Closing - 14 December 2023
Concept Note

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Vision without action is a dream,
action without vision is a nightmare.
Japanese proverb

The purpose of this note is to prepare the concluding day of the work undertaken for the 150th anniversary of the ADI/ILA that will take place on 14 December 2023.

In 2017, the International Law Association entrusted the celebration of its 150th anniversary to the French branch.

The original plan (a symposium in Paris) was disrupted by the Covid-19 epidemic and the uncertainty into which international society was plunged both by the epidemic itself and states' responses to it. To ensure that there would nonetheless be an in-depth reflection on international law to mark the 150-year anniversary, even though it was not possible to hold a symposium in Paris (or not in the form originally planned), the decision was taken to organize a number of exercises in collective reflection.

The first stage took the form of a call for contributions, aimed at the youngest members in the field, in an effort to bring out new ideas[1]. Some of these contributions were included in the white papers, others have been published separately on the 150th anniversary website.

The second stage was the drafting of 23 white papers on the following topics: Food/Agriculture, Anthropocene, Corruption, Mass Crimes and Impunity, Democracy, Human Rights, Energy, Business and Human Rights, Outer Space, Civil Status, Finance, Taxation, Global Governance, Investment, Migration, Digital Challenges, Ocean, SDGs, Cultural Heritage, Intellectual Property, Dispute Resolution, Health and Labour. These topics were not chosen at random. They reflect the fields of human activity presenting

[1] Details of this aspect of the project (text of the call for contributions, members of the jury, initial selection of drafts and the final contributions received and published) can be found on the 150th anniversary website in English https://www.ilaparis2023.org/en/ideas-lab/ and French https://www.ilaparis2023.org/laboratoire-didees/.

the greatest challenges and upheavals, and those in which international law has been or could be called into question.

We extend our warmest thanks to the coordinators and members of the steering committee for their work. Their task was a difficult one, given that they were asked not only to present a statement of the law as it now stands (part 1), but in particular to think ahead to the questions that might arise in the future and the challenges we will have to face (part 2). The basic idea was to view parts 1 and 2 together and make a list of the questions arising from that confrontation.

The white papers are all somewhat different, with each committee having focused on one or other of the three parts around which their mission was structured. All of them give food for thought. Taken overall, their findings provide a lucid account of the state of the planet and of international law, indispensable for fashioning the international law of tomorrow, which is what we set out to do in marking 150 years of the International Law Association. Reading them together also helps us to identify the main thrust of the approaches to be taken in drawing up the conclusions and recommendations. The white papers are available on the 150th anniversary website [2].

In the third stage of the project, each white paper was the subject of critical discussion in a webinar, usually lasting three hours. The general rule laid down at the start of the exercise, subject to very few exceptions, was that no one who had served on the steering committee could take part in the webinar, except as a listener. To have a critical conversation it was essential for the debate not only to cover the white paper itself but to extend beyond it to include people who had not been involved in its drafting[3].

The webinars were recorded, but the recordings will remain under embargo for 2023 and the early part of 2024, accessible only to those who have registered to take part. It is expected that they will be made public in the course of 2024.

The fourth stage of the project was the June symposium, which brought together 380 people from 75 countries in Paris from 18 to 20 June 2023. At the symposium, crosscutting topics were discussed in 16 panels (see the full programme, attached as Annex 1). In addition, some 400 people registered to follow the proceedings online, with all sessions broadcast live, and the online audience able to ask questions.

The final stage will take place on 14 December 2023. This will be a day conducted entirely online, devoted to four overall themes: Creation of international norms – by whom and how? Creation of international norms – which norm? Effectiveness of international legal norms, and Dispute Resolution.

We have structured this concept note in such a way as to suggest some partial conclusions and recommendations for each of the topics covered by the white papers (Part I). We then give some preparatory suggestions on the four topics to be further

[2] https://www.ilaparis2023.org/livres-blancs/ (for the French).
[3] A list of the speakers at each webinar can be found on the 150th anniversary website https://www.ilaparis2023.org/webinars/ (for the French).

discussed on 14 December (Part II). That said, the structure is to a certain extent artificial as some of the conclusions and recommendations on topics dealt with in the white papers will also feed into the discussions on 14 December.

Part I – The topics covered by the white papers and the webinars[4]

We draw the attention of readers of this note to the fact that this part of the note has not been validated either by the coordinators of the white papers or the chairpersons of the webinars in which the white papers were discussed. These are, therefore, provisional approaches compiled by the author of this concept note and they will be replaced by more definitive conclusions and recommendations in the book to be published in 2024.

A number of cross-cutting ideas emerged from the work on the white papers and the corresponding webinars: the negative consequences of the "silo mentality" and the overspecialization of the organizations responsible for creating international law, at a time when the challenges confronting international society are increasingly complex and call, at the very least, for a holistic approach that takes all aspects of the problem into account. This is a general observation; there are no easy solutions, given that the tools of global governance gradually put in place since the end of the Second World War have led us to approach the law one problem at a time. The second crosscutting idea to emerge is the need for information, education, awareness-raising and capacity building among all the stakeholders.

Food/Agriculture

This white paper highlighted the proliferation of norms ("saturation", as one participant put it) in this field, which is so important for the future of the planet and its inhabitants. That proliferation is, in part, the result of a deep-seated crisis in multilateralism. As things stand, perhaps we should not be adding new norms to the dense layers of regulation that already exist.

However, access to healthy and adequate nutrition, especially for women and children, is still an issue even in the twenty-first century, demonstrating that principles of social justice are not applied where food is concerned, despite the fundamental right to food being laid down very clearly in international law (art. 11 ICESCR). Hunger has not been eradicated, and the multitude of norms in existence have proved ineffective. It could even be said that some norms (in particular on the opening up of markets) have made access to food more difficult.

