

**Statement by Mario Oyarzábal\***

**on the Third Report on Subsidiary Means for the Determination of Rules of  
International Law by Charles Chernor Jalloh, Special Rapporteur  
(A/CN.4/781, 30 January 2025; A/CN.4/781/Add.1, 24 March 2025)**

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Thank you, Chair,

I join other colleagues in thanking and congratulating the Special Rapporteur (SR) on his Third Report on the Subsidiary Means for the Determination of Rules of International Law.

I will first make some general comments on the Report, before addressing specifically draft conclusions 9 through 13 as proposed by the SR.

Mr. Chair,

First, the relevance of the topic remains incontrovertible, especially when viewed in connection with our simultaneous work on general principles of law. The very nature of international law as a constantly evolving system devoid of a central authority, together with the exponential growth of international court decisions and scholarly writings, make the question of the sources of international law a permanent one. At the same time, the SR's Report and the very rich discussions that we had in the Drafting Committee in previous years reveal the difficulties that we face in drawing conclusions which, on the one hand, help States and other stakeholders in using subsidiary means and, on the other hand, do not transpose principles and dogmas from certain domestic legal traditions which are not transposable to the international legal system or, in the quest for aims that may be desirable, introduces normative and possibly adverse elements beyond this Commission's mandate.

Second, while I acknowledge the responsibility of the members of this Commission, starting with my own, to assist the SR in the elaboration of a representative bibliography, I cannot fail to mention the very limited number of women, and the virtual lack of Spanish speaking authors and materials, three materials in Spanish to be concrete in a 34-page long bibliography. Moreover, all decisions of national courts are from Common Law systems except for one, and from English speaking countries, the majority from the United States and the United Kingdom. I submit that, besides having a more complete final bibliography, the commentaries to be elaborated by the SR would also benefit from a more representative use of teachings and decisions of courts and tribunals in line with what this Commission found desirable in paragraph (a) of draft conclusion 3.

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\* I thank Paulo Glowacki, Quazi Omar Foysal and Trinidad Gómez Barbella for their research assistance.

Mr. Chair,

On draft conclusions 9, 10 and 11, I believe that the Commission would profit from clarification by the SR on the rationale for having three draft conclusions with almost identical content, as well as specifically on the addition of the expression “as appropriate” in paragraph 2 of the three draft conclusions as they refer to the criteria set out in draft conclusion 3, and the exclusion of a paragraph 3 in draft conclusion 9 similar to paragraph 3 of draft conclusions 10 and 11 as they refer to the use of subsidiary means for other purposes.

On **draft conclusion 9**, I must say that I fail to understand its added value with regard to draft conclusion 5 and draft conclusion 2 paragraph (b). If anything, in stating that “[w]hen assessing the weight to be given to such outputs, regard should be had to, *as appropriate*, the criteria set out in draft conclusion 3” paragraph 3 of draft conclusion 9 relativizes the general criteria for the assessment of subsidiary means.

Moreover, there is little doubt that teachings include “outputs” — to use the SR’s term — authored by both individual and groups of individuals. And yet, the draft conclusion offers little guidance as to what types and whose outputs exactly may serve as a subsidiary means.

A further element of confusion is introduced in the title of draft conclusion 9 which speaks of “Outputs of private expert groups” when the text of the draft conclusion also includes individual outputs and makes no reference to the expertise of those involved.

A similar disconnection between the title and the text is noticeable in **draft conclusion 10**, with the former referring to “Pronouncements of public expert bodies” and the latter to “an expert body”. Moreover, the draft conclusion 10 sheds no light as to what are the expert bodies referred to therein or what makes them “public” which can only be inferred by reference to draft conclusion 9 which includes expert bodies “organized independently of State or international organization involvement”. Also, reference to an “expert body” begs the question of whether the outputs of individual “public” experts such as the human rights mandate holders like the independent experts or the special rapporteurs appointed by the Human Rights Council, or the separate and dissenting opinions of judges of the International Court of Justice, are included or not.

