

Annex II

Request of the General Assembly under operative paragraph 34 of its resolution 76/111 of 9 December 2021

1. In paragraph 34 of its resolution 76/111, the General Assembly took note of paragraph 329 of the 2021 report of the Commission (A/76/10) and, *inter alia*, requested that more information about the constraints and shortfalls referred to in paragraph 329 be provided, as well as available options to address them, including information regarding the terms of reference of the proposed trust fund, for consideration by the General Assembly at its seventy-seventh session.
2. The present information is provided in response to the above-mentioned paragraph 34. The first part addresses matters concerning Special Rapporteurs and Chairs of Study Groups, whose work is unremunerated, and the role of the Secretariat in supporting them, while the second part considers related budgetary aspects. It should be noted that the information in the present annex and the terms of reference of the proposed Trust Fund set out in the appendix focus on assistance to Special Rapporteurs and Chairs of Study Groups, and support of their work by the Secretariat.
3. The Commission recalls that it has on numerous occasions reiterated its views concerning the question of honoraria, as well as the extent to which the research of Special Rapporteurs is affected by lack of resources. It stresses the importance of the need for Special Rapporteurs (particularly those from developing regions) to obtain the necessary assistance to undertake the research required for the preparation of their reports.

The role of Special Rapporteurs, Chairs of Study Groups and the Secretariat

4. The proposed consideration of a Trust Fund to support the work of Special Rapporteurs and Chairs of Study Groups and Secretariat assistance to their work should not be understood as detracting from the fact that these matters should be addressed in the relevant programme budget pertaining to the work of the Commission. The proposed Trust Fund is suggested as a “stop-gap” measure.
5. The Commission wishes to underline that its Special Rapporteurs play a central role in its functioning. The practice of the Commission has been to appoint one of its members to serve as Special Rapporteur at an early stage of the consideration of a topic irrespective of whether it is a matter of progressive development of international law or its codification.¹ Special Rapporteurs have different professional backgrounds and responsibilities and are appointed taking into account the different regional groups that are reflected in the composition of the Commission as a whole.
6. The additional functions of a member serving as Special Rapporteur continue until the Commission has completed its work on a topic. It is the responsibility of the Special Rapporteur to offer the intellectual vision for the topic; to mark out its contours; to explain existing practice and the state of the law; to make proposals in reports on the topic to the Commission; to take into account the views expressed by members, Member States and, in some instances, international organizations and other actors; and to manage the overall development of the Commission’s work on the topic, from its conception in terms of content and structure to the adoption of a final output with commentaries.
7. The Special Rapporteur performs a variety of tasks ranging from the preparation of reports on the topic, participation in the consideration of the topic in the plenary, elucidation of various aspects of the topic in plenary and in the work of the Drafting Committee, and the

¹ The statute of the Commission only envisages the appointment of a Special Rapporteur in the case of progressive development of international law.

preparation of revised texts, to the elaboration of commentaries, once such texts are adopted by the Commission. The reports of Special Rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established under its statute.²

8. The tasks of Special Rapporteurs require extensive independent research and analysis, as well as a serious commitment to stewardship at all stages of the Commission's work on a topic. While the Commission is in session for a determined period of time, the functions of the Special Rapporteurs continue throughout the year.

9. The requirement of independence in the performance of their functions has the consequence for the Special Rapporteurs that they carry out their tasks separately from their other professional responsibilities – in parallel with, but often at the expense of, their professional activities. As the Commission assumes increasing responsibility for topics that are multidisciplinary, coupled in certain instances with the paucity of readily available practice, research work on particular topics has involved travel and contacts with individuals and institutions with particular expertise on the specific topics in question or with access to particular information. The use of research assistance under the direct supervision of a Special Rapporteur has always been an essential component of the work of Special Rapporteurs in preparing reports intersessionally.

10. In some instances, Special Rapporteurs are located in places where accessibility to primary research material and resources is difficult and expensive. Indeed, there have been situations in which individual Special Rapporteurs have used their personal resources for research activities or have foregone travel entitlements to make detours to conduct research elsewhere on their way to or from the Commission's sessions in Geneva. In some regions, access to the Internet may be intermittent and expensive. All these impediments place an additional burden on Special Rapporteurs, particularly when the Commission is out of session, as they are required to prepare reports analysing complex questions of international law in readiness for the following session of the Commission.

