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Statement by
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before the Sixth Committee of the
78th Session of the United Nations General Assembly

on

**Agenda item 79: "Report of the International Law Commission on the work
of its Seventy-third and Seventy-fourth sessions"**

Cluster III

**Chaps: VII (Subsidiary means for the determination of rules of international
law) and IX (Succession of States in respect of State responsibility)**
New York, 1 November 2023

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Mr. Chairman,
Distinguished Delegates,

I will begin our statement today by addressing the topic of "**Subsidiary means for the determination of rules of international law**". I will subsequently address the topic "**Succession of States in respect of State responsibility**".



At the outset, we would like to express our appreciation to the Special Rapporteur, Mr. Charles Jalloh for his preliminary work on the topic of "**Subsidiary means for the determination of rules of international law**" and preparation of his first report. My delegation also commends the other members of the International Law Commission (ILC) and appreciates the Secretariat for preparation of the Memorandum.

My delegation takes note of the inclusion of this topic in the Commission's program of work. It helps the Commission to continue its long-standing work in the clarification of the sources of international law.

According to the established practice of the Commission, the topic is referred to the Drafting Committee only after several successive reports by the Special Rapporteurs. The provisional adoption of the draft conclusions 1-5 by the Drafting Committee based on the First Report on "Subsidiary means" before receiving and considering comments and observations of member States seems to be premature at this stage.

This very First Report of the Special Rapporteur seems to be a progressive development of the topic rather than a codification.

It is clear that Article 38 of the ICJ Statute reflects customary international law. It is axiomatic that the "subsidiary means" are supplementary, ancillary, auxiliary and secondary sources of law.



Mr. Chairman,

I will now address the content of the report of the Special Rapporteur. With regard to the nature and scope of subsidiary means, three issues merit further consideration:

1. First, the argument concerning the non-exhaustive nature of Article 38, paragraph 1 (d) of the Statute of the International Court of Justice (ICJ) is not persuasive and lacks sufficient reasoning.

2. Second, it is not clear how "the practice of international courts and tribunals" would differ from "judicial decisions".

3. Third, the "practice of States" could constitute a rule of customary international law if it is consistent and widespread based on *opinio juris*. In such situations, the subsidiary means would also overlap with international custom at some point and under certain circumstances.

In so far as, judgments of national courts considered for the purpose of Article 38, paragraph 1 (d) of the Statute of the ICJ, their application should be subject to consistent and widespread decisions. Needless to say that the principle of consent of States still plays a pivotal role in generating international legal obligations. Indeed, despite some critiques and challenges, international law is a State-centric legal system and remains so.



Judicial decisions could contribute to the formation of a rule of customary international law if and only if they are consistent with established principles and rules of international law and are widespread, *i.e.*, reflects legal traditions of various legal systems of the world. That said, if a judicial decision were contrary to an established rule of international law it would not give rise to the formation of a rule of customary international law even if it were widespread in the eyes of certain States.

Unilateral acts of States and resolutions and decisions of international organizations that are two distinct sources of obligations are considered as additional subsidiary means; the study and analysis of these additional means would be inevitable in light of developments in State practice and international jurisprudence. While resolutions of international organizations would better fall within the ambit of Article 38, paragraph 1 (d) of the ICJ Statute, one may argue that they could also fall within the ambit of Article 38, paragraph 1 (a). One reasoning for the latter argument is that even though resolutions are not *per se* treaties, they nonetheless derive their legal authority from general international conventions, *i.e.*, constituent instruments. Apart from the argument concerning the formal sources of international law, some resolutions are source of obligations for States with legal effects.



In *Legality of the Threat or Use of Nuclear Weapons*, "the Court notes that General Assembly resolutions, even if they are not binding, may sometime have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."¹ It is clear from the Court's finding that certain resolutions of the General Assembly could be tantamount to specified legal rules, but not all resolutions of the General Assembly having such a character.

