Statement by Mario Oyarzábal

on the First Report on Subsidiary Means for the Determination of Rules of International Law by Charles Chernor Jalloh, Special Rapporteur (A/CN.4/760, 13 February 2023)

International Law Commission – 74th Session
18 May 2023

Original: Spanish

Thank you, Madame Chair.

I join other colleagues in congratulating and thanking the Special Rapporteur wholeheartedly on his First Report on the Subsidiary Means for the Determination of Rules of International Law, as well as the Secretariat for the very useful Memorandum. The draft conclusions lay the groundwork for a very productive outcome.

My statement will be structured as follows. Firstly, I will make some general comments on the Report and the topic. Secondly, I will address the issues which I find most relevant, and those on which the SR is seeking guidance from ILC members.

To begin with, I would like to reiterate my sincere compliments to Mr. Jalloh. His erudite and thought-provoking Report greatly facilitates the Commission's work and allows us to hit the ground running.

The relevance of the topic is 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 sources of international law a permanent one.[1]

Also incontrovertible, is the need to take account of the diversity of sources. However, little reference is made in the Report to judicial decisions or publications from outside of the Western world, Europe and Common Law systems, nor to publications written in a language other than English, let alone in Spanish. While I acknowledge the SR's plea to ILC members and States for relevant materials in various languages,[2] I strongly encourage him to overcome the imbalance in his future Reports. That may help diffuse implicit bias, both in his own work and the subsidiary means relied on by the ILC. While a multilingual bibliography would be useful and important, its actual use in the SR's and our own work is what truly matters.

[1] See generally, J.A. Barberis, *Fuentes del Derecho Internacional*, La Plata, Editora Platense, 1973; J.A. Barberis, *Formación del derecho internacional*, Buenos Aires, Ábaco de Rodolfo Depalma, 1994.
[2] *First Report on subsidiary means for the determination of rules of international law,* by Charles Chernor Jalloh, Special Rapporteur, doc. A/CN.4/760, 13 February 2023, para. 66.

More generally, despite the continuing developments, and even if less so now than when the Statute of the International Court of Justice was adopted, international law remains highly State-centric. With some exceptions, State consent continues to be the ultimate source of authority in international law-making, and Art. 38 reflects exactly this state of affairs. While treaties, custom and general principles are sources of the law, judicial decisions and teachings are used to verify the existence of a rule of law or a binding obligation for States under international law. While the ICJ decisions, in particular, have an undeniable legal weight and moral authority, Article 38 remains the best foundation for the law and great care must be taken to avoid subverting well-established rules and practices by overtheorizing and overemphasizing the importance of judicial decisions and scholarship in the development of international law.

Madame Chair, I will now address what I consider to be the most relevant issues raised in the Report and some specific questions posed by the SR. I will make six points.

My first point is on advisory opinions (AOs). Despite their non-binding character, AOs constitute a key part of the function of the International Court of Justice (ICJ), and their authoritative character is hardly disputed in practice. Even if their material effect may be debated –think for example of the AO on the *Wall*[3]– and affected by their non-binding nature, that does not invalidate AOs as subsidiary means, in very much the same way that judgments are, regardless of compliance and despite the fact that they are binding only on the parties to the dispute (Art. 59, ICJ Statute). In the exercise of its advisory functions the Court is also guided by the provisions of the Statute which apply in contentious cases (Art. 68, ICJ Statute). And in their own way, AOs also contribute to the clarification and development of international law.[4] Recent practices further confirm the relevance of ICJ's AOs, as shown for example by the UK's eventual acceptance to negotiate with Mauritius the handover of the Chagos Islands following the 2019 ICJ's AO,[5] and the "legal effect" given to it by ITLOS in its 2021 judgment on the *Mauritius/Maldives Maritime Boundary Dispute*.[6] Likewise, the Interamerican Court of

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*: I.C.J. Reports 2004, p. 136. See https://www.alhaq.org/advocacy/14616.html

[4] Relevant examples include the criterion of the compatibility of reservations with the object and purpose of a treaty, developed by the Court in the 1951 AO on the *Reservations to the Genocide Convention,* which found its way into the Vienna Convention on the Law of Treaties (Arts. 19*(c)*), through the work of the ILC; and the international legal status of international organizations which developed from the *Reparation* 1949 AO, was followed by the Court in the *WHO Nuclear Weapons* 1996 AO. In *DRC vs. Uganda* (a contentious case), the Court relied on previous legal determination made in an AO (the *Wall*), to determine the extent and specific content of the applicable rules of international law, i.e. the customary nature of Art. 42 of the Hague Regulations of 1907, and the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 172 and 216).