Agriculture plays a significant part in climate change and the deterioration of the environment. The time has therefore come to rethink the role of the FAO, in cooperation with the other organizations concerned, in order to promote healthier agriculture and principles of fair trade instead of free trade, as one speaker in the webinar put it. This could be achieved by acknowledging that agricultural products are not simply products like any other.

[4] We have deliberately kept to the French alphabetical order of the topics so as to avoid grouping any of them together in an artificial way. Many of the topics are mutually complementary.

Anthropocene

For the first time in the history of mankind, man has become a geological force, the cause of the transformations the planet is undergoing, its degradation and the probably irreversible loss of biodiversity, climate change and the increasingly frequent destructive phenomena beyond human control.

Participants viewed what has traditionally been called the international law of the environment as so ill-equipped to face up to the Anthropocene that it needs to be rethought in its entirety, along with its relationship to other branches of the law such as economic and investment law and private law – the more so as the role of non-state actors is essential, and without them nothing will improve. Also mentioned a number of times was the primordial importance of the rule of law and good governance within states themselves, without which nothing will happen in this area. As to whether the "shield of sovereignty" should be replaced by "responsible sovereignty", the discussion is still open, the more so as the border between the two is porous and the line finer than it appears on first examination. We must also promote the common interest of the international community rather than the interest of states. Unless we do, the inherent internal logic of the current system cannot change. But without radical change, we will be unable to face the challenges.

The absence of education on issues around the Anthropocene was mentioned as one of the obstacles to the desired change. It was suggested that the ILA could initiate a discussion of what should be a minimum mandatory curriculum to be integrated into university courses, irrespective of the discipline (and above all in management and business schools).

Corruption

In this field as well, attention was drawn to the proliferation of norms.

However, in the fight against corruption, the primary difficulty encountered was the lack of reliable data. Could things be any different? Probably not. We are condemned to working in this state of economic flux, which should make every actor and stakeholder ever more vigilant about acting only within their own respective roles.

This is all the more necessary because, very often, corruption flows from South to North: the amounts spent on corruption in countries in the South find their way to countries in the North in the form of investment in real estate or the luxury goods industry, to name only two.

The role of law and justice is thus not an easy one, but given what has been said above it is all the more necessary. We therefore need to build solid coalitions to fight against corruption, incorporating every link in the legal and judicial chain. The systems of vigilance put in place to guard against damage to the environment or breaches of human rights must encompass the fight against corruption, by strengthening whistleblowers' rights and training judges and arbitrators in how to recognize the signals and red flags that can indicate dubious transactions.

Justice needs a more important profile if citizens are to retain their trust in the political, legal and judicial systems. The education not just of citizens but of everyone involved in transactions (including the employees of companies working locally) was highlighted as one of the keys to fighting corruption.

Lastly, there is the question of suitable sanctions when acts of corruption are proved. Among others mentioned, ruling claims inadmissible or holding contracts null and void with no other measures to back them up (to prevent unjust enrichment, for instance) are not sanctions that carry real weight in the fight against corruption.

Mass Crimes and Impunity

The work carried out on this theme showed that impunity, whether inherent in the absence of a norm or a competent forum, or, as the white paper demonstrated, due to the ineffectiveness of the justice system, certainly plays a role in the continuing perpetration of mass crimes. The webinar was held at the very time when the United Nations was embarking on its consideration of a possible treaty on crimes against humanity. The gathering and use of evidence were discussed in depth, as areas probably in need of urgent reform, given the existence of a number of persistent trouble spots throughout the world and the absolute need to prevent the commission of mass crimes.

Our attention was drawn to the difficulty of using images, videos, etc. posted on social networks in evidence. However, it was also pointed out that digital tools could be helpful in the triage and prioritizing of evidence, among other things.

Democracy

Democracy, and the preservation of the rule of law in the service of democracy, were deemed essential for the proper functioning of the international legal system. It was acknowledged, however, that democracy is often flawed, and so fragile and easily subverted as to demand constant attention.

That said, working on democracy at the international level might be considered as contrary to the supposed neutrality of international law vis-à-vis the internal political organization of its individual members, and to the principle of non-interference in the internal affairs of states, except in the case of a serious breach of human rights.

One aspect in particular was highlighted: the difficulty of maintaining a peaceful but lively democracy at a time of such rapid and widespread propagation of fake news through digital communication tools. If information is a key element of any living democracy, a solid educational system is equally vital, one that leaves no one behind and engages with the greatest possible numbers from an early age. The more elitist education remains, the less democracy can thrive.

It was also pointed out that the universalist principles surrounding democracy must be capable of adapting to the different regions of the world while still keeping that universalism in focus as an ideal to strive for, provided it is not a mere cover for western interests.

Human Rights
As with democracy, the tension between universalism and regionalism was stressed with regard to human rights. It was also pointed out that many rights, including economic rights, must henceforth be taken as part of the array of rights to which human beings are entitled; the same is true of the environment, with the right to water and healthy nutrition, to maintain people's health.

Several speakers drew attention to the ineffectiveness of human rights, with their invocation often no more than an empty formula. Some thought that the ineffectiveness of such rights in practice could be due to the increase in their number. Others noted that sanctions are not always directed against the right entity (for instance where a state is held liable for having failed to prevent harmful activity by a company, while the company itself is not sanctioned).

Here, too, citizens' education was mentioned as the main factor in the application of human rights in practice.

Energy
Leaving aside the current political situation in Europe, where the war in Ukraine and the subsequent waves of sanctions have resulted in drastic changes in the flows of energy, the work on this topic was influenced in particular by the protection of the environment and the Paris Accords (energy decarbonization) on the one hand, and universal access to energy and social justice on the other.

