he 'generally accepted techniques of interpretation and conflict resolution in international law' mentioned in the draft conclusion refer to principles such as *lex specialis derogat legi generali*, *lex posterior derogat legi priori*,

[43] *Id.* at 29 (draft conclusion 10, comment 3).
[44] *Id.* at 28 (draft conclusion 10, paragraph 2).
[45] *Id.*
[46] *Id.* at 29–30 (draft conclusion 10, comment 6).
[47] *Id.* at 33.
[48] *Id.*
[49] *Id.* (draft conclusion 11, comment 3).
[50] *Id.* at 33–34 (draft conclusion 11, comment 5).

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the principle of harmonization, as well as to Articles 31 to 33 of the Vienna Convention on the Law of Treaties."[51]

Having adopted the foregoing set of eleven draft conclusions and their commentaries on general principles of law, the Commission decided, in accordance with Articles 16 to 21 of its statute, to transmit them, through the UN secretary-general, to governments for their comments with the request that they respond by December 1, 2024.[52]

There has been an imbalance in the geographical distribution of comments received from states on topics with comments often predominantly coming from developed Western states. The relatively limited participation of Global South states is often linked to lack of capacity. It is to be hoped that, given the foundational nature of general principles of law as a source of international law, states from Africa, Asia, and Latin America and the Caribbean will engage substantively with the Commission's first reading text and commentaries.

A fourth and final report will be prepared by the special rapporteur in 2025. Its sole purpose will be to analyze the comments received from governments, and in some cases, that might lead to adjustments to the text of the conclusions and commentaries adopted upon first reading.[53] Procedurally, the Commission intends to complete a second reading of the Conclusions on general principles of law in 2025 and then submit them to the General Assembly with a final recommendation. For similar projects, the recommendation has been multipronged: (1) to take note of the conclusions and to annex them to a resolution; (2) to bring them to the attention of all those who may have reason to address the substance of the topic; and (3) to encourage their widest possible dissemination.[54]

Until last year, when the General Assembly decided to defer consideration of the Commission's recommendation on "identification and legal consequences of peremptory norms of general international law (*jus cogens*),"[55] states typically endorsed the Commission's recommendation for outcomes styled as *conclusions*. The General Assembly has returned to the *jus cogens* topic in autumn 2023 and acted on the Commission's recommendation with a problematic new twist.[56] That new twist, which was to merely take note of the Commission's work without annexing the Commission's final text to a General Assembly resolution and encouraging its wider dissemination, attracted some strong criticisms by a group of states.[57] However, the decisions to not endorse immediately the generally well received *jus cogens* conclusions and once it decided to do so to take a cherry picking approach

[51] *Id.* at 35 (draft conclusion 11, comment 7).

[52] *Id.* at 11, para. 38.

[53] *Id.* at 110, para. 261.

[54] *Id.*

[55] *See* Statement by Mr. Matúš Košuth (Slovakia), Coordinator of the Draft Resolution on "Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)" (Item 77), General Assembly Seventy-Seventh Sess., Sixth C'ee (Nov. 18, 2022), *at* https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/36mtg_slovakia_juscogens.pdf.

[56] The General Assembly adopted resolution 78/109 on "peremptory norms of general international law (*jus cogens*)" December 7, 2023 (45th plenary meeting) in which it took note of the adoption by the Commission of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the annex and commentaries thereto. *See* https://undocs.org/A/C.6/78/L.21 (Dec. 7, 2023).

[57] Seventeen delegations made a joint statement registering their strong reservations about the decision of the Sixth Committee. See, in this regard, the Lebanon (and Group) Explanation of Position Statement (*Jus Cogens*), Report of the ILC on the Work of Its Seventy-Third and Seventy-Fourth Sessions, Sixth Committee (Legal), 78th Sess. (Nov. 17, 2023), *at* https://www.un.org/en/ga/sixth/78/pdfs/statements/ilc/37mtg_lebanon_eop.pdf.

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to the Commission's work, should give rise to further reflections in the Commission and the Sixth Committee as well as between the two bodies. It could have negative implications for their intertwined mandates of promoting the codification and progressive development of international law. There is already a strained relationship between the two bodies due to non-action on many Commission recommendations to the General Assembly dating back to the early 2000s.[58] Ironically, the concerning developments on the *jus cogens* topic took place in the same year that the Commission had undertaken strenuous efforts including by adopting, for the first time, a standing agenda item concerning enhancing its relationship with the General Assembly. Hopefully, as a number of states in the Sixth Committee also rightly recognize that states too need to deploy more effort to strengthen relations with the Commission, they can strengthen their interactions and previously successful partnership that contributed significantly to the advancement of modern international law.

II. Other Topics Addressed During the Seventy-Fourth Session

A. Subsidiary Means for the Determination of Rules of International Law

During its 2022 session, the Commission moved the topic "subsidiary means for the determination of rules of international law" onto the current program of work and appointed Charles Chernor Jalloh (Sierra Leone; the present author) as special rapporteur. The topic, which was proposed by the current author in 2021 and received broad support from the Sixth Committee, is intended to serve as a final piece of the Commission's work on the sources enumerated in Article 38(1) of the ICJ Statute.[59] The Commission's study of Article 38(1) began with its draft articles on the law of treaties under subparagraph (a) completed in 1966, which served as the negotiating basis for the Vienna Convention on the Law of Treaties. It was then followed by the Commission's 2018 Conclusions on identification of customary international law under subparagraph (b) of Article 38(1). In the same year, the Commission took up "general principles of law" from subparagraph (c) of Article 38(1), which as discussed immediately above, just accomplished a first reading in 2023 and seem set to be finalized in 2025.

