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SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF INTERNATIONAL LAW

Statement of the Chairperson of the Drafting Committee

Mr. Mārtiņš Paparinskis

21 July 2023

Madam Chair,

It is my pleasure, today, to introduce the fifth and final report of the Drafting Committee for the seventy-fourth session of the International Law Commission, which concerns the topic "subsidiary means for the determination of rules of international law." This report is contained in document A/CN.4/L.985/Add.1, which reproduces the text of draft conclusions 4 and 5 provisionally adopted by the Drafting Committee during the second part of the present session. Since there is insufficient time for the preparation of commentaries, the Drafting Committee recommends that the Commission take note of draft conclusions 4 and 5. I will in due course propose an oral revision to draft conclusion 5.

You will recall that, on 3 July 2023, I presented the fourth report of the Drafting Committee, which was contained in document A/CN.4/L.985 and the Commission adopted the texts and titles of draft conclusions 1 to 3 on subsidiary means for the determination of rules of international law. The Drafting Committee subsequently held a further five meetings on the topic during the second part of the session, from 6 to 12 July 2023, in order to complete its consideration of draft conclusions 4 and 5 on the basis of the text proposed by the Special Rapporteur in his First

Report.[1] The Drafting Committee was able to successfully conclude its work on both draft conclusions.

Before introducing the report of the Drafting Committee, allow me to pay tribute to the Special Rapporteur, Mr. Charles Chernor Jalloh, whose mastery of the subject, guidance and cooperation once again greatly facilitated the work of the Drafting Committee. I also would like to thank the other members of the Committee for their active participation and contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my particular appreciation to the interpreters.

Draft conclusion 4

Madam Chair,

Let me turn first to draft conclusion 4. This draft conclusion addresses decisions of courts and tribunals and builds on draft conclusion 2, which provided a list of the categories of subsidiary means. The purpose of the draft conclusion is to draw a distinction between the role of international and national court decisions. It should also be considered in light of future draft conclusions on the functions of subsidiary means for the determination of rules of international law.

The Drafting Committee proceeded on the basis of a revised proposal presented by the Special Rapporteur, which took into account the views which had been expressed in the Plenary debate. The Drafting Committee decided to retain the structure proposed by the Special Rapporteur by which the provision contained two paragraphs, the first dealing with the decisions of international courts and tribunals and the second dedicated to those of national courts.

Paragraph 1

[1] A/CN.4/760.

The first paragraph confirms the basic proposition that "the decisions of international courts and tribunals are a subsidiary means for the determination of rules of international law". The initial proposal of the Special Rapporteur, in his first report, referred to decisions of international courts and tribunals "on questions of international law". The Special Rapporteur subsequently proposed a broader reference to "issues" of international law, in order to take into account some of the concerns expressed during the Plenary debate. However, the Drafting Committee considered that such a qualification was redundant since international courts and tribunals were typically already mandated to decide on the basis of international law.

One of the questions the Drafting Committee confronted was whether or not to include an express reference to the International Court of Justice. While there was general agreement on the centrality of the International Court, some members observed that the draft conclusions concerned not just rules of general international law, but also rules contained in regional, specialised, and bilateral agreements. In such context, a reference to the International Court of Justice would not necessarily be appropriate and would, in effect, suggest a hierarchy among tribunals that might not reflect the practice in these settings. Nonetheless, the Drafting Committee considered that the decisions of the International Court of Justice retained a special relevance, in light of the role of the International Court as the principal judicial organ of the United Nations, with general jurisdiction over matters of international law, and in light of the obligation on all Member States, under Article 94 of the Charter of the United Nations, to comply with its decisions.

As such, the Drafting Committee decided to include an express reference to the International Court, as reflected in the phrase "in particular those of the International Court of Justice". Initially, the proposal of the Special Rapporteur was to reflect the special role of the International Court in a separate sentence. However, the Drafting Committee opted for the streamlined version that you have before you, which is modelled on draft conclusion 13, paragraph 1, of the conclusions on identification of customary international law.

The Drafting Committee considered several options for reflecting the role of the International Court of Justice, while at the same time recognizing that, in some circumstances, other courts might be more relevant. For example, the Drafting Committee considered inserting the phrase "where appropriate" but decided against doing so in light of the possible confusion that might arise regarding the use of that phrase in the conclusions on customary international law and

in the draft conclusions on general principles of law. Other options included inserting the phrases "are particularly authoritative", "regard shall be had" or "regard may be had" to the decisions of the International Court of Justice. The Drafting Committee settled on the phrase "in particular" which, in its view, best captured the contemporary role of the International Court of Justice in relation to other courts and tribunals. The commentary will explain that the explicit reference to the International Court of Justice was related to the significance of its role and competence and should not be understood as suggesting a particular hierarchy.

I wish to also record the fact that some members requested that the commentary to the draft conclusion include a reference to the consideration of the work of hybrid tribunals, so as to clarify whether the decisions of such tribunals would be considered as falling within the scope of the first paragraph of this draft conclusion, that is, as international courts, or whether they would be considered and assessed by analogy to national court decisions under paragraph 2.