Similar questions arise with regard to **draft conclusion 11**, as to whether pronouncements of international organizations and conferences other than “resolutions,” or pronouncements by a group of States outside the context of an international organization, fall within or without the draft conclusion.

In any event, while it is commendable that the SR has tried to delimit the scope of teachings in his Third Report, it is difficult for me to understand why the three types of subsidiary means addressed in draft conclusions 9, 10 and 11 each merit a separate draft conclusion, in light of the fact that no distinction is made amongst them in terms of their role or the weight to be given to them.

Since the Report does not suggest that a distinction exists other than in the private/public and individual/collective characters of the listed subsidiary means, my suggestion would be to replace the three draft conclusions with just one that reads:

*“The following materials may also serve as subsidiary means for the determination of*

*rules of international law:*

...”

And then we go on and develop a non-exclusive list of materials that may fall under paragraph (c) of draft conclusion 2, that is subsidiary means different from teachings and judicial decisions if we are to give content to the new/third category of subsidiary means that the Commission established in 2023.

Mr. Chair,

Concerning **draft conclusion 12**, allow me to acknowledge the SR’s excellent analysis of cases from international courts and tribunals in particular, which sheds light on the problem of conflicting decisions, and the compelling case he makes for the unity and coherence of international law.

While I am in full agreement with the SR’s quest to strive for consistency in the interpretation and application of international law, I strongly believe that this draft conclusion should not be part of the current project.

First, because as it currently stands, the draft conclusion does not appear to address the use of decisions of courts and tribunals as subsidiary means for the determination of rules of international law, but rather their adjudicatory role, and thus its object falls squarely outside of our mandate.

Second, because the draft conclusion introduces through the window what we refused to let in through the front door last year, that is the absence of legally binding precedent in international law, which the Commission rightly affirmed in draft conclusion 7.

And third, because even if the two previous reasons were not dispositive of the matter, draft conclusion 12 introduces several concepts which would need to be evaluated with due care. In that regard, while the title refers to “coherence” in decisions of courts and tribunals, paragraph 1 proposes that courts or tribunals charged with interpreting and applying international law promote the “consistency”, “stability” and “predictability” of the international legal system, and that where there appears to be a conflict between the legal interpretations contained in decisions of different courts or tribunals on essentially the same issue, regard shall be had to the interest of achieving the necessary “clarity” and the essential “consistency” of international law as stated in paragraph 2. There are no less than five concepts there: coherence, consistency, stability, predictability and clarity, with consistency being described as “essential” in paragraph 2. How are these concepts or values going to be applied? Do they all carry the same value? Neither their meaning nor how they are to be achieved by courts and tribunals, are the object of the Report, and it will take considerable time and effort in the Drafting Committee to discuss the legal subject and the problem of legal coherence in international law to draw meaningful conclusions.

Mr. Chair,

I must regrettably say that I also believe that **draft conclusion 13** does not belong to this set of Draft Conclusions as, once again, it does not address the use of judicial decisions and doctrine as subsidiary means, but as supplementary means of interpretation of treaties, which is not the object of the present exercise.

Respectfully, the draft conclusion also does not deliver what it promises in the title, which is the relationship between subsidiary means and supplementary means of interpretation.

Moreover, the proposed formulation raises questions. For example, what does the SR mean when draft conclusion 13 provides that “[s]ubsidiary means can play a *significant* role in the interpretation of a treaty”?

Mr. Chair,

In concluding, I suggest that we concentrate our efforts in the Drafting Committee to give content and clarify the “other means” generally used to assist in determining rules of international law different from the decisions of courts and tribunals and teachings, including what materials fall within this category, any specific functions that they may have and what is the weight that they should be given.

The Report is extremely rich in this regard and there is much to borrow from it in order to provide meaningful guidance to States and other stakeholders in their use of subsidiary means for the determination of rules of international law.

Finally, regarding the SR’s suggestion to amend draft conclusions 5 and 8, I believe that the second reading of the Draft Conclusions is the appropriate time to consider it.

Thank you, Mr. Chair, and thank you also, colleagues, for your time and attention.