As was to be expected, the white paper on energy and the webinar on the subject focused their discussions on renewable energies and the energy transition. This also ties in closely with the issue of investment. In practice, large numbers of disputes have arisen between investors and host states because of new energy policies implemented by states in recent years. Moreover, the energy transition will require amounts of capital greatly exceeding the capacities of public investors, meaning that foreign investment will still be necessary in these areas and the law applicable to such new investments will have to be stabilized one way or the other. Added to which the exit from fossil fuels must be handled in a "just and equitable" manner, an especially divisive issue for COP28.

From the governance standpoint, while the reassessment of the Energy Charter was not discussed as such, there were calls for the creation of a new international organization dedicated to energy. There was insufficient time to address this in any depth at the webinar, given that the proposal goes against the tendency of other discussions on the multiplication of specialized organizations and the "silo mentality" that inevitably results[5].

Business and Human Rights
This is an area of active growth in international law and has been since at least the early 2010s, with, among other things, the adoption of the United Nations Guiding Principles (better known as the Ruggie Principes) and the reform of the OECD Guidelines for Multinational Enterprises with the addition of Chapter IV on Human Rights. The work

[5] See, below, the preparatory discussion for the first session on 14 December 2023.

that remains to be done in this field falls mainly to states, which must find a way to agree on a treaty – hard law – that will flesh out the Ruggie Principles with secondary rules to enhance their effectiveness. Unfortunately, there has been little progress from one year to the next, and it is far from certain that such a treaty will be adopted in the near future. Even if it were, it is doubtful whether such a treaty would be widely ratified by those states with the power to regulate the activities of businesses presenting the greatest problems in terms of respect for human rights. It is possible that pursuing soft law initiatives might prove more effective than attempts to enact hard law in this field[6].

In practical terms the issue arises because, while states in general acknowledge that they must act (see, especially, the work of the Member States of the European Union to draw up legislation at European level on corporate sustainability due diligence), breaches are not, most of the time, committed by those states themselves but rather by companies with headquarters in their territory doing business in the territories of other states with less robust systems of business regulation. Attention should therefore be focused particularly on measures directed towards the businesses themselves, as they have a certain influence in the creation of both national and international norms.

Outer Space

The crisis in multilateralism and the upheavals in the balance of power between states on the one hand, and between states and private sector actors on the other, are neatly exemplified by activity in outer space. Today, space adventure (still probably an accurate expression) is seeing the emergence of new players who were not even in existence when the relevant law was laid down.

The law in this field has been remarkably stable, with space activity still governed by the 1967 Treaty (and the treaties that followed) and the principle of non-appropriation that has hitherto been the basis of all outer space law. However, it is now claimed in some quarters that this principle has been weakened (notably by the private exploitation of outer space resources), maybe to the point of having become obsolete, sparking an intense debate among the specialists. In addition, we note that two major players in the field are seeking to reshape space law through bilateral agreements (cf. the Arthemis agreements proposed by the United States of America) on the fringes of, or in opposition to, multilateralism.

Here, again, the role of soft law is under discussion, with states able to intervene only by laying down fundamental guidelines, and the actors themselves (including private sector actors?) taking part in the creation of secondary regulation.

Civil Status

This topic was included in the collective reflection for the 150th anniversary as it has been clear for many years now that the universality of civil status and the fundamental right of each individual to have the benefit of civil status are being questioned. There are at least two phenomena behind this state of affairs: the first, a growing one, concerns migrants or, more broadly, displaced persons (often as a result of force) living in refugee camps for indefinite periods. The second relates to gender and the transitions certain

[6] This question will be addressed in the second session on 14 December 2023.

people undergo, as well as the deep-seated changes in the family, which is no longer composed in the same way as it has been for centuries. The first situation referred to concerns children born in the course of migration or in the camps mentioned above, and who have not been registered at birth because there is no system in place for such registration. Those children are, in a sense, without an identity and vulnerable to illicit trafficking of various kinds. In the second situation, which admittedly applies to fewer people, the right being flouted is the right of the human being to a civil status that corresponds to who they really are.

Work must be undertaken in these two areas at least.

International Finance

Finance is at the heart of all international debates, be they economic, social, geopolitical, environmental or other. The experts noted a possible historic paradigm shift when the discipline ceased to be called "monetary law" and adopted the title of "international finance".

Identified challenges are numerous and only a few were discussed. In particular, the experts insisted on the fact that prevention, and therefore prudential standards, are essential in this field. The SDGs have a major influence on the financing of investments, and the responsibility of financial institutions should be no exception when it comes to determining their role in breaches of the standards applicable to the responsible conduct of business (due diligence requirements, in particular). The public-private relationship was also discussed, as it influences the ability of our societies to meet the many economic and climate challenges (to name just two areas in which finance plays a major role). The intervention of digital technology is also significant, encouraging central banks to create their own electronic money, with all the consequences that this can entail, particularly when it results in a cash-less society. The complexity of restructuring the public debt of certain countries was also the subject of an initial discussion, although there was general agreement that this issue merits further study and reflection.

While the governance of financial institutions was identified as one of the challenges of the 21st century, the discussion focused more on collaboration/cooperation between institutions (particularly non-financial institutions), bearing in mind that the mandates of the main institutions enable them to adapt to the main challenges of the day, and that reforms are already under discussion. Some experts have also stressed the need for a robust dispute settlement system. Furthermore, at a time when the United Nations is calling for an overhaul of the international financial system, in particular to take account of the needs of the poorest countries, which have borne the full brunt of repeated crises, it is not certain that the institutions that govern this system are particularly active in this area.

As for the law applicable to financial activities/contracts, it has been noted that the vast majority of these activities are subject to New York State or English law, the result of a historical conjunction and the belief that these legal systems are more flexible and better adapted to the needs of practice. There has, however, been a breakthrough in

Singaporean law (also belonging to the common law category) for transactions in the Asian region.