[5] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*: I.C.J. Reports 2019, p. 95. See https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/HCWS1528 and https://www.theguardian.com/world/2022/nov/03/uk-agrees-to-negotiate-with-mauritius-over-handover-of-chagos-islands

[6] *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections*, Case No. 28. Judgment, Special Chamber of the International

Human Rights has stressed that AOs have "undeniable legal effect",[7] an approach seemingly endorsed by the European Court of Human Rights when it stated that even though "its advisory opinions would not be formally binding on the domestic courts, the Court itself should consider them as valid case law which it would follow when ruling on potential subsequent individual applications".[8] The requests for AOs on climate change submitted to the International Tribunal for the Law of the Sea (ITLOS) and the Interamerican Court, and more recently to the ICJ, prove that States themselves have recourse to AOs for the development of international law where it is expedient in the interest of the international community to do so. To conclude, in a functional sense, AOs do qualify as subsidiary means, fitting within the category of "judicial decisions" pursuant to Article 38(1)(d), and I see no reason to exclude them from the scope of our work.

My second point is on national courts' decisions. I would agree that Article 38(1)(d) of the ICJ Statute is not confined to the decisions of international tribunals, and that the decisions of municipal courts have evidential value for the practice of the State of the forum. In fact, the decisions of municipal courts have been an important source for material for example on diplomatic immunity, sovereign immunity and extradition.[9] The application of international law is entrusted, in the first place, to domestic courts; and yet examples abound with wrongful application by them of international law. A most blatant one is the 2012 decision by a Ghanaian tribunal to seize a foreign warship, which was eventually vacated by the Supreme Court of Ghana only after a decision by ITLOS which declared that the seizure was illegal and ordered the immediate release of the ship.[10] However, due to the decentralization of the international legal system, in most cases, no international court is available to undo the wrongdoing, recourse to regional human rights courts[11] being a notable exception in that regard. Moreover, domestic courts decisions from Western countries, including Europe and the United States, are relatively easy to find but judgments from developing countries are often difficult to uncover and put into

---

Tribunal for the Law of the Sea, 28 January 2021, at https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf The Special Chamber found that it was "necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ" and that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigor and scrutiny by the 'principal judicial organ' of the United Nations" (at 203). See, Niccolò Lanzoni, "The Authority of ICJ Advisory Opinions as Precedents: The *Mauritius/Maldives* Case", in *The Italian Review of International and Comparative Law*, 2022, at https://brill.com/view/journals/iric/2/2/article-p296_005.xml but also Sarah Thin, "The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute" at https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/

[7] See *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*, Advisory Opinion OC-15/97 of 14 November 1997, Series A No. 15, para. 26.

[8] ECHR, "Reflection Paper on the Proposal to Extend the Court's Advisory Jurisdiction", https://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf para. 44.

[9] J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed.,Oxford, Oxford University Press, 2019, at p. 38.

[10] See *The 'ARA Libertad' Case (Argentina v Ghana)* (Provisional Measures, Order of 20 November 2012, 15 December 2012) ITLOS Reports.

[11] The European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights.

context.[12] The result is that contributions by developing country courts are often overlooked. For example, the international law on State immunity — as depicted by the mainstream scholarship — largely stems from US and UK case law, regardless of the fact that a number of jurisdictions continue to afford sovereign immunity for "commercial acts", which poses the question of which are the rules of general application in the field. On the whole, national judicial decisions raise serious questions of "quality" of the decisions, and "legitimacy" of the process of transmutation into international law due to their limited and selective application. For these and other reasons explained in the Report, I agree with the SR's conclusion that, whatever the merits that there may be in invoking the decisions of national courts as subsidiary means, they should be examined with (extreme) caution.[13]