11. In short, the scheme under the statute of the Commission relies heavily on the work done by Special Rapporteurs, whose reports, prepared intersessionally, form the basis for the consideration of the various topics by the Commission.

12. Where the Commission has in recent years established a Study Group, the Chairs and members assigned to particular issues work in a similar manner to that of Special Rapporteurs outlined above.

13. As regards the Secretariat, pursuant to article 14 of the statute of the Commission, the Secretary-General of the United Nations provides substantive and technical servicing to the Commission, including providing various forms of assistance to Special Rapporteurs. From the establishment of the Commission, the Codification Division of the Office of Legal Affairs of the United Nations has served as the Secretariat of the Commission.

14. The type of assistance offered by the Secretariat to Special Rapporteurs has two interconnected aspects: assistance provided to the Commission as a whole, from which Special Rapporteurs benefit, and assistance provided to individual Special Rapporteurs in the discharge of their responsibilities.

15. In the context of the former, the Codification Division undertakes considerable independent research, analytical studies and surveys to facilitate the work of the Commission. At its thirty-second session (1980), the Commission noted that the studies and research projects prepared by the Codification Division were part and parcel of the consolidated methods and techniques of work of the Commission and, as such, constituted an indispensable contribution to its work.³ This remains the case.

² See generally, United Nations, *The Work of the International Law Commission*, vol. I (2017) (9th ed.), (United Nations publication, Sales No. E.17.V.2).

³ See *Yearbook ... 1980*, vol. II (Part Two), pp. 169–170, para. 192. While there is a synergy for the overall work of the Commission, the studies and surveys by the Secretariat are independent of reports of the Special Rapporteurs and, in the nature of the work of the Commission, are not intended to be a replacement thereof.

16. As to the latter, this includes the Codification Division assigning a staff member or members to: work closely with the Special Rapporteur at the various stages of development of the topic; follow and monitor developments on the topic in question; and provide research assistance upon request, such as collecting evidence of State practice, doctrinal material and jurisprudence, or conducting research on a particular issue. These functions are subsumed in the overall activities of the Division. The staff members concerned also perform editorial, research and referencing tasks with respect to the reports prepared by Special Rapporteurs. They may sometimes also assist with the preparation of the commentary to draft outcomes at the request of the Special Rapporteurs, who remain primarily responsible for the commentaries.⁴ The presence of such staff members is often crucial during the consideration of a particular topic when the Commission is in session. Based on recent practice, their participation in any related outside activities undertaken by the Special Rapporteur in the development of the topic can also be highly valuable.

Honoraria for Special Rapporteurs

17. The Commission recalls that the unique role of Special Rapporteurs in its work has been recognized by the General Assembly from the outset when, in 1949, it initially authorized on an exceptional basis the payment of research grants to Special Rapporteurs and subsequently decided that special allowances be granted on an exceptional basis to all members of the Commission.⁵

18. It was the specific provision in the statute of the Commission concerning the appointment of members of the Commission as Special Rapporteurs on selected topics that led the Fifth Committee that year to recommend to the General Assembly, as an exception, the payment of research project grants, in the form of honoraria. Payment of such honoraria was conditional upon the submission of a report. In the debates in the Fifth Committee, the Chair of the Advisory Committee on Administrative and Budgetary Questions noted that Special Rapporteurs prepared drafts and working papers to assist the Commission, which not only saved the Commission time during sessions, but also demanded extra work and time on the part of seasoned legal authorities.⁶

19. The payments were designed not so much to compensate adequately the individuals concerned for their services as to acknowledge in a token manner the substantial sacrifice of time or of financial interest on the part of the individuals concerned.

20. After several reviews, the General Assembly, in paragraph 1 of its resolution 35/218, decided, with effect from 1 January 1981, on certain rates of honoraria payable in those cases it had already authorized on an exceptional basis, including the International Law Commission, and its Special Rapporteurs. It was determined that the rates payable would be: Five thousand (5000) United States dollars for the Chairs, 3000 dollars for other members. An additional amount of 2500 dollars was payable to members of International Law Commission when acting as Special Rapporteurs, conditional upon the preparation of specific reports or studies between sessions of the Commission.⁷

21. At its fifty-sixth session (2002), having considered the note by the Secretariat on the comprehensive study of the question of honoraria payable to members of organs and subsidiary organs of the United Nations (A/56/311), the General Assembly, in accordance with its resolution 56/272, decided, with effect from 6 April 2002, to set at a level of one United States dollar per year all honoraria then payable on an exceptional basis, including to the members of the International Law Commission. Consequently, when the honorarium was pegged at \$1 per year for all members of the Commission, Special Rapporteurs no longer

⁴ See *Yearbook ... 1996*, vol. II (Part Two), p. 96, para. 234; see also article 20 of the statute of the International Law Commission.