Taxation

Taxation is another cross-cutting issue mentioned by many of the White Papers as an essential tool for implementing public policies and enabling governments to carry out both the internal and international redistribution required by the income disparities between different social groups and the economic, climatic and other challenges.

The question of the most legitimate institution to create international standards and implement reforms, particularly with regard to inclusiveness, was particularly discussed, bearing in mind that the primary legislator in this area remains the State. The OECD has been the historic institution in the field of taxation and has shown openness towards all the countries that make up international society, whether or not they are members of the organisation. More than 140 countries adopted the 2013 reform. The United Nations has taken up the subject of taxation under controversial conditions. There is no official cooperation between the two organisations, although there does appear to be some practical dialogue.

More technically, the current challenges concern the place of taxation of activities, i.e. the place where the value is created; the possible maintenance of the arm's length principle, in particular for intra-group transfer prices leading to losses of tax revenue as a result of choices made by companies; and the taxation of digital activities which may escape taxation altogether. It was pointed out that the time has passed for simply combating double taxation without worrying about non-taxation anywhere.

Global Governance

There are at least four factors compelling us to consider reforms to global governance: (a) The undeniable fact that international law as we know it today was developed at a time when at least half the world was not independent, and played no part in its creation, serves as the starting point for any rethinking of global governance. (b) Added to this, states are no longer the only ones creating international norms – so much so that we have gone from multilateralism to "multistakeholderism", adding layers of complexity to global governance. (c) A third factor to be taken into account stems from the challenges to a globalization based on ultraliberalism which instead is giving way to a new brand of protectionism. (d) The fourth factor identified is the political regimes of states, many of which favour illiberal systems to the detriment of democracy.

Having said that, some would nonetheless argue that "functional governance", in other words the formation of interest groups that fluctuate depending on the topic, or "plurilateralism", can be acceptable as long as it is clearly identified as such.

In addition, a number of international organizations have succeeded in reforming, to integrate actors other than states and modify their voting systems with various types of weighting. The norms these organizations create are accepted by all those involved in the field concerned and are applied to everyone's satisfaction. The examples given include the ILO and the International Labour Office that forms part of it, the tandem consisting of the ICAO and IATA, and the IMO.

Investment

The last half of the twentieth century was a time of unprecedented development in the law on foreign investment, and this is still continuing. The economic weight of these investments is considerable and can only increase given the cost of the energy transition international society is facing.

Many commentators have expressed the view that the law as developed in the mid-twentieth century, which still serves as the cornerstone of the regulation of relations between investors and host states in 2023, has outlived its usefulness and no longer responds to present-day needs. Admittedly, this argument is somewhat more nuanced: the problem may not lie with the law itself but rather with the methods used to resolve disputes, hence the work on reforms undertaken by UNCITRAL in 2017 and still ongoing in 2023. As long as there is no clear and accurate diagnosis, the remedies will not be appropriate either.

The tendency to think in silos was criticized in this area, too; in fact the law of investment cannot be taken in isolation from respect by both states and companies for human rights, which are often thrown into doubt by investment projects. The same is true for the protection of the environment, health and other systemic challenges where investment law can have a negative impact[7].

If investor protection is called into question and with it the investment protection treaties that serve as its vehicle, it will probably become necessary to create a different vehicle, an "investment contract" perhaps, to take the place of the old "state contract" that traditionally embodied investor protection. Work on this is under way.

Migration

Both the white paper and the webinar highlighted several very pressing issues with the rules on migration[8]. First, a number of distinctions must be drawn when considering migrants, including their age, gender and geographical provenance. Then, the impossibility was pointed out of differentiating between so-called economic migrants, climate-driven migrants and political migrants, with only the last category having the right to refugee status.

Criticism was also levelled at the ECHR for having reversed its priorities: it now bases its case law on the sovereignty of states and their right to "regulate" the flow of migrants into their territory, whereas migration policies should be founded on protection. This reversal of values translates into the adoption within states of security-based policies rather than policies geared to welcoming migrants.

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[7] See also the comment above, on the Anthropocene.

[8] Migration, as the term is used here, does not include expatriation as this is a chosen form of migration, governed by a framework of rules favourable to expatriates, who enjoy a number of legal rights and protections completely unlike the regime applied to forced or involuntary migration.

Discrimination, and racial discrimination in particular, as well as the colonial past of the countries of immigration, are two further major hindrances to establishing an international law that is fair and protective, and urgent reform of the international system is required.

A new international committee has been set up within the ILA and has already begun work on incorporating some of the discussions from the white paper and the webinar.

Digital Challenges

The digitization of society presents us with challenges that touch every aspect of our lives: personal relationships, data protection, information, education, politics, the economy, international relations, war, etc. The white paper had to be selective as not everything could be included, but the lessons to emerge both from the white paper and the webinar that discussed it are transversal.

The point was made, with good reason, that before calling for new legal norms to be drawn up we should take stock, in detail and comprehensively, of the ones that already exist; most of the time the norms already in force should be sufficient to regulate the shift to digitization. Where new norms are necessary, they must be technology-neutral, as the technology is evolving so fast that any legal rule that is not neutral will be obsolete as soon as it is enacted.

In the view of most of the speakers, the digital divide is a pressing issue and must be eradicated or, at the very least, robustly contained. Failure to do so could result in global governance and the rule of law being undermined. In similar vein, hybrid threats require extremely close attention.

Given the interests involved, a territorial approach (like the one we have now) is probably doomed to fail. Cooperation between states and private sector actors is therefore indispensable in facing up to the challenges, especially in terms of prevention and respect for human rights.

Ocean

The ocean is the paradigm for the way in which international relations have evolved [9], with the commodification of natural resources and the degradation of the environment man has brought about[10]. For too long, the oceans were thought to be inexhaustible, but we now know that is very far from the truth.