Mr. Chairman,

We should make distinction with regard to the pleadings before international courts and tribunals including written and oral pleadings of Counsel and advocates, legal advisers, and Agents' speech. The pleadings, legal arguments and defense therein do not reflect State practice and are used for establishing certain claims based on certain facts. Some pleadings may however establish a certain claim or reflect a

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, pp. 254-255, para. 70. See. also paras. 71-73.



legal position by a Party to a contentious case, which makes its best efforts through legal reasoning by legal advisers, and Counsel simply to guarantee that it wins the case in a particular inter-State dispute which has its own relevant legal and factual background.

In addition, there is a logic to make a distinction between written and oral pleadings. While written pleadings including the application, memorial, counter-memorial, reply and rejoinder are signed and submitted by the Agents of States before the ICJ, oral pleadings are usually made by Counsel and advocates. On the other hand, Agent's speech reflects both a State practice and official position of a State.

In addition, possible interventions by States as *amicus curiae* or friend of the court process before national or international courts and tribunals in cases dealing with international law issues should be given a distinct weight. If the *amicus* brief is being filed by any organ or agency of a State, for instance Ministry of Foreign Affairs or Ministry of Justice or one of its officers or agents, the legal arguments advances therein could as a matter of principle reflect State practice and official position of a State.

At first look, "judicial decisions" and "teachings" appear to be on the same footing. As a matter of principle and practice however, "judicial decisions" should be given more weight than "teachings and legal writings". Judicial decisions can also be used to elucidate a rule of



the law. As suggested by the late Professor and Judge James Crawford, "judicial decisions" are regarded as evidence of the law.

The Commission itself makes more use of the "judicial decisions" rather than "teachings." Thus, there appears to exist a normative difference between these two subsidiary means. During the drafting of the Statute of the Permanent Court of International Justice (PCIJ) by the Advisory Committee of Jurists, members of the Committee touched this issue. Some drafters including the French member of the Advisory Committee were of the view that "judicial decisions or Jurisprudence" is more important than "teachings or doctrine", "since the judges in pronouncing the sentence had a practical end in view".

This reasoning is logical and persuasive. As the Special Rapporteur has rightly pointed out, the ICJ's reliance on "teachings" is rare and it has cited "teachings" only in few cases. Even in the rare instances that the Court referred to teachings, its citation of writers does not seem to be representative of the various nations. That being so, it does not have sufficient diversity to be reflective of principal legal systems of the world significantly ignoring or neglecting the Global South. In this regard, we would like to highlight the important status of the Islamic legal systems as a principal legal system in many countries which deserves appropriate attention.



In the same vein, the weight attached to the works of prominent and pioneer private expert groups or eminent groups of scholars such as Institute of International Law (*Institut de Droit International*) and the International Law Association should be much higher than those of individual scholars and a single authority should. Some international lawyers and judges have opined that the reference to "the determination of rules of law" in Article 38, paragraph 1 (d), connotes a decision which would elucidate the existing law (*de lege lata*), and not bring new law (*de lege ferenda*) into being. If we stick to this argument, then no role would be left for the ICJ and other international courts and tribunals in the progressive development of international law.

Having said that, there are many reasons to believe that international courts and tribunals play an important role in the progressive development of international law. No doubt, the ICJ has made many contributions to develop international law. With this in mind, we agree with the Special Rapporteur that "the formal "subsidiary" status of judicial decisions belie in practice their fundamental role and importance in the development and consolidation of international law."



Mr. Chairman,

Although separate or dissenting opinions to decisions of the ICJ are likely equivalent to "teachings" rather than "judicial decisions", the existence of some sort of hierarchy between the individual opinions of international judges, and opinions and writings of scholars is susceptible to further analysis.

In principle, the reports and opinions of Special Rapporteurs on thematic issues and situations could not be considered as a source of international law. Special Rapporteurs are not necessarily publicists let alone being "highly qualified publicists" as set forth in Article 38, paragraphs 1 of the Statute.