⁵ At its fourth session (1949), the General Assembly authorized the annual payment of honoraria to the Chair and the Special Rapporteurs of the Commission in respect of work performed by them between sessions.

⁶ See *Official Records of the General Assembly, Fourth Session, Fifth Committee, Summary Records of Meetings*, 20 September–8 December 1949, 208th Meeting, 26 October 1949.

⁷ A/53/643.

receive the additional amount that was payable conditional upon the preparation of specific reports or studies between sessions of the Commission.

22. Since its fifty-fourth session (2002), the Commission has repeatedly drawn the attention of the General Assembly to the impact of resolution 56/272,⁸ emphasizing in particular that the resolution affected Special Rapporteurs, especially those from developing countries, as it compromises support for their research work. It has urged the General Assembly to reconsider this matter, with a view to restoring the honoraria for Special Rapporteurs.

Other related budgetary aspects

23. The Commission's budget is covered under subprogramme 3 of the programme "Legal affairs" of the regular budget. It covers the requirements of travel and subsistence allowance of the 34 members of the Commission, attendance by the Chair at the regular session of the General Assembly during consideration of the Commission's report, honoraria for the 34 members of the Commission (payable at the \$1 per year rate set by the General Assembly in its resolution 56/272, which the Commission opted not to receive), and travel and subsistence allowance for a limited number of members of the Codification Division to substantively service the sessions of the Commission.

24. The Commission notes that there have been budgetary pressures affecting the United Nations over the years, resulting in budgetary cuts (for example, 2010–2011, 2012–2013 and 2014–2015) or no growth (for example, 2006–2007), from which the Commission has not been immune. In some instances, with a budgetary overrun contemplated in the budget estimates, a programme budget implication (PBI) has been raised to meet the needs of the Commission (2016–2017).

25. The Commission is aware that administrative and budgetary questions are matters considered by the Fifth Committee. It is not its intention to interfere in the processes concerning the negotiation of the regular budget, and any options that may be available in that regard. As will be clear from the above, however, attendance by Special Rapporteurs or by Chairs of Study Groups at workshops or seminars to further their work, and attendance at such workshops or seminars by members of the Secretariat in support of Special Rapporteurs and Chairs of Study Groups, although a valuable and often essential part of the work of the Commission, in the absence of honoraria, fall outside United Nations budgetary provision.

26. In paragraph 34 of its resolution 76/111, the General Assembly also requested information regarding the terms of reference of the proposed trust fund. Should the proposal for the establishment of a trust fund be accorded favourable consideration by the General Assembly, there will be a need for terms of reference. Such terms of reference to be promulgated by the Secretary-General could take the form contained in the appendix to the present annex. The text draws upon other previous terms of reference, including those contained in General Assembly 75/129 on the Trust Fund for the Judicial Fellowship Programme of the International Court of Justice. The Commission is grateful to its Secretariat for the preparation of the terms of reference.

⁸ See *Yearbook ... 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook ... 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook ... 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook ... 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook ... 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook ... 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook ... 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook ... 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook ... 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook ... 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook ... 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook ... 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook ... 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 302; and *ibid.*, *Seventy-sixth Session, Supplement No. 10 (A/76/10)*, para. 317.

Appendix

Proposed Terms of Reference

Trust Fund for Assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto (ILC Special Rapporteurs Trust Fund)

Terms of Reference

I. Establishment

1. The Trust Fund for Assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto is hereby established pursuant to resolution 77/...

II. Background

2. At its seventy-second (2021) and seventy-third (2022) sessions, the International Law Commission proposed that consideration be given to the establishment of a Trust Fund to support Special Rapporteurs of the International Law Commission and related matters.