Madam Chair,

If you recall, in my statement delivered on 3 July I referred to the fact that the Drafting Committee had considered the question of whether the term "identification" should be included in the draft conclusions, but that the Drafting Committee in the end decided to retain only "determination" or derivatives thereof in draft conclusions 1 to 3. Such a decision was taken on the understanding that it would be without prejudice to the inclusion of "identification" in future provisions. Indeed, the Special Rapporteur's revised proposal for draft conclusion 4 referred to the significance of decisions of courts and tribunals for the "identification or determination" of rules of international law. The Drafting Committee held an extensive debate on the choice of one of those terms or whether to include both, as it had done in the context of draft conclusion 1 earlier this session. The choice was essentially between maintaining consistency with the approach taken in the earlier provisions or departing therefrom. In the end, as you can see from the text, the Drafting Committee chose the former option, by retaining only the word "determination", also in order to maintain consistency with Article 38, paragraph 1 (d) of the Statute of the International Court of Justice. The issue will be further explained in the commentary and is without prejudice to the same formulation being used in later draft conclusions.

Several members, including the Special Rapporteur, preferred to refer to both identification and determination, which in their view reflected two different concepts or two different operations.

Identification concerned the exercise of establishing the existence of a rule but not necessarily specifying its content, and also implied the possibility of ascertaining the non-existence of applicable rules. "Determination" was perceived as emphasising instead, among other things, a more dispositive character encompassing a higher level of decision-making with a view to indicating the precise content of the rule. These members considered that their position was consistent with the established practice of the Commission.

Other members were of the view that identification and determination were synonyms and that the term determination was sufficiently broad to encompass also the identification of the existence of a rule. It was recalled that the commentary to the conclusions on the identification of customary international law had used the terms "identification" and "determination" interchangeably. It was also pointed out that the word "determination" was to be found in the title of the project.

Paragraph 2

Madam Chair,

Let me now turn to the second paragraph of draft conclusion 4, which concerns the decisions of national courts. This text was also considered on the basis of a revised proposal by the Special Rapporteur, which took into account the comments expressed by members in the Plenary debate and the Drafting Committee. The text was based on conclusion 13 of the conclusions on identification of customary international law, which indicated that "regard may be had, as appropriate," to the decisions of national courts. It was recalled that the commentary to that provision had confirmed that such decisions might be used in certain circumstances as subsidiary means for the determination of rules of international law.

The two key elements in this paragraph are the phrases "may be used" and "in certain circumstances". In introducing such qualifying phrases, the Drafting Committee was motivated by the concern that there was a need for particular caution in respect of the decisions of national courts, since only some decisions of some national courts could serve as subsidiary means for the determination of rules of international law, and only in some situations. As such, the decisions of international courts and tribunals, in paragraph 1, "are" a subsidiary means, whereas the decisions

of national courts "may be used" for the determination of the existence and content of rules of international law. The Drafting Committee considered inserting the phrase "as appropriate", which had been used in the conclusions on the identification of customary law and the draft conclusions on general principles of law but decided against doing so since the nuance was already captured by the phrase "in certain circumstances". The commentary will elaborate on such circumstances, including providing examples thereof. The same reference to the "determination" of rules, as I discussed in the context of paragraph 1, is to be found in the second paragraph.

The title of draft conclusion 4 is "decisions of courts and tribunals", which is consistent with the formulation used in other projects such as the conclusions on the identification of customary international law and draft conclusions on general principles of law. A proposal was made to refer to "categories of decisions", but the Drafting Committee felt that such a title was best considered in the context of a future draft conclusion dealing with the pertinent elements of judicial decisions.

Draft conclusion 5

Madam Chair,

Let me now turn to draft conclusion 5, which concerns teachings. The Committee undertook its work on the basis of a series of revised proposals by the Special Rapporteur, which took Article 38, paragraph 1 (d) as a starting point and added elements, including some arising from the suggestions made during the Plenary debate and in the context of the work on draft conclusion 3, in particular the need to emphasize representativeness – a point I will return to shortly. You will recall, regarding the textual pedigree of draft conclusion 5, that I noted in my fourth report of the Drafting Committee regarding draft conclusion 2, paragraph (b) that '[s]everal proposals were considered in that regard, including referring to "persons of recognized competence", which was drawn from the Commission's own Statute'.

The provision contains two sentences. The first describes the basic proposition, while the second deals with the matter of representativeness. As regards the first sentence, the Drafting

Committee addressed several issues in the revised text proposed by the Special Rapporteur. As I indicated in my statement on draft conclusion 2, concerning the categories of subsidiary means for the determination of rules of international law, the term "teachings" has been rendered as "*la doctrine"* in French, and "*la doctrina"* in Spanish, to refer collectively to materials and not limited to a particular text or instrument.

The term "especially" was included in order to allow for the consideration of teachings where there were fewer materials available on a subject. It was the view of the Committee that such formulation could also signal that in certain circumstances non-international law teachings could also be relevant for the determination of rules of international law, such as in the case of writings dealing with related areas such as comparative law.