Under Article 38(1)(d) of the Statute, the ICJ may also apply subject only to the provisions of Article 59 "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[60] The topic seeks to clarify the traditional and contemporary role of subsidiary means in the process of determining the rules of international law. This includes by offering, as the Commission explained in its commentary, "a coherent and systematic methodology"[61] to elucidate the traditional

[58] The metaphor that the Sixth Committee has become the "graveyard" where the Commission's work products are buried has been invoked by several delegations (e.g., Mexico, Sierra Leone) and UN officials increasingly concerned about the lack of General Assembly action on a long list of final products from the Commission. See, in this regard, Statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Mr. Miguel de Serpa Soares, to the Seventy-Third Session of the Commission, Provisional Summary Record of the 3588th Meeting, ILC, UN Doc. A/CN.4/SR.3588 (Aug. 5, 2022).

[59] *See* ILC, Report on the Work of Its Seventy-Second Session, Supp. No. 10, at 186, UN Doc. A/76/10 (2021) (Annex, Syllabus on Subsidiary Means for the Determination of Rules of International Law by Charles Chernor Jalloh).

[60] ICJ Statute, Art. 38(1)(d).

[61] 2023 Report, *supra* note 4, at 74.

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subsidiary means as well as to determine "the scope of new subsidiary means"[62] that may emerge in the future.

At the 2023 session, the Commission considered the first report of the special rapporteur,[63] as well as a memorandum prepared by the Secretariat, identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[64] The first report addressed the scope of the topic and the key issues proposed for examination by the Commission. The report also considered: the views of states on the topic; questions of methodology; the previous work of the Commission on the topic; the nature and function of sources in the international legal system and their relationship to the subsidiary means; as well as the drafting history of Article 38(1)(d) of the ICJ Statute.[65] The special rapporteur, consistent with the Commission's approach to the customary international law and general principles of law topics, proposed draft conclusions as the final form of output with the main objective of clarifying the law based on current practice.[66]

The first report proposed five draft conclusions and a tentative program of work for the topic. Following the plenary debate and their referral to the Drafting Committee, the Commission provisionally adopted Conclusions 1 (scope), 2 (categories of subsidiary means), and 3 (general criteria for the assessment of subsidiary means), and their commentaries toward the end of the first half session. Owing to lack of time, the Drafting Committee considered Draft Conclusions 4 (decisions of courts and tribunals) and 5 (teachings) during the second half session in July 2023. It thereafter provisionally adopted both.[67] The text and commentaries to these two last mentioned conclusions will likely be adopted by the Commission during the 2024 session.

Conclusion 1 on scope provides that: "[t]he present draft conclusions concern the use of subsidiary means for the determination of rules of international law."[68] The point of departure is the language "subsidiary means for the determination of rules of law" in Article 38(1)(d) of the ICJ Statute. However, the term "rules of law," found in the ICJ Statute, was replaced by the term "rules of international law" that was chosen to emphasize that the main thrust is "the determination of the rules of international law, as opposed to the rules of law more generally."[69]

Based on a proposal of the special rapporteur, after he sensed some intellectual tension perhaps due to differences of approach between common law and civil lawyers, the commentary clarified that the subsidiary means are not sources of law as are the first three subparagraphs of Article 38(1) (i.e., treaties, customary law, and general principles of law). Instead, they play an auxiliary role by providing a basis to assess "whether or not rules of international law exist and,

[62] *Id.* at 76.

[63] ILC, First Report on Subsidiary Means for the Determination of Rules of International Law, UN Doc. A/CN.4/760 (Feb. 13, 2023) (prepared by Special Rapporteur Charles Chernor Jalloh) [hereinafter First Report on Subsidiary Means].

[64] ILC, Subsidiary Means for the Determination of Rules of International Law, Memorandum by the Secretariat, UN Doc. A/CN.4/759 (Feb. 8, 2023).

[65] First Report on Subsidiary Means, *supra* note 63, at 6–8, paras. 8–20.

[66] *Id.* at 127–28, paras. 386–90.

[67] See 2023 Report, *supra* note 4, at 63, para. 65 (see also n. 215).

[68] *Id.* at 76

[69] *Id.* at 77 (draft conclusion 1, comment 3).

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if so, the content of such rules."[70] The ancillary nature of "subsidiary means" is confirmed by the other authentic language versions of the provision, including the French (*moyen auxiliaires*) and Spanish (*medios auxiliaries*) versions, which "set forth a relatively narrower understanding of the term subsidiary than a broader ordinary understanding which also became associated with the English term."[71] The Commission also explained the term "determination,"[72] which as a noun, can mean to ascertain what a rule is or as a verb can mean to state the law. The Commission mostly endorsed the special rapporteur's approach. But there was pushback, on aspects of the draft commentary to conclusion 1 out of concern that some proposed language could wittingly or unwittingly elevate the standing of subsidiary means to being more like sources of law. It will be interesting to see whether, and if so how, the doctrinal difference in the starting points of common law versus civil law as regards the place of judicial decisions might affect member approach to the topic going forward. This is particularly so keeping in mind that the universe of principal legal systems that the Commission—as a global body—is statutorily required to take into account extend well beyond those two predominant Western systems to include additional principal legal traditions prevalent in different regions of the world.

Draft Conclusion 2, "categories of subsidiary means for the determination of rules of international law," states:[73]

> Subsidiary means for the determination of rules of international law include:
>
> (a) decisions of courts and tribunals;
> (b) teachings;
> (c) any other means generally used to assist in determining rules of international law.