My third point is on specialized and regional international tribunals and review bodies. The Report gives an account of the diversity of "international courts and tribunals" that form the current landscape, which includes international criminal courts and tribunals, regional (human rights) courts, hybrid courts, arbitral tribunals and other disputes settlement bodies. I agree with the SR that the decisions of international(ized) tribunals warrant consideration,[14] which in turn raises the question of the "weight" they are to be given in the determination of international rules of general application, beyond the determination of the rules that may be applicable to the specific legal regime (International Criminal Law, Human Rights Law, Law of the Sea, International Economic Law, etc). The ILC's prior work on the fragmentation of international law first comes to mind,[15] and our current work could help bring coherence and legal certainty in this regard. It also presents an opportunity for the ILC to establish the particular authority that must be given to the decisions of the International Court of Justice, in light of the institutional role of the Court as the "principal judicial organ" of the United Nations (Art. 92, UN Charter) and the overall high quality of its jurisprudence. It also presents an opportunity to address the so-called "case law" of investor-State arbitral tribunals that — perhaps for good reason — the SR did not address in his Report, since the problems raised by the impartiality and lack of independence of arbitrators, lack of predictability and inconsistency of interpretation, and poor quality of awards and flaws in proceedings, together with the lack of an appellate tribunal staffed with full-time adjudicators, cast serious doubts on their credibility as material sources for the determination of international law, beyond and within the international investment regime.[16] Problems of unpredictability and inconsistency of decisions

[12] See A. Nollkaemper and A. Reinisch, "Four of the most interesting domestic cases on international law", Oxford Academic (Oxford University Press), 2017, available at https://www.youtube.com/watch?v=KoxXWZriDms
[13] *First Report,* note 1, para. 300.
[14] Para. 64.
[15] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN doc. A/CN.4/L.682 (13 April 2006), UN doc. A/CN.4/L.702 (18 July 2006), *Yearbook ILC* (2006), Vol. 2, Part 2, pp. 175-184.
[16] In general, investment tribunals use precedents from other investment tribunals. That is explained by the specificity of the subject matter. Great deference is shown to ICJ decisions with regard to the general principles of the law of treaties and of treaty interpretation in particular, the content and limits of the competence of States, the jurisdiction of international courts and tribunals, procedural issues such as preliminary objections to the merits, interim measures, burden of proof, proceedings in absentia, interpretation or annulment of awards, and the general principles of State responsibility (A. Pellet, "The Case Law of the ICJ in Investment Arbitration", *ICSID Review*, Vol. 28 (2013), pp. 225 et seq., at 231-232). However, with regard to the protection of shareholders, arbitral tribunals pay only lip service to the decisions in Barcelona Traction and Diallo while availing shareholders claims

are common to other international courts and tribunals, for example the international criminal tribunals as well as regional human rights commissions and courts, and next year's report could shed light on possible ways to resolve them.

My fourth point is on "the teachings of the most highly qualified publicists of the various nations" as a subsidiary means for the determination of the law in Article 38(1)(d). Despite not being a law-creating factor, concededly *la doctrine* has been very influential in laying the foundation of international law. The ICJ only rarely refers to the writings of publicists in its judgments and advisory opinions. However, evidence that writers are used is reflected not only in express references in dissenting and separate opinions but indirectly in the application of "the general principles of law". The principles being a domestic derivative, writers have been an important source for the exposition of the law of the different countries and the municipal decisions of courts and authorities of particular States on legal questions. From a historical perspective, the weight of legal doctrine has decreased with the growth of judicial activity.[17] Still, the reciprocal influence of doctrine and jurisprudence is significant. Navigating the tangle of arbitral awards and municipal court decisions would be strenuous were it not for the opinions of writers and other expert bodies who often enter into a subjective assessment of judicial findings. In this respect, in my view, the question is not so much whether a hierarchy exists between judicial activity and doctrine — it does in practice —, but whether they perform partially different functions as subsidiary means. While international judicial decisions can be instrumental in developing or molding international law, the role of the doctrine is limited to a determination in the sense of "finding out" what the rule is.[18] However difficult it may be, clarifying the contours of the functions of teachings, and of judicial decisions, as subsidiary means, will be fundamental for our work. As per the teachings, I would suggest that the question whether they perform a different "higher" role in the determination of general principles *vis-à-vis* that of treaties and custom could be studied further.

My fifth point is on "additional subsidiary means". This raises two questions in my view: whether other subsidiary means exist alongside judicial decisions and teachings for the determination of the rules of international law and, if that is the case, which would those be.