Several participants in the webinar took the view that the law of the sea, as enshrined in the 1982 Convention, defines the legal framework within which all activities carried out in the oceans and seas must take place; to this end, it must be interpreted in an inventive manner and supplemented by new instruments such as the BBNJ to effectively meet the

[9] 90% of global merchandise is carried by sea.
[10] See also the white paper and webinar on the Anthropocene.

new challenges of the law of the sea. Any possible reform of the system should include a role for due diligence[11].

The role of non-state actors was also identified as being part of the new direction future regulation should take. Similarly, private international law was mentioned as being an essential element in the regulation of maritime activity.

The role of science was likewise highlighted as a key factor in assessing needs and responses to the challenges.

SDGs after 2030

The Sustainable Development Goals could perhaps provide an example of how to refresh international regulation in the sense that the goals, their structure and the vocabulary used might inspire future work, including that of lawyers.

At the outset, it was acknowledged that the SDGs are not formulated in terms of legal obligation. The 17 goals are designed to apply inclusively, leaving no one behind, representing a "universal social contract" that must embrace the Anthropocene, a new global governance and the necessity of financing all of this, including through taxation. The challenges of achieving acceptance for a system of taxation geared to the SDGs were discussed in the webinar, and are part of the work now being undertaken by the United Nations to prepare for the next phase of the SDGs after 2030. A number of speakers wanted to see greater consideration given to indigenous knowledge and, in a more general sense, to science, which is both the problem and part of the solution.

Ethics, particularly with regard to youth and women, was mentioned as a fundamental value that should guide the forthcoming work of the United Nations. That value must be present in private law as well. It must permeate our actions and way of life, so that the "4 Rs" become the yardstick for evaluating our ability to improve our consumption habits: Refuse, Reduce, Reuse and Recycle.

Lastly, access to justice must be preserved, even though the SDGs themselves are not legal norms.

Cultural Heritage

Cultural heritage exists only through human beings. This is the essential axis around which cultural heritage law should be structured, even though it is at the frontier of a large number of legal disciplines and the object of contradictory interests. Cultural heritage can be viewed through the prism of economics, just as it can be seen as revealing mystical or religious beliefs, or as belonging to the political and symbolic fundamentals of a society. In this respect, if it is moved, it may not be viewed in the same way by the State of origin and the State where the artefact was found. Requests for restitution are therefore often the subject of delicate negotiations.

[11] It was also stated that no reform should be undertaken until ITLOS has given its advisory opinion on climate change.

This is also an area where public and private interests are particularly intertwined, so it is essential not to take a solely state-centric view of the juridical rules.

As for the applicable legal standards, while reforms are sometimes envisaged (for example, to take account of the post-colonial perspective), it was nevertheless stressed that, before anything else, it is important to ensure that the existing standard is effective, which in many cases is sufficient provided that it is fully implemented. In case new rules are contemplated, cooperation between existing international organisations is of essence.

Intellectual Property

Some 150 years since the birth of modern intellectual property, all the participants in the webinar agreed on the pressing need to redress the balance between the holders of rights and the demands of the public interest, especially in times of crisis, as the Covid-19 pandemic has demonstrated once again. Access to health is probably the greatest challenge facing intellectual property, and we have not yet achieved that seemingly indispensable new balance.

In this field, as in many others studied in the course of 2021-2023 as part of the 150th anniversary of the ILA, the issues surrounding the environment, social justice, geopolitical imbalance and the effectiveness of norms were all identified as challenges to intellectual property as it has hitherto been understood.

The consequences of post-colonialism were also raised, including with regard to the knowledge of indigenous peoples, especially in the field of health. A number of speakers argued that these forms of knowledge should be treated in a radically different way to other "innovations".

Lastly, cooperation between international organizations (in particular the WTO and ILO) should be strengthened.

Dispute Resolution[12]

The very substantial white paper dealt not only with international courts and tribunals, but also certain aspects of the private international law of dispute resolution. The webinar concentrated instead on three fundamental topics: (a) the disproportionate influence of certain cultures; (b) justice as a market; (c) justice and climate change.

On the first point, the speakers asked themselves how regional cultures could be better respected when most countries have adopted laws modelled on those of the West. Many proceedings are long and costly because they follow the pattern of the common law trial, more especially the common law of the United States of America. Though some speakers referred to the "transnationalization" of proceedings, it is not clear that this really solves the problem as identified, as it can mask a "westernization" of the procedure that creates too great a distance from the users of the justice system. This can be seen, for instance, in investment arbitrations where the interests of the local population are in issue.

[12] Most of the white papers and a large number of the webinars called for the creation or improvement of robust dispute resolution methods.

The competition between norms, institutions and places, and between people working in the field of dispute resolution (including competition for posts in international courts and tribunals as well as among arbitrators) reveals the extent to which justice has indeed become a market, a transnational one used as such by parties to optimize their litigation strategies. We are also seeing more and more so-called "strategic" disputes, especially in the environmental field.

Where climate justice is concerned, various difficult issues have come to light for which international justice is ill-equipped: (i) how to take account of the interests of persons not party to the proceedings; (ii) imbalance, in particular economic imbalance, between the parties; (iii) third-party funding; (iv) the question of procedural ethics; (v) the difficulty in enforcing decisions.

Health

The discussions on the white paper on health stressed prevention above all, particularly in relation to food and also health in the workplace (especially in agriculture). Cooperation and ethics, too, were very frequently mentioned in the preparatory work on the white paper and in the webinar discussion. Lastly, social justice, including the fair and equitable distribution of medicines and healthcare, was the subject of several interventions during the webinar.

Cooperation between intergovernmental organizations was used as an example of the sometimes problematic relations between these institutions. In the case of medicines, and the possibility of protecting intellectual property in them, notably by patents, it was shown that relations between the WTO, the WHO and WIPO had not always been optimal, though a degree of improvement had been observed in recent years. This example could offer some lessons, especially for the discussion at the first working session on 14 December 2023.