As the commentaries noted, "[t]he first two categories are rooted in and largely track the language of Article 38, paragraph 1(d) of the Statute of the International Court of Justice, with the adjustments discussed below. The third category addresses the fact that there are other means used generally in practice to assist in the determination of the rules of international law."[74] In an important conclusion that will likely attract comments from states, but consistent with both practice and the literature, the Commission determined that the list of subsidiary means in Article 38(1)(d) of the Statute was not exhaustive.[75] This understanding was reflected in the use of the word "include" at the end of the *chapeau* and in the inclusion of subparagraph (c). Subparagraph (a) indicates that the first subsidiary means category are "decisions of courts and tribunals." This wider formulation, which deletes the qualifier "judicial," was intended "to ensure that a wider set of *decisions* from a variety of bodies could be covered"[76] by the draft conclusions and to promote consistency with other texts previously adopted by the Commission.[77] Decisions are understood broadly to originate from

[70] *Id.* (draft conclusion 1, comment 6).
[71] *Id.*
[72] *Id.* at 79 (draft conclusion 1, comment 10).
[73] *Id.* at 80.
[74] *Id.* (draft conclusion 2, comment 1).
[75] *Id.* at 80–81 (draft conclusion 2, comment 2).
[76] *Id.* at 81 (draft conclusion 2, comment 4) (emphasis added).
[77] *Id.* at 82 (draft conclusion 2, comment 8).

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traditional judicial bodies such as national or international courts or another type of body or institution, so long as they are "part of a process of adjudication with a view to bringing to an end a controversy or settling a matter."[78] This conclusion leaves open the possibility—contested only by a minority of members—of including certain decisions[79] of treaty bodies concerning individual complaints of human rights violations such as those of the Human Rights Committee established under the ICCPR.

Subparagraph (b) addresses "teachings" as subsidiary means. Here, much as it did in the topic general principles of law, the Commission retreated from the language of Article 38(1)(d), which employs "teachings of the most highly qualified publicists of the various nations." The original formulation, from a century ago, was described as "historically and geographically charged notion that could be considered elitist."[80] It was also thought that the phrasing "focused too heavily on the status of the individual as an author as opposed to the scientific quality of the individual's work, which ought to be the primary consideration."[81] Further clarification of "decisions" and "teachings," addressed as part of the categories described by Conclusion 2, are addressed by Conclusions 4 (decisions of courts and tribunals) and 5 (teachings), which have been provisionally adopted by the Drafting Committee.

Subparagraph (c) recognizes a third category of subsidiary means: "any other means generally used to assist in determining rules of international law." This category unsurprisingly provoked the most debate within the Commission. The threshold issue was whether there are subsidiary means beyond "decisions" and "teachings" or whether those two traditional categories were sufficiently wide to encompass developments in practice since 1945. And, if so, whether to enumerate any additional categories explicitly. There was broad consensus that Article 38(1)(d) was not exhaustive and there are various other subsidiary means found in practice. In terms of the best formulation, after some debate, the Commission settled on the subparagraph (c) language above since it was broad enough "for further elaboration of its contents in future draft conclusions."[82] Based on a robust debate around candidates for inclusion in the "other means" category, the future work would likely include the works of public and private expert bodies and certain resolutions/decisions of international organizations.

Conclusion 3 addresses the "general criteria for the assessment of subsidiary means for the determination of rules of international law." It provides:

> When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

[78] *Id.* at 81 (draft conclusion 2, comment 6).

[79] One related issue on which the special rapporteur invited comments from the Commission and states was whether to address the unity and coherence of international law, sometimes referred to as fragmentation, at least in so far as it relates to the question of possible conflict between contradictory decisions on the same legal question issued by different courts and tribunals. Many members supported the inclusion of the question in the scope of the topic. In his summing up of the plenary debate, the special rapporteur suggested a deferral of a decision on the matter to give states in the Sixth Committee the opportunity to comment.

[80] *Id.* at 82–83, (draft conclusion 2, comment 11).

[81] *Id.*

[82] *Id.* at 84 (draft conclusion 2, comment 16).

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(a) their degree of representativeness;
(b) the quality of the reasoning;
(c) the expertise of those involved;
(d) the level of agreement among those involved;
(e) the reception by States and other entities;
(f) where applicable, the mandate conferred on the body.

As indicated in the *chapeau* of this conclusion, these factors are illustrative and not exhaustive. They are "general factors for determining the relative weight to be given to materials that are already considered subsidiary means under one of the categories identified in draft conclusion 2."[83] Each of them is further explained in the commentary.

Draft Conclusions 4 and 5 and their commentaries are slated for adoption by the Commission at next year's session. The special rapporteur's work plan aims for a second report in 2024, one that addresses judicial decisions and their function and relationship to the primary sources of international law.[84]

B. Settlement of Disputes to Which International Organizations Are Parties.

The Commission added the topic "Settlement of international disputes to which international organizations are parties" in 2022 and appointed August Reinisch (Austria) as special rapporteur.[85] This topic builds upon and continues in some respects the Commission's prior work on the law of international organizations.[86] During this year's session, the Commission changed the title of the topic from "Settlement of *international* disputes to which international organizations are parties" because there is no sharp distinction between international and non-international disputes. To ensure that disputes of a "private law character," and any disputes that may be qualified as "non-international" fall within the scope of the draft guidelines, the word "international" before "disputes" was deleted.[87]

In the 2023 session, the Commission considered the preliminary report of the special rapporteur, which proposed two draft guidelines and a tentative program of work.[88] The Commission, following a rich debate and transmission of the guidelines to its drafting committee, provisionally adopted Guidelines 1 and 2 with commentaries.

The two provisionally adopted guidelines concern the scope of the draft guidelines (Guideline 1) and definitional issues (Guideline 2).[89] The commentary to Guideline 1 indicates that it is to be read in conjunction with Guideline 2, which defines the terms

[83] *Id.* at 85 (draft conclusion 3, comment 3).

[84] First Report on Subsidiary Means, *supra* note 63, at 128, para. 388.