In line with the Commission's practice on source-related issues, *i.e.*, Article 38, paragraphs 1 (b) &(c) of the Statute of the ICJ, we agree with the Special Rapporteur that the draft conclusions with commentaries would be an appropriate form of output on this topic.

"Judicial decisions" pertain to judgments, orders, and other decisions by a court of law which are not simply "arbitral awards", and as such, the former term does not cover *stricto sensu* the decisions rendered by arbitral tribunals. It includes advisory opinions as well as national court decisions. We cannot however, agree that the advisory opinions are declarations *erga omnes*. This statement lacks any credible authority in law and practice. The advisory opinions of the International



Court of Justice are judicial statements and contribute to the work of the UN organs and other bodies on legal questions arising within the scope of their activities. While advisory opinions are not *per se* declarations *erga omnes*, the dictum of such opinions may contain certain obligations *erga omnes*. A well-known example of such a dictum of the ICJ having an *erga omnes* character, pronounced in its 2004 Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Court in its advisory opinion rendered in the *Wall* case, stated that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."²

That said, we express serious doubt that the "judicial decisions" envisaged in Article 38, paragraph 1 (d) of the ICJ Statute would encompass decisions of treaty bodies *inter alia* the General Comments of various human rights treaty bodies. The term "Judicial" naturally pertains to the functions of a court or tribunal. We should not broaden the scope of an existing expressed term. The Secretariat's Memorandum corroborates this reasoning. Nonetheless, the Commission should take into account the limitations applicable to subsidiary means, in particular

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 202, para. 159.



the limitation set out in Article 59 of the Statute of the ICJ regarding the relative effect of the decisions of the Court.

We believe that the Draft conclusions prepared by the Special Rapporteur are precise and lucid.

From a formalistic point of view, Draft conclusion 3 provisionally adopted by the Drafting Committee is well organized and lucid. On substance, Draft conclusion 5 of the Drafting Committee would more probably rectify the long-standing neglect of the Global South explicitly referring to "various legal systems and regions of the world". Yet, the exemplary criteria for assessing the "representativeness of teachings" namely "gender and linguistic diversity" needs further scrutiny as they are not decisive criteria for this purpose.

The proviso "certain circumstances" under which decisions of national courts may be used as subsidiary means for the determination of rules of international law should be elaborated in the forthcoming reports of the Special Rapporteur.

My final point on this topic concerns the latter part of paragraph 2 of the commentary to draft conclusion 2 provisionally adopted by the Commission. My delegation does not share the view that the subsidiary means "are part and parcel of customary international law." As mentioned above, they could contribute to the formation of a rule of



customary international law if and only if they are widespread and consistent with established principles and rules of international law.

Mr. Chairman,

Allow me to refer to the Chapter nine of the ILC Report, which deals with the topic of "**Succession of States in respect of State responsibility**".

My delegation would like to thank the Commission for the decision to establish a Working Group on the topic and we welcome the appointment of Mr. August Reinisch as Chair of the Working Group. We are also grateful to the insight of the Commission not to proceed with “draft articles” as a final outcome of the ongoing work but rather to proceed with a “draft guidelines” for the topic under consideration.

Finally, recalling the position and observations of the Islamic Republic of Iran on this topic before the seventy-seventh session of the Sixth Committee and its other sessions,³ we will provide our complementary comments and observations on the draft guidelines worked out by the Drafting Committee in due time.

³ See. Statement delivered by the Islamic Republic of Iran before the 73rd (Cluster III) Session of the Sixth Committee of the United Nations General Assembly under the Agenda item 78: Report of the International Law Commission on the work of its Seventy-third session.



Mr. Chairman,

Having reached the end of my statement corresponding to the final cluster on the Report of the Commission on the work of its seventy-fourth session, my delegation once again expresses its gratitude to the members of the ILC, and the Chair, Vice-Chairs, Rapporteur and the Secretariat of the Sixth Committee and wishes the successful completion of all the ongoing works currently underway.

I thank you Mr. Chairman.