3. Special Rapporteurs of the International Law Commission play a central role in the functioning of the Commission. The practice of the Commission has been to appoint one of its members to serve as a Special Rapporteur at the early stage of the consideration of a topic irrespective of whether it is a matter of progressive development or codification.¹ The Special Rapporteur of the Commission performs a variety of tasks ranging from the preparation of reports on the topic, participation in the consideration of the topic in the plenary, elucidation of various aspects of the topic in plenary and in the work of the Drafting Committee, and the preparation of revised texts, to the elaboration of commentaries once such texts are adopted by the Commission. The reports of Special Rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established under its statute.²

4. The tasks of Special Rapporteurs require extensive independent research and analysis, as well as a serious commitment to provide stewardship at all stages of the Commission's work on a topic. The functions of Special Rapporteurs continue throughout the year. The scheme under the statute of the Commission relies heavily on the work done by Special Rapporteurs, whose reports, prepared intersessionally, form the basis for the consideration of the various topics by the Commission. Special Rapporteurs bear responsibility for the authorship of their reports.

5. The practical needs of the Special Rapporteurs are necessarily determined by the requirements of the statute of the Commission. The statutory responsibilities of the Commission and its character as an expert body of persons of recognized competence in international law with the object of promoting the progressive development of international law and its codification make it imperative to retain the distinct role of the Commission, as an expert deliberative body of the General Assembly.

6. The work of Special Rapporteurs is resource intensive. Special Rapporteurs, particularly those from developing countries, face many impediments in the discharge of their

¹ The statute of the Commission only envisages the appointment of a special rapporteur in the case of progressive development of international law.

² See generally, United Nations, *The Work of the International Law Commission*, vol. I (2017) (ninth edition), (United Nations publication, Sales. No. E.17.V.2).

activities, while it is recognized that they are required to prepare reports analysing complex questions of international law in advance for the sessions of the Commission. Some Special Rapporteurs are located in places where accessibility to primary research materials and resources is difficult and expensive. As the Commission assumes increasingly responsibility for topics that are multidisciplinary, coupled, in some instances, with the paucity of readily available practice. The research work on particular topics has involved travel and contacts with individuals and institutions with particular expertise on the specific topics in question or with access to particular information. Support for Special Rapporteurs is needed in particular to ensure that they are in a position to collect materials from a wide range of legal systems and in different languages. There have been situations in which individual Special Rapporteurs have used their personal resources for research activities or have foregone travel entitlements to make detours to conduct research elsewhere. In some cases, access to the Internet is difficult and expensive. Where the Commission has in recent years established a Study Group, the Chair(s) and members assigned to particular issues work in a similar manner. In accordance with General Assembly resolution 56/272 of 27 March 2002, Special Rapporteurs no longer receive, exceptionally, 2500 dollars that previously was specially dedicated to assisting them in the preparation of their reports, payable upon submission. Since its fifty-fourth session in 2002, the International Law Commission has repeatedly drawn the attention of the General Assembly to the impact of its resolution 56/272,³ by the terms of which it decided, with effect from 6 April 2002, to set at a level of one United States dollar per year all honoraria payable on an exceptional basis, *inter alia* to the members of the International Law Commission, including for assistance to Special Rapporteurs, emphasizing in particular that the resolution affects the Special Rapporteurs, especially those from developing countries, as it compromises support for their research work. It has urged the General Assembly to reconsider this matter, with a view to restoring the honoraria for Special Rapporteurs.

7. In some circumstances, the Commission has established Study Groups whose Chairs or co-Chairs work in a similar manner as outlined above in relation to Special Rapporteurs. Accordingly, references to Special Rapporteurs also refer to Chairs of Study Groups carrying out similar activities.

8. In paragraph ... of resolution ... of ... December 2022, the General Assembly took note of paragraphs ...to ... of the Commission's report and, "without prejudice to the importance of ensuring the necessary allocations in the regular budget, request[ed] the Secretary-General to establish a trust to accept voluntary contributions so as to provide assistance to Special Rapporteurs and to provide any support to the Secretariat as may exceptionally be required".

9. Additionally, in recent years the work of the Commission has proceeded under conditions of financial and budgetary stress affecting the United Nations with impact on its Secretariat. The regular budget will continue to be used for travel and subsistence of Commission members and members of the substantive Secretariat at the annual sessions of the Commission. Resources from the Trust Fund may also be used to ensure attendance of a member of its Secretariat at activities other than the annual session of the Commission, undertaken by a Special Rapporteur to accomplish her or his tasks.