[85] ILC, Report on the Work of Its Seventy-Third session, UN GAOR, 77th Sess., Supp. No. 10, at 342, para. 238, UN Doc. A/77/10 (2022) [hereinafter 2022 Report]. The topic had been included in the long-term program of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal by Michael Wood contained in an annex to the report of the Commission to that session (*Yearbook of the International Law Commission*, Vol. II (Pt. Two), Annex I, at 233 (2011)).

[86] *See* Draft Articles on the Responsibility of International Organizations, Y.B. INT'L L. COMM'N, VOL. II (PT. TWO), at 40 (2011).

[87] 2023 Report, *supra* note 4, at 39 (draft guideline 1, comment 7) (emphasis added).

[88] *See* ILC, First Report on the Settlement of International Disputes to Which International Organizations Are Parties, UN Doc. A/CN.4/756 (Feb. 3, 2023) (prepared by Special Rapporteur August Reinisch) [hereinafter First Report on Settlement of Disputes].

[89] 2023 Report, *supra* note 4, at 37, para. 48.

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"international organization," "dispute," and "means of dispute settlement" and also helps contribute to delimiting the scope of the topic.[90]

Guideline 1 states: "[t]he present draft guidelines concern the settlement of disputes to which international organizations are parties." The commentary explains that international organizations may be parties to disputes at both the national and international levels, and that these disputes may be subject to varying sources of applicable law including international law, national law, stipulated applicable rules or the rules of the organization itself.[91] The disputes may stem from the relationship between international organizations and host states, third states, or other international organizations, but more frequently in practice, involve disputes with private persons often in relation to contractual or tortious issues.[92] International organizations often enjoy immunity that may limit litigation against them in relation to private disputes. It is unclear, at this stage, whether the Commission will address that aspect although there were already some calls by some members for it to do so.

Lastly, the commentary to Guideline 1 explains that draft articles are not an appropriate output for this project.[93] Instead, the objective is to restate the existing practices of international organizations in the settlement of disputes and to develop recommendations for resolving disputes in the form of draft guidelines.[94] The guidelines will not provide procedural rules, which the Commission has done in the past,[95] but will instead focus on the availability and adequacy of means for the settlement of disputes and also possibly include model clauses for national and international instruments including contracts and treaties.

Guideline 2, on the use of terms, defines three key terms: "international organization," "dispute" and "means of dispute settlement" by providing as follows:

> For the purposes of the present draft guidelines:
>
> (a) "international organization" means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.
> (b) "dispute" means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial.
> (c) "means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes.

Subparagraph (a) and its accompanying commentary containing the term "international organization" traces the history of the definition the Commission developed over the course

[90] *Id.* at 37 (draft guideline 1, comment 1).
[91] *Id.*
[92] *Id.* at 38–39.
[93] *Id.* at 39–40 (draft guideline 1, comment 8).
[94] A similar purpose was provided in the introduction to the *Commission's Guide to Practice on Reservations to Treaties* (*Yearbook of the International Law Commission*, Vol. II (Pt. Three), at 40, para. (2) (2011)) ("The purpose of this Guide is not—or, in any case, not only—to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most appropriate for the progressive development of such rules.").
[95] *See* Model Rules on Arbitral Procedure, Y.B. INT'L L. COMM'N, VOL. II, at 12–15 (1958).

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of several projects over the decades. In its earliest form, the Commission simply defined international organizations as "intergovernmental organizations" and this definition was adopted by multiple multilateral treaties.[96] Subsequently, by the time of the Articles on the Responsibility of International Organizations (ARIO) in 2011, the Commission adopted a more elaborate definition (ARIO definition), which provided:

> an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.[97]

There was significant debate within the Commission whether the draft guidelines should reproduce the ARIO definition, or to adopt a new definition as proposed by the special rapporteur. Several members argued that reproducing the ARIO definition was more appropriate because, besides being consistent with past work, it was sufficiently flexible for the current topic and was already known and generally accepted by states and legal practitioners. A few members believed that a new definition would allow for refinement to account for evolutions in the definition since 2011.[98] Ultimately, the Commission elected to adopt a new definition that builds upon the ARIO definition and includes its core elements.

The commentary explains that this definition highlights that the legal basis of an international organization is international law, most often by operation of a treaty.[99] As a result, only subjects of international law with treaty making capacity, namely states, *sui generis* subjects of international law and international organizations that possess that capacity, can create a new international organization.[100] The reference to other entities "in addition to States" does not require that a plurality of states be members of an international organization. The commentary indicates that instances where an international organization was created by a treaty between a state and an international organization, such as the case of the Special Court for Sierra Leone,[101] where an international organization may include territories as members,[102] or where an international organization was created entirely by other international organizations[103] are all covered by subparagraph (a).

[96] 2023 Report, *supra* note 4, at 37 (draft guideline 2). For a list of conventions, which includes the Vienna Convention on the Law of Treaties, see 2023 Report, *supra* note 4, at 40–41.

[97] 2023 Report, *supra* note 4, at 41 (guideline 2, comment 4); *see also* Draft Articles on the Responsibility of International Organizations, *supra* note 86, at 49.

[98] *See* Settlement of International Disputes to which International Organizations are Parties, Statement of the Chair of the Drafting Committee, Mārtinš Paparinskis, at 4–5 (May 25, 2023), *at* https://legal.un.org/ilc/documentation/english/statements/2023_dc_chair_statement_sidio.pdf [hereinafter Settlement of Disputes, Statement of the Chair of the Drafting Committee].

[99] 2023 Report, *supra* note 4, at 41–43 (draft guideline 2, comments 4–5).

[100] *Id.* at 44 (draft guideline 2, comment 8).

[101] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 UNTS 137. For commentary on the contributions of that tribunal to the development of international law, see CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE (2020); THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (Charles C. Jalloh ed., 2014).