Labour

"No peace without social justice" was the motto on which the ILO was founded in 1919, and it continues to work towards international labour norms that stand the test of time. It has to be said, however, that international labour law is far from comprehensive, for example with regard to migrants[13] or maritime workers. As to this, there was discussion about the autonomy of labour law and whether this should be reconsidered in order to better protect employees, irrespective of the terms on which they are employed[14].

In this area, as in many others, the postcolonial legacy was discussed, and, in parallel, the question whether employee protection could ever be universal, with many speakers emphasizing the difficulty of harmonizing labour norms. One notable finding is the backsliding seen in some regional investment protection treaties. For example, it must be ensured that the due diligence obligations incumbent on businesses include the rights of employees. Failure to do so would be to undermine the protections built up

[13] This point was also discussed at the webinar on migration.

[14] It should be noted that approximately 50% of workers worldwide belong to the informal economy, with the figure rising to 90% in Africa.

since the start of the twentieth century, which should now be considered as acquired rights.

In the same way, it now seems to be established that the operations supported by the IMF will not involve any reduction in education, health or social protection (a commitment of the Social G7). That said, we note that the law of the WTO makes no mention of social norms. The new Director-General of the ILO appears determined to launch a global coalition (intended to be universal) to strengthen those rights.

Part II – Preparatory suggestions for the discussions on 14 December 2023

A number of themes emerged throughout the discussions held in 2023 as being cross-cutting if not universal concerns. Those themes have been grouped together to make up the four sessions proposed for 14 December. Each session will be introduced by one or two speakers, then the discussion will be expanded to include everyone present.

The suggestions below are not intended as a substitute for the introduction to be delivered on 14 December. They are offered merely in preparation for the collective discussion.

Session 1
Creation of international norms – By whom and how?

At least since the beginnings of modern international law, the state has been responsible for international norm creation, whether acting bilaterally,[15] regionally or more broadly at the more universal multilateral level. The state can act on its own or through the international intergovernmental organizations in which it participates.

Within the state, moreover, it is the executive branch of the government that is involved in norm creation, as parliaments are either excluded completely where the norm in question is not intended to become a treaty, or called upon only a posteriori where they have to approve ratification of a treaty, with no right to intervene at the negotiation stage[16]. The first conference in the series of webinars for the 150th anniversary, which took place on 12 January 2023, set out to consider ways of involving national parliaments more closely in the creation of international norms. There are many challenges to be overcome if parliaments are to have a greater role. Among the questions that arise are how to involve parliaments where the norms being negotiated are soft law norms, and what procedures need to be in place to ensure the negotiations are not unduly slowed down.

A number of cross-cutting ideas emerged from the white papers and webinars where this was discussed. One of them concerned the drawbacks that had been identified of the "silo" mentality arising from the limited subject-matter mandates of most intergovernmental organizations, which have authority to create norms only within their assigned field, the one in which they have developed their expertise. It is possible that cooperation between organizations could at least partially alleviate the disadvantages of limited mandates. Cooperation lies at the heart of the international legal system set up under the United Nations Charter in 1945. However, the ever-growing complexity of the questions and challenges confronting international society means that we should be strengthening that cooperation by making it the favoured

[15] The state can act unilaterally to regulate all kinds of activities including those without any significant link to its territory, which is considered as a sort of abuse of power, sometimes known as extraterritoriality.

[16] Mechanisms exist at regional level (notably for European norms) to enable the parliaments of member states to be consulted throughout the negotiation process.

working method of organizations rather than leaving it as an aspiration between Member States [17].

Going beyond the role of norm-creating intergovernmental organizations, another equally important question is that of the methods used in negotiating and producing norms. Subsidiary questions can be identified, such as the language or languages of the negotiation, voting methods (you do not negotiate in the same way where the objective is to reach a consensus as where a majority of votes is required), etc. The question whether observers are authorized to take part in the discussion is key to the presence or absence of civil society in the negotiations. Similarly, observers can bring complementary skills to the negotiating table (for example scientific competences). Should we be developing best practices for civil society participation?

Session 2
Creation of international norms – Which norms?

This is another cross-cutting issue raised in a great many white papers and webinars as well as at the June symposium.

Without claiming to give an exhaustive list of the questions to be discussed at this session, the first subsidiary question could be about primary and secondary norms, not necessarily in the sense in which those categories are generally understood, but by suggesting that general principles of hard law should be adopted, universally where possible, to regulate the activities concerned. Those general norms would be supplemented by more detailed secondary norms, which might differ from one region to the next and from one culture to the next, and which could be soft law norms.

The hard law/soft law dichotomy [18] is still a highly relevant one in international law, the more so as states are finding it increasingly difficult to agree on hard law norms. However, this dichotomy is not always seen for what it really is. For example, a non-binding international law norm can perfectly well be converted into a binding one when it is enshrined in a contract, by the will of the parties.

But even supposing that such a dichotomy operates, it would still be necessary to map the consequences of using soft law norms to get a better idea of their effectiveness and work towards a gradual hardening of such norms if that is what is required to make them effective. In addition, reflection is possible on the complementarity of soft law and hard law. Could a system not be devised in which hard law encompassed the main structuring principles of the international system, while soft law could be left to the discretion of states or private sector actors as long as it did not set the bar lower than the hard law principles? Alternatively, if we do not want to leave states to act

[17] As to this, see the panel discussion on cooperation at the June symposium. See, also, the white paper on Global Governance and the associated webinar. Manay white papers and webinars regretted the absence or deficiency of cooperation between international organisations.
[18] A preliminary discussion took place during the June symposium.

unilaterally without any other framework, the soft law part of an international instrument could put forward a menu of options from which states must choose.

