

Statement by Mr. Mario Oyarzábal*

**on the Second Report on Subsidiary Means for the Determination of Rules of International Law by Charles Chernor Jalloh, Special Rapporteur
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Thank you, Mr. Chair,

I start by congratulating and thanking wholeheartedly the Special Rapporteur (SR) on his Second Report on the subsidiary means for the determination of rules of international law which contains very useful food for thought, as well as the Secretariat for the extremely useful Memorandum. The draft conclusions lay the groundwork for a very productive outcome.

First, I will make some general comments on the Report and the topic, before addressing specifically draft conclusions 6, 7 and 8.

Mr. Chair,

Starting with my general comments, I concur with the SR's key conclusion that subsidiary means are not to be thought of as sources of international law. As noted by the SR in draft conclusion 6, the sources of international law are treaties, custom and general principles of law. Subsidiary means only mirror these sources, but do not constitute independent sources in and of themselves¹.

I also agree with the SR's overall analysis that there is no application of the rule of *stare decisis* in international law. The SR is right to point out that absent certain special regimes², there is no

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¹ See the SR's conclusions in Charles Chernor Jalloh, *Second report on subsidiary means for the determination of rules of international law*, A/CN.4/769, para. 82-83 ("*Second Report of the SR*"), including his discussion of Mads Andenas & Johan Ruben Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 ZaoRV/HJIL, p. 927 ("the term 'subsidiary means' indicates that judicial decisions are applied subsequently to, and are dependent on, a prior principal determination of legal rules." This, in essence means that "they cannot stand alone but must refer back to other legal sources.")

² As is the case in certain International Criminal Law regimes. See D Akade, 'Sources of International Criminal Law' in Antonio Cassese (Ed. in Chief), *The Oxford Companion to International Criminal Justice*, (Oxford University Press Oxford 2009) 5; as well as the discussion of the ICTY Appellate Chamber in its Judgment, *Aleksovski* (IT-95-14/1-A), AC, 24 March 2000, §§ 92-115.

system of binding precedent in the international legal system³.

I would add that we must be wary of importing notions derived from domestic systems — in this case, from the *Common Law* tradition — to the international law context. Our framework to analyze the notion of precedent in international law must be contained within the international legal system, rather than in reference to notions derived from specific domestic traditions. Some domestic legal categories and concepts, such as the notion of *stare decisis*, do not fit in this system and risk compromising its foundation.

Indeed, the international legal system is different from domestic law, in that it is based on State consent⁴. Unlike under the *Common Law*, judicial decisions are not sources of international law. To conceptualize international courts as bound by their previous decisions absent a specific treaty regime to that effect would be to bind States to a new source of international law they never agreed to.

Having made these preliminary comments, I will now address specifically draft conclusions 6, 7 and 8.

Mr. Chair,

As I understand the structure of **draft conclusion 6**, while paragraph (a) addresses the “nature” of subsidiary means, paragraph (b) is purported to address its function or functions.

Regarding draft conclusion 6 (a), I would advocate for a change of terminology. The draft conclusion refers to the “*sources of international law found in treaties, customary international law and general principles of law*”. Perhaps this wording could be changed to reflect the fact that the treaties, customary law, and general principles of law do not so much contain the sources as they *are* the sources themselves.

In the same line of thought, I also find the use of the word “auxiliary” to describe the nature of subsidiary means as somewhat confusing and not very helpful. The SR makes a strong case in his Report, that subsidiary means are not to be considered as sources of international law, but only as mirroring these sources⁵. Subsidiary means help us elucidate the content and meaning of the

³ *Second Report of the SR*, para. 203. See also Shahabuddeen M (ed), ‘Stare Decisis’, *Precedent in the World Court* (Cambridge University Press 1996), pp. 98-99.

⁴ See Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1999, p 1 (“there are important differences arising from the fact that domestic law operates in a vertical legal order, and international law in a horizontal legal order. Consent and sovereignty are constraining factors against which the prescribing, invoking, and applying of international law norms must operate”).