[102] *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 3, Art. XII, para. 1 ("Accession") (*entered into force* Jan. 1, 1995) (permitting membership of "[a]ny separate customs territory possessing full autonomy in the conduct of its external commercial relations").

[103] *See* Agreement for the Establishment of the Joint Vienna Institute, 2029 UNTS 391 (July 27, 29, 1994 and Aug. 10, 19, 1994).

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Finally, there was considerable debate within the Commission regarding the new criteria of "at least one organ capable of expressing a will distinct from that of its members" and the link between that element and international legal personality. The special rapporteur's initial proposal forwent a reference to international legal personality,[104] instead proposing the criteria of an organ capable of expressing a will distinct from its members, which in his view, would be a readily identifiable marker of an organization's international legal personality. However, several members including the present author considered that international legal personality was too important to omit, being a key requirement for an organization to be able to create treaties, raise or respond to international claims and incur international responsibility.

It was further observed that the ICJ advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* did not refer to the possession of an organ capable of expressing a distinct will from that of its members as an aspect of an international organization.[105] Ultimately, a compromise text containing reference to possession of international legal personality and at least one organ capable of expressing a distinct will was adopted by the Commission, though it was stressed that the addition to the ARIO definition is to be read as an enrichment of it, not a departure from it.[106] Whether this definition, which was strongly preferred by the special rapporteur, will make a practical difference remains to be seen as the work on this new topic evolves, taking into account the views of states on the adjustment to the ARIO definition.

The commentary to subparagraph (b) explains that the definition of "dispute" is grounded in the classic one offered by the *Mavrommatis Palestine Concessions* judgment.[107] There was debate within the Commission whether the draft guidelines should simply adopt the definition contained in *Mavrommatis*, or whether a new definition should be adopted as the special rapporteur had proposed in his first report. The Commission did adopt a new definition. However, it omitted reference to disputes regarding policy that the special rapporteur originally proposed. The Commission, however, acknowledged that legal disputes may reflect underlying political and policy differences, but stressed that these do not detract from the legal character of the dispute.[108]

Subparagraph (c) is basically modeled on Article 33 of the Charter of the United Nations,[109] and lists various means generally available to settle disputes. As was emphasized in the Drafting Committee and underlined in the commentary, the listed means are not to be understood as being in any particular order.[110] The phrase "of their own choice" was omitted

[104] This debate is explained in paragraphs 17–22 of the commentary to draft guideline 2. *See* 2023 Report, *supra* note 4, at 46–48.

[105] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174 (Apr. 11).

[106] Settlement of Disputes, Statement of the Chair of the Drafting Committee, *supra* note 98, at 7.

[107] The Mavrommatis Palestine Concessions, Judgment No. 2, 1924 PCIJ (Ser. A) No. 2, at 7. In that definition, since endorsed by the ICJ, a legal dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

[108] 2023 Report, *supra* note 4, at 49.

[109] UN Charter, Art. 33 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.")

[110] 2023 Report, *supra* note 4, at 50 (draft guideline 2, comment 32).

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from the language of Article 33 to account for the reality that an international organization may have obligations that limit the choice of means of dispute settlement, depending on the applicable law of the dispute. Lastly, subparagraph (c) merely lists means of dispute settlement. It does not mean there is an obligation for parties to "actually" resolve a dispute, unlike Article 33, which requires the parties to a dispute that endangers international peace and security to seek a solution—as explained in the commentary to draft guideline 2.[111] Indeed, it would be odd to include the latter as a substantive requirement in what is basically a definitions clause addressing the "use of terms."

A substantive second report is expected in 2024.[112] It is expected to analyze the practice of the settlement of disputes to which international organizations are parties, i.e., mostly disputes arising between international organizations and states.

C. Prevention and Repression of Piracy and Armed Robbery at Sea

The Commission, in 2022, moved "Prevention and repression of piracy and armed robbery at sea" onto the current program of work and appointed Yacouba Cissé (Côte d'Ivoire[113]) as special rapporteur. The topic seeks to clarify, given the modern resurgence of piracy, the law and practice in respect of piracy as well as armed robbery at sea.

In 2023, the Commission considered the first report of the special rapporteur[114] and a Secretariat memorandum examining the previous work of the Commission that could be particularly relevant for its future work on the topic.[115] The first report considered historical, socioeconomic, and legal aspects of the topic, and analyzed the international law applicable to piracy and armed robbery at sea, including its shortcomings in light of contemporary practice.[116] It also provided a detailed overview of national legislation and judicial practice of states concerning the definition of piracy and the implementation of conventional and customary international law. Three draft articles proposed in the first report, on the scope of the draft articles, on the definition of piracy, and on the definition of armed robbery at sea were all transmitted to the Drafting Committee, which then reported them back to the plenary.[117] The Commission provisionally adopted them with commentaries.[118]

The outcome of the topic was to be draft articles as initially proposed by the syllabus in 2019.[119] Given the first report, some members agreed that draft articles would be the most

[111] *Id.*

[112] First Report on Settlement of Disputes, *supra* note 88, at 43, para. 84.

[113] May 17, 2022 was the first time that the Commission simultaneously appointed two special rapporteurs from Africa. The present author, from Sierra Leone, was on the same day also named special rapporteur for the topic subsidiary means for the determination of rules of international law discussed above.

[114] *See* ILC, First Report on Prevention and Repression of Piracy and Armed Robbery at Sea, UN Doc. A/CN.4/758 (Mar. 22, 2023) (prepared by Special Rapporteur Yacouba Cissé) [hereinafter First Report on Piracy].

[115] ILC, Prevention and Repression of Piracy and Armed Robbery at Sea, Memorandum by the Secretariat, UN Doc. A/CN.4/757 (Feb. 7, 2023).

[116] First Report on Piracy, *supra* note 114.

[117] See *id.*, Proposed Draft Articles, Sec. VIII, 102–03.