Session 3
Effectiveness of international legal norms

The concept of effectiveness is one of the concepts that recurs most frequently in the white papers. It is a constant preoccupation of lawyers who are often aware that they have all the norms they need at their disposal, but that the application of those norms in practice is not effective, either because it is too difficult, too costly or too complicated. Effectiveness is also undermined where the sanction is inadequate or not enforced, or where no sanction exists. Increasingly however, much of developing law takes the form of soft law, or is accompanied by ethical norms – so much so that it is doubtful whether effectiveness is merely a matter of the sanction, contrary to the received wisdom.

We need to develop a better understanding of what effectiveness means, and how it should be assessed and controlled. Should effectiveness function on its own or alongside other complementary processes? What is the weight of effectiveness in the legitimacy of the norm?

The link between legitimacy and effectiveness must be explored. Among the lessons to be learned from the work of Max Weber, we should remember that a legitimate norm is implemented by the subject of the rule without being contested, even if the norm is not accompanied by a sanction, simply by virtue of the fact that it corresponds to the needs of the subjects to whom it is addressed and therefore has legitimacy in their eyes. The link between legitimacy and effectiveness is also useful in the reverse sense – in other words, a norm will be legitimate if it is effective. The two concepts are thus closely interlinked.

Session 4
Dispute Resolution

This session could have been entitled "The role of the judge", taking the concept of judge in the sense of adjudicator (any third party tasked with deciding a dispute, including arbitrators).

But the session goes beyond the notion of the "judge", because it also has to consider the place of alternative, non-judicial, modes of dispute resolution.

Undeniably, with society becoming increasingly complex, changeable and uncertain[19], judges are more frequently called upon to intervene in human interactions (human in the broad sense, which includes nature) and in ever more complex situations. There might be a number of hypothetical situations (the list is not exhaustive):

[19] A panel at the June 2023 symposium was dedicated to this question. See the provisional conclusions of that panel in Annex 2 below.

1) The norm might exist and be suitable for dealing with the situation brought before the judge. But the judge has to apply that norm to the specific circumstances of the case before her or him, if necessary by adapting it.
2) The norm exists but was not intended for the type of dispute before the judge. The judge must therefore decide the dispute by adapting the norm to the circumstances of the case at hand as needed, using the usual forms of reasoning available to lawyers (by analogy, a fortiori, a contrario, etc.).
3) There is no norm, and the judge must thus rely on general principles to resolve the dispute. This hypothesis is based on two principles that are sometimes contested: (a) there is no such thing as a legal vacuum; (b) the judge cannot refuse to judge, thereby becoming guilty of a denial of justice. Straight away, this hypothesis raises a question: the international legal system is not intended to be comprehensive, thus the judge might well need to resort to an applicable system of national law to supplement the international norm or as a substitute where no norm exists.

Where the array of modes of dispute resolution is concerned, the current situation is one of proliferation, leading in practice to jurisdictional conflicts and in theory to concurrent proceedings. Less frequently, despite this proliferation, the risk exists of denial of justice where no jurisdiction can be found, or reasonably accessed, by a claimant. There is room for cooperation here, including through dialogue among judges[20].

There are numerous regional courts and tribunals whose competence must be harmonized with courts of universal or national jurisdiction. Here, too, frameworks and methods could probably be devised for cooperation.

Lastly, the place of alternative, non-jurisdictional modes should be rethought, so these can be deployed not only upstream of any dispute or commencement of proceedings, but throughout the process (particularly in arbitration) so that proceedings are better and more efficiently managed, less lengthy and thus less costly.

Throughout the discussions on the reform of resolution of disputes between an investor and a state (the host state where the investment is made), one aspect highlighted in particular was the flawed competence of arbitrators in assessing damages. This question probably calls for more work, for example by setting up training sessions for arbitrators perhaps jointly with experts, so that presentations by experts at hearings on the calculation of damages can be adapted to the needs of the experts.

[20] Nonetheless, the several members of the panel at the June 2023 symposium that discussed this question expressed serious doubts about cooperation between judges.

ANNEX 1
Symposium June 2023
Summary of the program

Monday 19 June 2023 (morning)
Two parallel panels are offered for each time slot

9:00 am -10:45 am
International Law Confronted with the Uncertain, Unforeseen, Unthinkable (Chair: Christina Voigt – Speakers: Philippe Sands; Paulo Canelas, Florian Couveinhes-Matsumoto, Susan Karamanian, Leila Sadat)

New relation Between Hard Law and Soft Law (Chair: Gabrielle Marceau – Speakers: Juan Antonio Dorantes, Sabine Lochmann-Beaujour, Tajana Sachse, Bezahinibé Micheline Somda)

10:45 am – 11:15 am Break (hosted by McDermott)

11:15 am -1:00 pm
Businesses as International Law Actors (Chair: Julie Bédard and Laure Lavorel – Speakers: Geneviève Dufour, Damilola Olawuyi, Maria Pernas, Valérie Pironon) (*Panel co-organised with Skadden)*

Rethinking International Institutions (Chair: Anne-Thida Norodom and August Reinisch – Speakers: Vilawan Mangklatanakul, Sheila Braka Musiime, Aniruddha Raiput, Yejoon Rim)

Monday 19 June 2023 (afternoon)
2:00 pm – 3:45 pm

Cooperation (Chair: Laurence Boisson de Chazournes and Jason Rudall – Speakers: Hannah Birkenkötter, Pascal Lamy, Mohamed Mahmoud Mohamed Salah, Natalie Morris-Sharma, Alejendro Rodiles Breton)

Accountability of Courts and Tribunals (Chair: Lucy Reed – Speakers: James T. Gathii, Anthea Roberts, Christian Tams, Geir Ulfstein, Marina Weiss) (*Panel co-organised with PluriCourts and Bredin Prat*)

3:45 pm – 4:15 pm Break (hosted by Paris Place d'Arbitrage)

