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INTERNATIONAL LAW COMMISSION

Seventy-fifth session

Geneva, 29 April – 31 May and 1 July – 2 August 2024

SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF INTERNATIONAL LAW

Statement of the Chair of the Drafting Committee

Ms Phoebe Okowa

1 July 2024

Mr. Chair,

It is my pleasure to introduce the second report of the Drafting Committee for the seventy-fifth session of the International Law Commission, which concerns the topic "Subsidiary means for the determination of rules of international law". The report, which is to be found in document A/CN.4/L.999, was issued on 29 May and contains the texts and titles of the draft conclusions provisionally adopted by the Drafting Committee at the present session.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Charles Chernor Jalloh, whose mastery of the subject, guidance and cooperation, greatly facilitated the work of the Drafting Committee. I also would also like to express my profound gratitude to the other members of the Committee for their active participation and significant contributions to the successful outcome. 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 appreciation to the interpreters.

Mr. Chair,

The Drafting Committee dedicated five meetings to this topic. The Committee met from 15 to 22 May, to consider the three draft conclusions originally proposed by the Special Rapporteur in his second report. [1] The Special Rapporteur proposed a number of reformulations of the original text of the draft conclusions with a view to responding to suggestions made, or concerns raised, during the debate in Plenary and in the Drafting Committee. You will recall that the Commission adopted, on 2 May 2024, two draft conclusions that had been provisionally adopted by the Drafting Committee last year to enable the Special Rapporteur to prepare the commentaries. At the present session, following the Commission's referral of three draft conclusions proposed by the Special Rapporteur on 15 May 2024, the Drafting Committee proceeded with its work and also provisionally adopted a total of three draft conclusions which are being presented to the Commission today for adoption.

I shall introduce in turn the three draft conclusions, respectively on the nature and function of subsidiary means, the absence of legally binding precedent in international law and the weight of decisions of courts and tribunals, as provisionally adopted by the Committee. Let me turn first to draft conclusion 6.

Draft conclusion 6

Mr. Chair,

Draft conclusion 6, as adopted by the Drafting Committee, concerns the nature and function of subsidiary means. Regarding the drafting of the provision, the Drafting Committee proceeded on the basis of a revised proposal presented by the Special Rapporteur, which took into account the views expressed in the Plenary debate. The provision has two paragraphs, and although only after some debate, retained the two-part structure that had been proposed by the Special Rapporteur in his second report.

[1] A/CN.4/769.

I shall begin with paragraph 1, which consists of two sentences. The first affirms the basic proposition that "subsidiary means are not a source of international law." Before arriving at that formulation, the Drafting Committee had started with a revised proposal of the Special Rapporteur indicating that "subsidiary means are auxiliary in nature vis-à-vis the sources of international law". There had been broad agreement with the essence of that proposition during the plenary debate. That said, when it came to the drafting, views were more divided. There was a debate concerning whether to phrase the first paragraph in a more positive language explaining what the subsidiary means are as some members preferred. Several members preferred that approach since they considered that could be more helpful for users of the conclusions to state what they are. It was recalled that the fact that subsidiary means are not sources of international law had already been reflected in the commentary to draft conclusion 1, adopted last year. Nonetheless, the Drafting Committee considered it appropriate for a provision dealing with the nature of subsidiary means to start by expressly clarifying what they are not. Ultimately, the Committee favoured this negatively phrased clarification over a positive statement of what subsidiary means are because the latter was deemed to speak more to the function than the nature of subsidiary means. The Committee considered a proposal that clarification be provided on the relationship between the subsidiary means and the sources of international law in terms of their "nature vis-à-vis the sources of international law". It was suggested that reference should also be made specifically to treaties, customary international law and general principles of law as the sources of international law set out in Article 38, paragraph 1(d), of the Statute of the International Court of Justice. While there had been support for the proposal, it was decided that such specification was not needed. Instead, a reference to the sources of international law more generally was preferred. The idea was to capture any source of international law used in practice not just those mentioned in Article 38(1) of the ICJ Statute.

The Committee also considered an alternative formulation, to indicate that subsidiary means were "distinct" or "autonomous" from the sources of international law, but opted for the more direct formulation that they are not sources. There was a view in the Drafting Committee that while the proposition contained in the first sentence was accurate, it could be understood as being too categorical, in light of the possibility of their use for other purposes, a point I will return to in connection with paragraph 2. Several members underlined that some nuance of what actually

occurs in practice is not captured by such categorial formulation and urged that this point be addressed in the report back to the Commission and also in the commentary.

Mr. Chair,

This takes me to the second sentence of paragraph 1, which refers to the function of subsidiary means, which was considered to be their distinctive feature. The second sentence of this paragraph goes on to elaborate that "the function of subsidiary means is to assist with the determination of the existence and content of rules of international law." The main question confronting the Drafting Committee regarding draft conclusion 6 was how to characterize the function and nature of subsidiary means. Several members preferred to place the emphasis on the function of subsidiary means, which had been referred to during the plenary debate, while others preferred instead to focus on the nature of such materials, and in particular to draw a contrast with the sources of international law, enunciated in Article 38, paragraph 1, subparagraphs (a) to (c) of the Statute of the International Court of Justice (ICJ Statute).