[118] 2023 Report, *supra* note 4, at 53–60, para. 58.

[119] *See* Prevention and Repression of Piracy and Armed Robbery at Sea, Statement of the Chair of the Drafting Committee, Mārtiņš Paparinskis, at 2 (June 2, 2023), *at* https://legal.un.org/ilc/documentation/english/statements/2023_dc_chair_statement_piracy.pdf [hereinafter Piracy, Statement of the Chair of the Drafting Committee]

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appropriate outcome as they would be more suitable for a criminal law topic and would allow the Commission to provide states with a concrete objective and practical legal solutions to the problems posed by piracy and armed robbery at sea. Other members favored other types of outputs, in particular draft guidelines, because they would allow the Commission to consider a wider range of legal issues without affecting the integrity of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It was ultimately found premature to alter the form of the Commission's output on the topic at this early stage.[120]

Article 1 concerns the scope of the topic and reads: "[t]he present draft articles apply to the prevention and repression of piracy and armed robbery at sea."[121] The draft article reflects the Commission's intention to address two separate crimes, namely, (1) piracy and (2) armed robbery at sea. The Commission decided not to further qualify the criminal acts or their geographical scope, as subsequent articles would define "piracy" and "armed robbery at sea."[122]

The Article 1 commentaries indicate that the topic will be primarily studied against the backdrop of the UNCLOS.[123] As armed robbery at sea is not addressed in UNCLOS, the Commission will also take into account existing applicable international law, regional approaches, extensive state practice, and legislative and judicial practice under national legal systems.[124] The work does not seek "to duplicate existing frameworks and academic studies, but instead aims to clarify and build upon them, as well as to identify new issues of common concern."[125]

Article 2 sets out the definition of piracy[126] as follows:

1. Piracy consists of any of the following acts:
   (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
      (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
      (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
   (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
   (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).
2. Paragraph 1 shall be read in conjunction with the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

[120] *Id.* at 2–3
[121] 2023 Report, *supra* note 4, at 53, para. 57.
[122] Piracy, Statement of the Chair of the Drafting Committee, *supra* note 119, at 3.
[123] 2023 Report, *supra* note 4, at 54 (draft article 1, comment 2).
[124] *Id.* (draft article 1, comment 3); *see* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397.
[125] 2023 Report, *supra* note 4, at 54 (draft article 1, comment 3).
[126] *Id.* at 53, para 57.

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In defining piracy in paragraph 1, following a lengthy debate, the Commission decided to reproduce the definition in Article 101 of UNCLOS.[127] That definition is understood as reflective of customary international law and has been reproduced in both regional legal instruments and national legislation.[128] The Drafting Committee declined the special rapporteur's suggestion of a provision to accommodate "any other illegal act committed at sea or from land that is defined as an act of piracy in domestic law or international law." Extending the definition also opened the door for the draft articles to incorporate acts beyond the definition already adopted in paragraph 1 subparagraphs (a) to (c), undermining the integrity of the established UNCLOS piracy definition. The commentary acknowledged that questions of interpretation have arisen in practice concerning key elements of the piracy definition under UNCLOS and therefore explained those aspects in detail, including by underlining that piracy can only be committed on the high seas (not in the territorial sea) and may also be conducted from land against ships.

Paragraph 2 of Article 2 recognizes that Article 58(2) of UNCLOS, stipulates: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible" with the regime established for that maritime zone in Part Five of UNCLOS.[129] The Commission sought to account for developments in practice. As part of this, by reference to the provisions of Article 58(2), it clarified that piracy can also be committed in the Exclusive Economic Zone as confirmed by the jurisprudence of arbitral tribunals.

Finally, Article 3 sets forth a definition of armed robbery at sea, which is the second crime covered by the topic. It provides:

> Armed robbery at sea consists of any of the following acts:
>
> (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
> (b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).[130]

The definition adopted by the Commission reproduces that of the Assembly of the International Maritime Organization (IMO) in paragraph 2.2 of its 2009 Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.[131] The only difference between the Commission's definition and the IMO definition was the former's preference for "armed robbery *at sea*" instead of "armed robbery *against ships*" in the *chapeau*.[132]

[127] Article 101 of UNCLOS, in turn, is based on the definitions provided in Article 15 of the 1958 Convention on the High Seas and Article 39 of the draft articles concerning the law of the sea, adopted by the Commission in 1956. 2023 Report, *supra* note 4, at 54 (draft article 2, comment 1); *see* 1958 Convention on the High Seas, 450 UNTS 11; *see* Y.B. INT'L L. COMM'N, VOL. II, UN Doc. A/3159, at 256, 260–61 (1956).

[128] 2023 Report, *supra* note 4, at 54 (draft article 2, comment 1).

[129] *Id.* at 58 (draft article 2, comment 16).

[130] *Id.* (draft article 3(b)).

[131] International Maritime Organization, Res. A.1025(26), Annex, at 4 (Dec. 2, 2009).

[132] The commentaries explain the issue in relation to draft article 3. See, in this regard, 2023 Report, *supra* note 4, at 59 (draft article 3, comment 3)

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The choice was justified, *inter alia*, on the basis that United Nations Security Council resolutions addressing the situation in Somalia and the Gulf of Guinea, which have been among the most active theatres for modern pirates, commonly used the phrase "armed robbery at sea" without the words "committed against ships."[133] The commentary explained that the decision to do so was "[i]n view of the practice of the Security Council, and to avoid unduly restricting the definition, the Commission considered that it was unnecessary to replicate the IMO definition verbatim."[134]

Ultimately, as far as the conduct itself is concerned, the commentary recognizes that there is no substantive difference between the *acts* of piracy and armed robbery at sea. Instead, the differences are ones of geographic location and jurisdiction. The commentary to Article 3 explained this critical nuance:

> The main difference between piracy and armed robbery at sea is the location of the act: the high seas and exclusive economic zone on one hand, and waters subject to the jurisdiction of the coastal State on the other. This has consequences for the applicable jurisdiction in respect of the two crimes. In the case of piracy, it is acknowledged that universal jurisdiction applies such that any State has the right to prosecute the crime of piracy committed on the high seas. With respect to armed robbery at sea, the coastal State has the exclusive competence to exercise prescriptive and enforcement jurisdiction over such acts.[135]

According to the special rapporteur's first report, in his second report, to be presented in 2024, the special rapporteur will focus on regional and subregional practices and initiatives for combating piracy and armed robbery at sea, as well as the resolutions of relevant international organizations, in particular IMO, the UN General Assembly and Security Council.