4:15 pm – 6:00 pm
Due diligence (Chair: Pierre d'Argent – Speakers: Shinichi Ago, Marie-Anne Frison-Roche, Phoebe Okowa, Alice Ollino, Nassib Ziadé)

Is Arbitration adapted for Mixed or asymmetrical Disputes? : (Chair: Yas Banifatemi and Anne van Aaken – Speakers: Kun Fan, John Kadelburger, Ndanga Kamau, Manuel Tomas) (*Panel co-organised with Paris Place d'Arbitrage*)

Tuesday 20 June (morning)
9:00 am – 10:45 am
New warfare means (Chair: Nehal Bhuta – Speakers: Thompson Chengeta, Nadia Marsan, Gregor Noll, Andy Shichen, Daniel Trusilo)

Ethics in International Economic Relations (Chair: Chantal Ononaiwu and Andreas Ziegler – Speakers : Nathalie Bernasconi-Osterwalder, Joshua Castellino, Sandrine Clavel, Iliana Rodriguez Santibanez, (*Panel co-organised with IERDJ, coordinated by Sarah Albertin*)

11:15 am– 1:00 pm
Mediation (Chair: Diana Paraguacuto-Maheo and Steven Sengayen – Speakers: Majda Dabaghi, Paul Fauteux, Matthias Fekl, Judith Knieper) (*Panel co-organised with UNCITRAL*)

L'abus de droit international (Chair: Wanshu Cong and Marie Lemey – Speakers: Payam Akhavan, Freya Beatens, Kateryna Busol, Constantinos Salonidis)

Tuesday 20 June (afernoon)
2:00 pm – 3:45 pm
Sanctions (Chair: Régis Bismuth and Jan Dunin-Wasowicz – Speakers: Sara Brimbeuf, Genevra Forwood, Chimène Keitner, Arman Sarvarian, Nathanael Tilahun)

Dialogue between Adjudicators (including arbitrators) : (Chair: Andrea Bjorklund and Yueming Yan – Speakers TBC) (*Panel co-organised with the Fortier Chair, McGill*)

4:*15 – 6:00 pm*
Immunities (Chair: Aziz Tuffi Saliba – Speakers: Carla Baker-Chiss, Noura Kridis, Franck Elong Mboule, Juliette Morel-Maroger, David Pavot) (*Panel co-organised with the Sport Law Chair, Sherbrooke University*)

Law for Future Generations (Chair: Maria Gavouneli – Speakers: Arthur Capella, Sonya Djemni-Wagner, Babatunde Fagbayibo, Jennifer Tridgell) (*Panel co-organised with IERDJ, coordinated by Sarah Albertin*)

Annex 2
Conclusions of the panel on uncertainty – June 2023 – Symposium

International Law Confronted with the Uncertain, Unforeseen, Unthinkable

Note prepared by Florian Couveinhes Matsumoto
Associate Professor in Public Law, École normale supérieure (Paris, Ulm), Université PSL (Paris Sciences & Lettres)

1. The risk of cataclysmic events (e.g. absolutely massive migrations due to climate disruption), with unforeseeable consequences that are worrying for the very guarantees of the application of the Law, is very high in the case where States, international organizations and international tribunals maintain an interpretation of International Law aimed solely at issuing rules and rendering decisions that are predictable in the light of their previous attitude. **This concern for narrow, short-term legal certainty must therefore be tempered by the will to guarantee a minimum standard of global, long-term legal certainty, which may be termed *legal resilience*.** Whereas legal certainty, as traditionally understood, calls for the application of a Law that the parties to a dispute or the main stakeholders could anticipate, the second notion calls for the applicable Law to be determined, in whole or in part, to preserve the legitimacy and effectiveness of international Law, institutions and major legal principles in the long run. Whereas the first notion echoes formalism, legitimate expectations, and predictability, the second rhymes with preservation, coherence, reasonableness, and the long term. **More work could be devoted to *legal resilience* and how it should temper or encompass legal certainty**.
2. One of the main sources of uncertainty today concerns **the linkage of rules with ecological, health, safety or human rights objectives, and rules with growth, competition, or investment profitability objectives**. Major changes lie ahead, while the institutions responsible for this kind of linkage are nowhere to be found or are undersized or inadequate. From this point of view :
    a. In the short term, international and transnational courts should **determine applicable Law by relying** less on the arbitration clause (which tends to limit the concerns taken into consideration by judges or arbitrators) and **more on the choice of Law clause** (which often refers to international Law as a whole).
    b. In the medium term, **States should set up international courts and tribunals capable of handling "mixed" disputes** (investment-health, trade-environment, etc.) **by applying several bodies of rules** (international investment Law and health Law, WTO Law and environmental Law, etc.). This also implies a review of the methods used to nominate/elect the members of existing courts and tribunals.
    c. In the medium term, States should work towards **setting up a world ecology organization** (or International Environmental Organization), or at least procedures to identify environmental dumping, fair carbon border

adjustment mechanisms, etc (the UNEP is not well equipped for such tasks).

3. Current and future crises are numerous (pandemics, series of fires, floods, or droughts, bursting financial bubbles, the disappearance of islands or coastlines, probably civil wars and mass migrations, possibly world war), and **existing institutions and procedures seem ill-equipped to deal with them**. To anticipate crises or extreme events in the environment, health, migration, and other fields, we need to **strengthen existing emergency procedures and create new ones** (such as insurance mechanisms at the global level), **as well as establish negotiation and coordination methods that transcend ideological and geopolitical divides** - possibly along the lines of what existed during the Cold War.
4. To ensure that international agreements are ambitious, meet public expectations and are likely to be effectively implemented, we need to **increase the transparency and participation of civil society, members of parliament, and citizens in international negotiations**, for instance by organizing parliamentary and citizens' debates **right from the negotiation stage**, or when considering the appropriateness and content of a negotiating mandate.