As to the phrase "generally reflecting the coinciding views", some members were of the view that coinciding views were needed for a given material to be considered a subsidiary means. Other members noted that the fact that there were diverging views amongst writers was also relevant to the determination of the content of a particular rule, and that the standard included in the draft conclusion did not require consensus or unanimity for materials to be considered subsidiary means.

As regards the phrase "persons with competence in international law", the Drafting Committee considered other alternatives such as "persons with recognized competence", which is used in the Statute of the Commission. However, the Drafting Committee was of the view that the standard should not be the same as that for the election of members of expert bodies or international tribunals, that allowance should also be had for the consideration of teachings by junior scholars, and that the concept of teachings should be understood in a sense as widely representative as possible. It was the view of the Committee, as indicated in draft conclusion 3, that the main criterion should remain the quality of the teachings and the competence of those who made them. The term "recognized", which had been included in the earlier proposals of the Special Rapporteur to qualify "competence", was dropped from the final text since it was unclear who would be responsible for recognizing such publicists.

In relation to the term "are", the Drafting Committee had also considered the option "may be used as" or "may serve as". Some members considered that the latter options were more appropriate and precise since they implied that only certain teachings could be subsidiary means.

Nonetheless, the Drafting Committee maintained the term "are" as it is the word used in the Statute of the International Court of Justice.

I wish to draw the Commission's attention to a point made in the Committee that a distinction should be drawn between the function and weight given to subsidiary means. While it is expected that the functions of subsidiary means will be elaborated in the Commission's future work on the topic, it was the view of the Drafting Committee that teachings were subsidiary means, and the question of the weight to be given to a particular material was different from whether the material itself could qualify as a subsidiary means or not. A view was expressed that the difference could also be reflected in the order of draft conclusions, with the question of weight to be given to a particular material (currently draft conclusion 3) being located after the provisions on the qualification as a subsidiary means (currently draft conclusions 4 and 5).

As in draft conclusion 4, the Committee discussed extensively whether to refer to "identification or determination" or only one of the concepts. As I explained earlier, several members were of the view that both terms implied distinct legal operations at different levels of ascertainment. Other members indicated that the distinction between the two was not easy to draw. As was the case for draft conclusion 4, the Committee decided to retain the term "determination" and the phrase "of the existence and content of rules of international law" to cover both operations (namely both "identification" and "determination") in a broad sense.

Let me now turn to the second sentence of draft conclusion 5, which deals with the question of representativeness. The Committee was of the view that this was a historic opportunity to address the imbalance of representativeness in the consideration of teachings, and that it was important for the Commission to identify the relevant elements to address such imbalance. Draft conclusion 5 provides that in assessing representativeness "due regard should also be had to, *inter alia*, gender and linguistic diversity". Here, I wish to draw the Commission's attention to a technical error. The word "also" was inadvertently omitted in some of the language versions of the report of the Drafting Committee, including the English, and should appear between the words "should" and "be had". I have been informed by the Secretariat that the text will be corrected when it appears in the annual report of the Commission.

It was the view of the Drafting Committee that gender and linguistic diversity would not necessarily be covered by the phrase "from the various legal systems and regions of the world"

and should be emphasized by being included in the text of the draft conclusion itself. At the same time, the words "*inter alia*" were included so as to indicate that there exist other criteria to take into account when assessing the representativeness of teachings. This will be explained in the commentary, which will make it clear that the Commission was not limiting the topics or criteria for representativeness but merely highlighting some of them.

Other forms of diversity mentioned as possibly relevant examples included racial, ethnic, cultural, religious diversity, as well as sexual orientation. Some members considered that an explicit reference to racial diversity should be included in the draft conclusion. However, it was also the view of some members that the first sentence of draft conclusion 5 should be read in a broader sense. In particular, reference to other regions of the world already covered such criteria as racial diversity. While it was the view of the Drafting Committee that the criteria mentioned in the provision were only illustrative, some members expressed concern regarding the practicability of verifying the representativeness of the teachings since some of the proposed criteria could not be easily ascertained by a simple review of the materials and would require a further enquiry into the background and identity of the author. At the same time, the notion of "due regard" was to be understood flexibly as requiring that best efforts be undertaken to make the assessment called for under the draft conclusion, in order to ensure representativeness.

The title of draft conclusion 5 is "teachings", which is consistent with the titles chosen in the conclusions on the identification of customary international law and the draft conclusions on general principles of law.

Madam Chair,

This concludes my introduction of the fifth report of the Drafting Committee for this session, devoted to the topic "subsidiary means for the determination of rules of international law".

As I indicated at the beginning of my statement, the Drafting Committee recommends that the Commission, at this stage, takes note of draft conclusions 4 and 5 on subsidiary means for the determination of rules of international law, as contained in the report of the Drafting Committee contained in document A/CN.4/L.985/Add.1, as orally revised.

I would like to thank Mr. Jalloh once again for his hard work on this topic. As this is my last report as Chair of the Drafting Committee, I would also like to extend my gratitude to the members of the Drafting Committee for their flexibility and spirit of cooperation. It has been an honour to have served as Chair, and I am grateful to the Commission for the trust shown in me.

I thank you for your kind attention.

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