D. Study Group on Sea-Level Rise in Relation to International Law

At the seventy-first session, the Commission decided to include the topic "Sea-level rise in relation to international law" in its current program of work to be addressed in the form of an open ended study group open to all members.[136] The topic is co-chaired by Bogdan Aurescu (Romania), Yacouba Cissé (Côte d'Ivoire), Patricia Galvão Teles (Portugal), Nilüfer Oral (Turkey), and Juan José Ruda Santolaria (Peru) who jointly proposed the topic. For the present session, it was decided that the study group would focus on the additional paper[137] addressing the law of the sea aspects of the topic, prepared by Mr. Aurescu and Ms. Oral,

[133] *See*, *e.g.*, SC Res. 2634, at 1 (2022).

[134] 2023 Report, *supra* note 4, at 60 (draft article 3, comment 3).

[135] *Id.* (draft article 3, comment 2).

[136] For prior discussion on the topic, see Sean D. Murphy, *Anniversary Commemoration and Work of the International Law Commission's Seventieth Session*, 113 AJIL 90, 107–08 (2019); Sean D. Murphy, *Peremptory Norms of General International Law (*Jus Cogens*) and Other Topics: The Seventy-First Session of the International Law Commission*, 114 AJIL 68, 84–85 (2020); Sean D. Murphy, *Provisional Application of Treaties and Other Topics: The Seventy-Second Session of the International Law Commission*, 115 AJIL 671, 683–85 (2021).

[137] Additional paper to the first issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, UN Doc. A/CN.4/761 (2021).

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as well as a selected bibliography[138] prepared in consultation with members of the study group. A final report is expected in 2025.[139]

Discussion focused in part on developing a clearer roadmap for the final report of the study group.[140] Some members suggested developing practical guidance for states, possibly in the form of a set of conclusions.[141] Others favored an interpretative declaration on the United Nations Convention on the Law of the Sea, to serve as a basis for future negotiations between state parties,[142] or a set of draft set of articles that could lead to a framework convention on issues related to sea level rise.[143] Some emphasized that the Commission's work should guarantee the sovereign rights of states over their maritime spaces, and that its work should be firmly rooted in existing international law.[144] Considering the recent requests for advisory opinions on the issues of sea-level rise from the International Tribunal for the Law of the Sea and the International Court of Justice, a view was expressed that the Study Group should exercise due caution considering issues being addressed by other bodies.[145]

The co-chairs highlighted that the issue of submerged territories that had not been raised in 2021 should be explored, given the issues relating to the law of the sea and to statehood, and suggested that it be included in the Study Group's additional paper to the second issues paper, expected in 2024.[146] In 2024, the Study Group is expected to revert to the subtopics of statehood and protection of persons affected by sea-level rise for a final time.

III. Addition of a New Topic to the Current Program of Work

In the last week of the seventy-fourth session, the Commission announced the inclusion of a new topic, "[n]on-legally binding international agreements," in its program of work and appointed Mathias Forteau (France) as special rapporteur.[147] The topic, whose name might need to be revisited to make it broader, aims to clarify the nature and regime that governs such agreements, which are increasingly common in state practice, and how to

[138] Selected bibliography related to the law of the sea aspects of sea-level rise, UN Doc. A/CN.4/761/Add.1 (2023)

[139] *Id.* at 104–05, paras. 222–30.

[140] *Id.* at 104, para. 223.

[141] *Id.*, para. 224.

[142] *Id.*, para. 225.

[143] *Id.*, para. 227.

[144] *Id.*, para. 228.

[145] *Id.* at 105, para. 229.

[146] *Id.*, para. 226.

[147] The decision was taken over strong objections from Bimal Patel (India) who expressed preference for a study group and argued that the topic should not be led by a member from the Western European Group when the Asia-Pacific region had been historically underrepresented in allocation of Commission special rapporteurs. *See* Provisional Summary Record of the 3656th Meeting, 11–13, UN Doc. A/CN.4/SR.3656 (Aug. 4, 2023). There is literature supporting the argument that there is a serious imbalance in the regional distribution of special rapporteurships of the Commission, which does not correspond to the number of seats held by members from each of the five UN regional groups, a concern that has also been raised by several Global South states including the African Group in the Sixth Committee. *See, e.g.*, Mónica Pinto, *The Authority and the Membership of the Commission in the Future*, *in* Seventy Years of the International Law Commission: Drawing a Balance for the Future, 370–71 (2021) (observing at the time of her writing the distribution of special rapporteurships, out of sixty-one appointments between 1947 and 2016, were as follows: thirty-one from the Western European Group; nine from each from the Group of Latin America and Caribbean states and Eastern Europe; seven from Africa; and five from Asia-Pacific region).