⁵ See *Second Report of the SR*, supra note 4.

sources of international law⁶. The word “auxiliary” does imply this subsidiary function of identification and elucidation of the rules of international law found in the sources, which is addressed in draft conclusion 6 (b). However, it remains ambiguous, especially for a reader who will not have the benefit of the SR’s Second Report. I would thus advocate for more direct wording: the nature of subsidiary means is, more than anything else, *that they are not sources of international law absent a specific treaty regime to that effect*. Let us be unambiguous about this.

Moving now to draft conclusion 6 (b), I would suggest that, as formulated, it does not exactly reflect the functions of subsidiary means identified in the SR’s Report.

First, I respectfully submit that the current formulation does not clearly articulate *what* the functions of subsidiary means *are*, but rather the *conditions under which* they are “resorted to”. I believe we should adopt a more direct formulation.

Second, as noted by the SR on several occasions in the Report and as already discussed by the Commission last year, the functions of subsidiary means are principally to assist with the determination of the existence and content of rules of international law. This formulation, which is the one employed by the Commission in previously adopted conclusions, would be preferable to the current one of “identifying, interpreting and applying rules of international law derived from the sources of international law”.

Third, the use of the term “mainly” implies that subsidiary means carry out *additional functions* to those of determining the existence and content of the rules of international law. Indeed, in his Report, the SR refers to other functions that subsidiary means may have⁷ further noting that such additional functions will be subject to further discussions⁸. Such functions could also include ensuring predictability, consistency, and legal security of the international legal system, the role of which has also largely been discussed in the Second Report. However, draft conclusion 6 (b) does not address the aforementioned additional functions that subsidiary means would have. I would note that since this draft conclusion has as its object the functions of subsidiary means, it would have been desirable for the SR’s Report to have addressed this question comprehensively and provided language accordingly in the draft conclusion that would have oriented the Drafting Committee’s work. Nevertheless, I believe that the Drafting Committee and the Commission should tackle this issue during the current session while dealing with this draft conclusion, in so

⁶ This is consistent with the Commissions’ previous findings during its work on the identification of customary international law: see Conclusions on the identification of customary international law with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II, Part II, at p. 109 (“The term “subsidiary means” denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law)”. See also *ibid*, p.110, with regards to teachings. See finally the SR’s discussion thereof in *Second Report of the SR*, para. 79.

⁷ See *Second Report of the SR*. at para. 160, 201, discussing the functions played by its own precedents in the decisions of the World Court.

⁸ *Second Report of the SR*, para. 124.

far as we can agree that subsidiary means have additional functions of a general character which are applicable to all subsidiary means.

With these comments, I will now move to draft conclusion 7.

Mr. Chair,

I will raise two issues regarding this draft conclusion.

First, **draft conclusion 7** is to be read together with and in light of draft conclusion 8. Draft conclusion 7, as I read it, suggests that international courts or tribunals *do in fact* apply their own prior decisions or those of other courts and tribunals, although they do not do so because they consider them to be binding, but rather as a matter of persuasiveness, convenience, or policy informed by legitimacy, consistency and judicial economy, which is in turn the object of draft conclusion 8. So far so good.

Now, the employment of the term “*normally*” is problematic, as it admits the possibility of situations in which international courts and tribunals do, in fact, follow their decisions because they consider themselves to be bound by them. These situations do exist but are limited in practice and are generally laid out in specific treaty regimes, as is the case for example between the Appellate and Trial chambers of international tribunals⁹. I believe that it would be better to formulate draft conclusion 7 to avoid this ambiguity.

One way of doing that, would be to combine draft conclusions 7 and 8 into one conclusion formulated in a more positive way. A unified draft conclusion could read for example:

International courts or tribunals, [when settling disputes between States and/or international organizations or issuing advisory opinions], may follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions address analogous factual and legal issues and are found persuasive for resolution of the issue at hand. However, international courts and tribunals do not consider their precedents as legally binding in the absence of a specific rule of international law to that effect.

