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Statement by

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before the Sixth Committee

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on

Agenda item 79: "Report of the International Law Commission on the work of its seventy-fifth session"

Cluster II

Chapters: IV (Settlement of disputes to which international organizations are parties) and V (Subsidiary means for the determination of rules of international law)

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بسم‌الله الرحمن الرحیم

Mr. Chairman,

In my statement on Cluster II, I will address Chapters IV and V of the ILC's Report and share our views on the topics "*Settlement of disputes to which international organizations are parties*" and "*Subsidiary means for the determination of rules of international law*".

On the first topic, namely, ***"Settlement of disputes to which international organizations are parties"***, we take note of the second report of the Special Rapporteur, Mr. August Reinisch, contained in document A/CN.4/766, as well as

the memorandum prepared by the United Nations Secretariat on the practice of States and international organizations.

Certain aspects of the current work of the Commission need to be viewed in the light of its previous work in relation to international organizations, in particular the 2011 Draft Articles on the Responsibility of International Organizations. On a relevant note, we concur with the Special Rapporteur to limit the scope of the ILC's work on the topic to intergovernmental organizations and to exclude non-governmental organizations and business entities. In this respect, we are still not convinced by the decision of the Commission to expand the definition of "international organizations" as previously adopted in 2011.

We note that the Special Rapporteur has presented a focused study of international disputes, the practice of settling international disputes to which international organizations are parties, as well policy issues and suggested guidelines.

The study of different modes of dispute settlement and rules of law renders inevitable consideration of the topic in light of the law of immunities. The notion that an international organization enjoys jurisdictional immunities have consequences for the settlement of disputes to which it is a party. In a given situation where an international organization has no choice of a means of dispute settlement and has not waived its immunity, question arises as to what extent it continues to rely on its jurisdictional immunity. In this context, the importance of draft Guideline 5 on "Accessibility of means of dispute settlement" cannot be overstated. This depends, first and foremost, on the constituent instrument of the international organization as well as the relevant agreement between the international organization and the host country. In this context, we understand that no hierarchy is intended to be denoted from the wording of Guideline 5, since subjects of international law are free to choose the most appropriate means of dispute settlement.

Additionally, settlement of disputes of a private nature to which an international organization is party depends on the inclusion of the same in the

constitutive instrument of the organization or the relevant host country agreement and a higher accessibility may better assist filling the gap in this respect.

Turning to draft Guideline 6, arbitration and judicial settlement have been rightly subjected to the requirements of independence and impartiality of adjudicators and due process; nonetheless, some other means of dispute settlement such as mediation, conciliation as well as inquiry involve engagement of neutral third parties and as such are subject to the abovementioned rule of law requirements.

To wrap up our comments in the first part, we underline the necessity of reflection of principles of pacific settlement of disputes as enshrined in the Manila Declaration on Peaceful Settlement of International Disputes in the work of the Commission on the settlement of disputes to which international organizations are parties.

Mr. Chair,

Concerning the second topic, *i.e.* "Subsidiary means for the determination of rules of international law", we take note of the second report of Mr. Charles Chernor Jalloh, the Special Rapporteur, contained in document A/CN.4/769 and the memorandum of the UN Secretariat regarding "the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic".

It is well understood that Article 38 of the Statute of the ICJ reflects customary international law and that "subsidiary means" are axiomatically supplementary, ancillary, auxiliary and secondary in comparison with sources of law.

Regarding draft Conclusion 4 on "Decisions of courts and tribunals", we need to highlight that 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., reflecting 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.

We concur with the Special Rapporteur as to the paramount significance of decisions of the ICJ as subsidiary means for the determination of the existence and content of rules of international law as reflected in draft Conclusion 4. In this context, we highlight that the decisions of other courts and tribunals may be considered as having a role as subsidiary means for the determination of rules of international law commensurate with the degree of their representativeness, quality of reasoning as well as their expertise as mentioned in draft Conclusion 3. As stated by the Court in Ahmadou Sadio Diallo case (Republic of Guinea v. Democratic Republic of the Congo), "The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[1]

Along the elements set forth in Conclusion 8, the Commission may further consider certain questions such as what exactly the term "courts and tribunals" embodies, how they are established, whether their decisions and jurisdiction are binding and compulsory, whether they interpret or apply rules of law, and whether they operate consistent with independence, impartiality and due process. In our view, answers to the above questions are relevant in an objective assessment of decisions of "courts and tribunals" as subsidiary means for the determination of rules of international law.

Regarding paragraph 2 of draft Conclusion 4, national courts in common law systems versus those in civil law systems turn out to act differently as regards matters of international law both in terms of content or frequency of judgments. Monism and dualism of systems could also affect the degree of representativeness of decisions of national courts. Also, due attention should be given to the level of

[1] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, *Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66.

the Court, for instance, whether it is a court of first instance or supreme court, as well as the relevance of the decision to international law; judges of national courts are often equipped with knowledge of national law rather than international law. In this respect, in so far as judgments of national courts are concerned for the purpose of Article 38, paragraph 1 (d), 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 has remained a State-centric legal system.

In this context, it goes without saying that expert bodies should not be equated with courts and tribunals. The use of the word "tribunal" for the Human Rights Committee in Paragraph 83 of the Special Rapporteur's second report is questionable. According to the said paragraph, *[I quote]*: "it [the Court] might use […] its own decisions or those of other courts, such as the International Criminal Tribunal for the Former Yugoslavia, or tribunals, such as the Human Rights Committee" *[unquote]*. Describing the Committee which is a treaty body established in 1966 by the International Covenant on Civil and Political Rights (ICCPR), as a tribunal without supporting constitutive or jurisprudential reference is problematic. In this context, we concur with some other delegations on the necessity of keeping the word "judicial" before "decisions" for the sake of consistency with the wording of Article 38, paragraph 1 (d), of the ICJ's Statute. As we have noted earlier, arguments concerning the non-exhaustive nature of Article 38, paragraph 1 (d) of the ICJ's Statute are far from persuasive and lack sufficient reasoning. In our view, clear distinction needs to be made between abovementioned expert bodies and courts and tribunals as the terminology suggests.

As regards draft Conclusion 5 on teachings, a cautious approach is advisable when weighing them as subsidiary means of determination of rules of international law, in particular when they are inclined to allude to lex ferenda. On the quality of teachings, the phrase "highly qualified" as in Article 38, paragraph 1 (d) is an appropriate qualifier and we suggest that it be preserved.

Compared with "judicial decisions", teachings are evidently less frequently resorted to for determination of rules of international law by courts and tribunals or even jurists. 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 "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 upon this issue. Some drafters including the French member of the Advisory Committee were of the view that "judicial decisions or Jurisprudence" are 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 also pointed out by the Special Rapporteur in his first report, 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.

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.

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.

With respect to draft Conclusion 7 on absence of legally binding precedent in international law, while *stare decisis* is nor generally applicable in judgments of international courts and tribunals, objective assessment of facts and law of each specific case are taken into account. In this respect, and in view of consideration of

Article 59 of the Statute of the ICJ, we underline that reference to previous judicial decisions by courts and tribunals are primarily premised upon similar judicial and at times factual characteristics and this may contribute to consistency and predictability, and upholding the unity and coherence of the given applicable rules of law.

To conclude, we follow the work of the Commission on the topic and look forward to further reports by the Special Rapporteur.

Thank you Mr. Chair.