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distinguish non-binding agreements from legally binding agreements through the preparation of a set of either conclusions or guidelines. The topic is expected to consider the potential direct and indirect legal effects of such agreements, building on the studies by regional codification bodies in the Americas and Europe. Further information on the topic can be found in the syllabus for the topic contained in Annex I to the Report of the seventy-third session.[148]

IV. Progress in the Review of Working Methods of the Commission

The Commission reconstituted the working group on methods of work of the Commission and elected Charles Chernor Jalloh (Sierra Leone; the present author) as Chair.[149] The prior working group on this topic in the 2017–2022 term did not present a report after five years of deliberation but did make progress discussing several member proposals. This year, discussion centered on how to build on those proposals, including whether to develop rules of procedure for the Commission; an internal practice manual; possible limits on the length of interventions in the plenary and on the length of special rapporteur reports; the membership size of the drafting committees; possible guidance on the nomenclature of the texts and instruments adopted by the Commission, including the meaning of output on topics described as draft articles, draft conclusions, draft guidelines, and draft principles; the timing of the issuance and distribution of official documents including in the various official languages; the possibility of establishing some mechanism for reviewing the reception by member states of the past products of the Commission; and the role of the special rapporteurs.[150]

Additional suggestions for the working group agenda included: development of a code of conduct for members in relation to conflicts of interest, a review of the implementation of the working group's prior reports, particularly its 1996 and 2011 reports, and a potential review of the statute of the Commission to address, *inter alia*, issues of gender parity in composition.[151] The working group, reflecting to some extent the similar initiatives of states in the General Assembly, established a new standing agenda of three broad themes to guide its future work on internal and external aspects of the Commission composed of: (1) revitalization of the working methods and procedures of the International Law Commission; (2) relationship of the International Law Commission with the General Assembly and other bodies; and (3) other issues.

The timing for the reconstitution of the working group is quite opportune. Perhaps due to the large number of new members for the 2023–2027 quinquennium, and the increased pace of its work over the last few years, several members of the Commission at multiple points throughout the current session raised questions about the working methods, which some found arcane, and how they could be improved. The various suggestions for how the working methods could be improved are to be welcomed as they are an opportunity to give fresh impetus to the institution and to respond to the increasing concerns of states on various issues, for

[148] 2022 Report, *supra* note 85, at Annex I, at 353–65.
[149] 2023 Report, *supra* note 4, at 110, para. 254.
[150] *Id.* at 110, paras. 254–55.
[151] *Id.*

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example, concerning the question of the normative value of the outputs of the Commission's work.

On the other hand, while some of the new members may not have fully appreciated this, many of the issues that they flagged had been raised in the previous quinquennia by other members, and in some cases, already led to concrete recommendations of how they could be addressed. The question then becomes about how best to implement those recommendations, in an incremental and balanced manner, in line with the Statute of the Commission and without radically altering the nature of the Commission as a body of independent legal experts that is accountable to states in the Sixth Committee. Given the important role that the Commission plays in the codification and progressive development of international law, and the significant 2023 decision to develop a structured approach to review of its working methods, it is hoped that this new approach would help revitalize the Commission while remaining true to its founders' aspirations. In an encouraging development, during the Sixth Committee 2023 debate, many states welcomed the transparent and structured approach of the Commission to improve its working methods. Several states, noting that a two-way relationship requires good will from both sides, called on the Sixth Committee to also reciprocate by establishing a standing agenda item to discuss how best to improve its own relationship with the Commission including in relation to the final outcomes of its work. The present writer could not agree more.

V. Trust Fund to Assist Special Rapporteurs Especially from Developing States

At its seventy-second (2021) and seventy-third (2022) sessions, the Commission proposed that consideration be given to the establishment of a trust fund to support special rapporteurs of the Commission and related matters. In paragraph 34 of its Resolution 76/111, the General Assembly requested information regarding the terms of reference of the proposed trust fund. In its 2022 report, the Commission included an annex elaborating on the unique role of special rapporteurs and the necessity to establish a Special Rapporteur's Trust Fund.[152] Significantly, the Commission recognized the need for special rapporteurs, particularly those from developing regions, to obtain assistance to undertake the research required for the preparation of their reports.[153] This is a significant initiative that should assist in addressing structural imbalances that otherwise result in a form of advantage to the special rapporteurs from developed states.

In November 2022, the Sixth Committee approved the submission of a draft resolution that requested the secretary-general to establish a trust fund for assistance to special rapporteurs of the Commission.[154] Pursuant to paragraph 37 of General Assembly Resolution 77/103 of December 7, 2022, the secretary-general has now established a trust fund to receive voluntary contributions for assistance to special rapporteurs of the Commission or chairs of its study groups and matters ancillary thereto.[155] While reiterating the importance of ensuring necessary allocations for the Commission and its secretariat in the regular budget, the

[152] 2022 Report, *supra* note 85, Annex II, at 366–69.
[153] *Id.*, Annex II, at 366.
[154] UN Doc. A/C.6/77/L.16, para. 36 (Nov. 10, 2022).
[155] *See* GA Res. 77/103, para. 37 (Dec. 7, 2022).

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Commission appeals to member states, NGOs, private entities, and individuals to contribute to the trust fund, in accordance with the terms of the trust fund, importantly including the need for the financial contributions *not to be earmarked* for any specific activity of the Commission, its special rapporteurs, or chairs of its study groups so as to preserve the independence of its work.[156]

The trust fund reflects the Commission's continued efforts toward diversity and regional representation in its work, as special rapporteurs and study group chairs, particularly those from developing regions, have often been limited in their ability to engage in research, access resources, and interact with relevant actors due to severe funding limitations. In the past, the Commission provided honoraria for special rapporteurs that was phased out due to the budgetary crisis facing the United Nations in the mid-1990s.

Overall, in this first year of the quinquennium in which it was welcoming many new members, the Commission had a successful session. It is to be hoped that the seventy-fifth anniversary (2024) session, during which commemorative events will be held in Geneva, will be equally successful.

[156] 2023 Report, *supra* note 4, at 117, para. 287.

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