³ See *Yearbook ... 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook ... 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook ... 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook ... 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook ... 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook ... 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook ... 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook ... 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook ... 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook ... 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook ... 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook ... 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook ... 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 302; and *ibid.*, *Seventy-sixth Session, Supplement No. 10 (A/76/10)*, para. 317.

III. Purpose

10. The purpose of the Trust Fund is to provide a mechanism for donors to contribute resources for the research activities of the Special Rapporteurs of the International Law Commission, and Chairs of its Study Groups, and where circumstances so require, expenses for members of the Secretariat in relation to activities undertaken by the Special Rapporteur and Chairs of Study Groups to accomplish their tasks, under subprogramme 3 for which the Codification Division, Office of Legal Affairs, is responsible.

IV. Contributions

11. Contributions to the Trust Fund may be made by States, intergovernmental and non-governmental organizations, national institutions, bar associations, private institutions and individuals, and other appropriate entities. Contributions may only be accepted by the Assistant Secretary-General, Controller.

12. Contributions in cash to the Fund may be accepted in United States dollars or other fully convertible currencies.

13. Financial contributions shall not be earmarked for any specific activity of the International Law Commission, its Special Rapporteurs or Chairs of its Study Groups.

14. Any interest income derived from contributions to the Fund shall be credited to the Fund in accordance with the applicable United Nations Regulations and Rules, and policies and procedures.

15. The Controller has designated the following bank account in which the resources of the Fund shall be kept:

[Account details]

Earmarked for the Trust Fund for Assistance to Special Rapporteurs of the International Law Commission

V. Authority

16. The Trust Fund shall be administered in conformity with the United Nations Financial Regulations and Rules and with the relevant policies and procedures. Exceptions to such rules, policies and procedures are not permissible, unless specifically authorized by the Secretary-General or on his behalf by the Assistant Secretary-General, Controller or by the Assistant Secretary-General, Office of Human Resources, as appropriate.

VI. Administration and implementation arrangements

17. The Trust Fund will be administered by the Secretary-General. The Codification Division, Office of Legal Affairs, shall be the implementing office of the Fund. It shall coordinate its efforts with the Executive Office of the Office of Legal Affairs.

18. For the purpose of ensuring proper financial controls, the Under-Secretary-General, The Legal Counsel shall be the Programme Manager of the Trust Fund and the Executive Officer of the Office of Legal Affairs shall be its Certifying Officer.

19. The Legal Counsel shall be responsible for ensuring that the Trust Fund is utilized for the purpose described in Part III, as read with objectives set out in Parts I and II.

20. In particular, up to [X] dollars shall be payable to a member when acting as Special Rapporteur, however designated, conditional upon the preparation of specific reports or studies between sessions of the Commission.

21. Where it is determined that there is a shortfall in meeting the expenses in relation to activities that might be undertaken by the Special Rapporteur to accomplish their tasks, an

attestation to that effect and its impact on the servicing of the Commission will be made by the Legal Counsel.

22. The Certifying Officer shall ensure that expenditures are incurred in accordance with the applicable United Nations Financial Regulations and Rules, and policies and procedures, for the purpose intended, and shall draw to the attention of the Controller any proposed commitment or expenditure which, in his or her view, is inconsistent therewith.

VII. Reporting

23. The Controller will provide an annual financial statement showing income and expenditures as at 31 December of each year with respect to the total funds pledged and received for the Trust Fund for Assistance to Special Rapporteurs of the International Law Commission.

24. All accounts and financial statements shall be expressed in United States dollars.

VIII. Programme support costs

25. In accordance with United Nations Financial Regulations and Rules, programme support costs will be charged to the Trust Fund at the rate of thirteen (13) per cent of the total annual expenditures, unless otherwise agreed with the Controller. In addition, the Trust Fund operating reserve will be applied within the cash resources to meet final expenditures of the activities covered from the Fund.

IX. Audit

26. The Trust Fund will be subject solely to the external and internal audit procedures of the United Nations.

X. Revision

27. The Secretary-General may revise the above provisions, should circumstances so require.

XI. Termination

28. The Secretary-General shall decide the termination of the Trust Fund and the disposal of its assets.