My second point with regard to draft conclusion 7 refers to the expression “when settling disputes between States and/or international organizations or issuing advisory opinions”, which effectively limits the scope of application of the draft conclusion to cases involving the principal subjects of international law — States and international organizations. This formulation would include “permanent” courts and tribunals like the International Court of Justice or the International

⁹ See *supra*, note 3.

Tribunal for the Law of the Sea, but also ad hoc State-to-State arbitral tribunals and, presumably other bodies performing a judicial-like or arbitral-like function like the panels of the World Trade Organization. Conversely, this formulation excludes an increasing number of international courts and tribunals dealing with human rights complaints, international crimes, international claims, and investment disputes. The second Secretariat Memorandum has showcased a wide range of decisions of such courts and tribunals dealing with subsidiary means¹⁰. The same reference to disputes between States and/or international organizations appears in draft conclusion 8.

It would be important to reflect in the Drafting Committee on the desired scope of draft conclusions 7 and 8 and whether they should be drafted in a more general manner to encompass the decisions of all the international courts and tribunals. In that case, it may suffice with deleting the expression “when settling disputes between States and/or international organizations or issuing advisory opinions” in both draft conclusions.

Mr. Chair,

I would, finally, like to make a few comments on **draft conclusion 8**.

I am concerned that analyzing the persuasiveness of previous decisions of international courts and tribunals through the prism of analogous factual and legal issues — which is, again, a *Common Law* test — may risk bringing back domestic conceptions of precedent through the backdoor.

Furthermore, in many cases, a court or tribunal may not be tempted by the persuasiveness of existing judicial decisions while dealing with the same factual and legal issues due to the divergence of the legal or procedural framework or judicial cultures. In those instances, resorting to existing case law may undermine the actual character of international adjudication.

At the same time, draft conclusion 8 does not provide sufficient indications as to what constitutes “persuasiveness”, beyond this reference to similar factual and legal grounds. In his Second Report, the SR refers to “legal security, consistency, and predictability” as criteria for persuasiveness in the jurisprudence of the World Court and International Tribunal for the Law of the Sea (ITLOS)¹¹. This may be true for institutions like the International Court of Justice or the ITLOS which deal with relatively fewer cases and have relatively stable and simple judicial structures. However, consistency becomes harder to achieve while dealing with complex judicial structures like regional human rights courts or among ad hoc tribunals like investment tribunals. In that case, draft conclusion 3, provisionally adopted by this Commission last year, may provide some guidance, and an express reference to the said draft conclusion here may be warranted.

¹⁰ See UN Secretariat, *Second Memorandum on Subsidiary means for the determination of rules of international law*, doc. A/CN.4/765, at sections II.D., II.E., and III.

¹¹ See *Second Report of the SR*, pars. 162, and 213. See, for e.g. with regards to the ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits*, Judgment, I.C.J. Reports 2010, p. 639, para. 66.

To conclude, Mr. Chair, I would like to point out that the SR's Second Report and his overall work may benefit from incorporating and taking account of sources arising from outside of the English-speaking Western States. Like the First Report, the Second Report continues to rely heavily on judicial decisions and doctrinal works from developed, anglophone countries, with a particular emphasis on the United States of America and the United Kingdom¹².

Draft conclusion 3, provisionally adopted last year, provides that “[w]hen assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, inter alia: (a) their degree of representativeness”. I believe that this Commission should lead with the example.

Considering the above, I will be sending together with the written copy of my statement, additional bibliography on the question of subsidiary means including works from the French and Spanish-speaking international legal community in particular. I hope that this bibliography can be of use to the SR when preparing the first draft of the commentaries to draft conclusions 6 to 8.

In thanking, once again, the SR, for his very descriptive Second Report and the extremely valuable information and analysis, I thank you, Mr. Chair, as well as the rest of my colleagues, for your time and attention.

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