---

in relation to losses suffered by the company in the name of the treaty or other rules of international law applicable in the given case (the *lex specialis investissmentorum*) (e.g. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003, para. 48, and Decision on Annulment of 25 September 2007, para. 69, note 18; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, para. 106). When looking at other issues, such as conditions governing necessity and the meaning and scope of the most favored nation clause, the analysis of arbitral tribunals to the ICJ case law is inconsistent to say the least, often relying on separate or dissenting opinions rather than on the opinion of the Court (*Pellet,* cit., pp. 235-239). Recently, the ICJ has denied that the principle of "legitimate expectations" employed in ISDS in the context of the fair and equitable treatment clauses, exists in general IL (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment*, I.C.J. Reports 2018, p. 507*,* at paras. 160-162).

[17] A. Pellet and D. Müller, "Article 38", in A. Zimmermann, C. J. Tams, K. Oellers-Frahm, C. Tomuschat, F. Boos and E. Methymaki (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, Oxford University Press, 2019, pp. 870 et seq. at p. 961.

[18] As per the different meanings of "for the determination of rules of law" in paras. 339-343 of the Report.

One potential candidate is the resolutions of international organizations.[19] The other is the ILC products. Other potential candidates are neither subsidiary means — the case being of unilateral acts—, or they can be properly characterized as teachings — such as the separate or dissenting opinions in judicial decisions, and the reports of ILC's SRs. This Commission has already established in its 2018 Draft conclusions on identification of customary international law that "[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development" (Art. 12), a position that it reaffirmed in its 2022 Draft Conclusions on identification and legal consequences of peremptory norms of general international law *(jus cogens)* when it stated that resolutions adopted by an international organization or at an intergovernmental conference are one of the forms of evidence of acceptance and recognition that a norm of general international law is a peremptory norm (Art. 8.2). Most especially, the evidentiary value of UN General Assembly resolutions has been acknowledged by the International Court of Justice in its 1996 *WHO Nuclear Weapons* AO in which the Court stated that "General Assembly resolutions, even if they are not binding, may sometimes 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".[20] It follows that in the views of the Court and of this Commission, resolutions of the UN General Assembly at least, can be both part of the law creation process and a subsidiary means for determining the existence and content of a rule of international law. A similar case may be made of the products of the International Law Commission. As the report points out, the ICJ's judgments and AO resort increasingly to ILC's work, in order to interpret the codification conventions that the Commission has prepared, or to give evidence of the existence of customary rules by quoting the Commission's draft articles.[21] The Commission's mandate to assist States in progressively developing and codifying international law, its status as a subsidiary organ of the UN General Assembly, its comprehensive working methods and its close interaction with the General Assembly, weigh in favor of considering the ILC products as a form of subsidiary means. Finally, in view of the similarities but also the differences, I look forward to further analysis that may be provided by the SR on this possible prong of the topic in order to determine whether the products of some other State-created bodies of universal character — such as the Human Rights Council's resolutions or UNCITRAL's rules — can be considered as subsidiary means.

My sixth and last brief point is on the relationship between subsidiary means and the primary sources. While I acknowledge the possible added value of the topic, I can also see the danger in a determination by the Commission of the weight and value to be assigned to the subsidiary

[19] See generally, J.A. Barberis, "Les résolutions des organisations internationales en tant que source du droit des gens", in *Recht zwischen Umbruch und Bewahrung : Völkerrecht, Europarecht, Staatsrecht : Festschrift für Rudolf Bernhardt*, Springer, Berlin and Heidelberg, 1995, p. 21-39.
[20] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), pp. 254-255, para. 70; quoted in L*egal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 132, para. 151.
[21] Para. 347.

means, especially judicial decisions, in developing international law. I fully subscribe to what was indicated yesterday by Messrs. Fathalla, Patel and Forteau. As is common knowledge, in common law, judicial decisions are binding, while under civil law, only legislative enactments are considered binding for all and there is less scope for judge-made law. Authors have been debating this matter for decades — if not centuries — and I am rather pessimistic that we will be able to resolve it here. Furthermore, this difference is not without practical consequences when transposed to the international level where State consent — through treaties and custom — is at the heart of the law development process. The sources of international law are those established in Article 38(1)(a)-(c) of the ICJ Statute. That is what emerges from the text of Article 38, and it is what is inferred from the ICJ jurisprudence and, it is a safe bet to affirm, it is what the States also think. I would, therefore, be very cautious in the way we embark on such an exercise without a clear mandate of the UNGA Sixth Committee.

Madame Chair, this concludes my statement. Before doing so, allow me to thank Mr. Jalloh one more time for his excellent work in his first report. I support that the draft conclusions be sent to the Drafting Committee, and I look forward to the debate thereof.