The Drafting Committee considered whether it would be desirable to have two separate draft conclusions concerning the function and nature of subsidiary means, respectively. However, the prevailing view was that the function of subsidiary means was inextricably linked to their nature, such that the two aspects had to be addressed together in a single provision. The nature of a set of materials as a subsidiary means was given by its function. Thus, materials became a subsidiary means when used to assist in determining the rules of international law.

The Drafting Committee considered alternatives ways of characterizing the function of subsidiary means, including as being "mainly to assist", or are "assistive" or "auxiliary" in nature. The members who proposed "mainly to assist" wanted to recognize that, in practice, there are also other additional functions performed by the subsidiary means including as a category and also individually. As regards to the term "auxiliary in nature", proposed by the Special Rapporteur, there was also a discussion of it. However, it was noted that resort to the term "auxiliary" would result in a repetitive formulation in Spanish and French that would not necessarily add clarity. It was also the view of the Drafting Committee that adding an adjective to qualify the functions of subsidiary means was not advisable because it implied that there existed other functions. In the end, the Drafting Committee opted for a similar phrase to that used in draft conclusion 2,

subparagraph (c), adopted last year which includes the phrase "used to assist in determining rules of international law".

Other proposals included resorting to terms such as "secondary" or "subordinate" in order to characterize the nature of subsidiary means and their relationship with the sources of international law. Such formulations were not adopted out of the concern to avoid a possible implication that subsidiary means were sources of a secondary or subordinate nature. A view was expressed that the Drafting Committee should have employed the term "autonomous sources", as had been included in the resolution of the *Institut de droit international* adopted in Angers in 2023 (Angers Resolution), when referring to decisions of courts and tribunals.

The Drafting Committee also considered the question of the use of the term "determination" versus "identification" of the existence and content of rules of international law, which had been discussed extensively last year in the context of the work on draft conclusion 1. Some members reiterated their preference for the term "identification" to emphasize that subsidiary means were not norm creators, but rather played an assistive function in identifying whether a certain rule exists, and if so, whether it could then be applied to a given situation. Another view was that the term "determination" was more precise, as it was the term used in the ICJ Statute, and it also encompassed the element of identification perhaps as part of an earlier step of analysis. Several members argued that the interchangeable nature of those terms is why the Commission had used both "identification" and "determination" in its previous projects that touched on subsidiary means. In terms of a further suggestion, the text should include an express reference to the possible role of subsidiary means in the interpretation of rules.

A final alternative proposal worth highlighting was to simply state that "subsidiary means are not sources but may be used for other purposes." A suggestion was also made to state that "subsidiary means are not sources of international law, and are used for the determination, including identification, interpretation and application, of rules of international law."

The Drafting Committee ultimately settled for the phrase "determination of the existence and content of rules of international law", as the use of subsidiary means could assist the identification and application of rules to solve a specific legal problem, and once identified or determined, they could then be applied to resolve a matter. The use of the present formulation, that is, determination of the existence and content of rules of international law, would retain

consistency with the previously adopted draft conclusions including draft conclusion 4. On the other hand, it was pointed out by several members that merely following the approach taken with prior draft conclusions, without careful regard to the specific context was potentially problematic, as it could undermine the technical rigor of the work being done on later texts formulated as draft conclusions as well as deny the draft conclusions of meaningful substantive content.

Mr. Chair,

Let me now turn to the second paragraph of draft conclusion 6, which contains a without prejudice clause to the use of the materials in question, for other purposes. In the initial proposal of the Special Rapporteur, contained in his second report, he had proposed a formula stating that "subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law". The Committee, in adopting the approach taken to paragraph 1, agreed that the subsidiary means do primarily assist with the determination of rules of international law and that such determination process requires interpretation in identifying, and once identified, applying the rules of international law. The without prejudice clause was meant to recognize that other functions exist and are played by certain materials as subsidiary means.

I would like to draw your attention to two points. First, the term "materials", which is a reference primarily to judicial decisions and teachings, was chosen to emphasize the point that such materials are only qualified as subsidiary means when they are used for the function indicated in paragraph 1. It was recalled in the Drafting Committee that the term "materials" had been used in a different manner in the conclusions on the identification of customary international law, namely, to refer to elements other than primary evidence of the constitutive elements of customary international law.

Second, the text refers to "the use for other purposes" and does not refer to "functions". Such more extensive formulation was preferred in order to emphasize the fact that the function of subsidiary means can only be one, namely, to assist in the determination of the existence and content of rules of international law, as defined in paragraph 1. At the same time, the phrase "use for other purposes" acknowledged the fact that the same materials could play other roles, including those identified in the previous work of the Commission.

For example, it was pointed out that the purpose of the issuance of a decision by an adjudicator was not to produce a subsidiary means but rather to resolve a dispute. In other words, such decisions can have multiple uses. This point will be elaborated further in the commentary. It also accords with the existing position of the Commission that materials such as the decisions of national or international court and tribunals, and teachings, may have various uses. For example, the decisions of national courts may have a double use, namely as evidence of the constituent elements of customary international law or as subsidiary means to help to assess such evidence of State practice and *opinio juris*. In particular, it was recalled that such other uses have been elaborated in the topics concerning subsequent agreements and subsequent practice in the interpretation of treaties, identification of customary international law, identification and legal consequences of peremptory norms of general international law (*jus cogens*) and general principles of law.

The Drafting Committee also observed that there could be other uses for such materials, beyond those identified in recent works of the Commission. An example was the use of materials as supplementary means to interpret the provisions in a treaty, following the rules of the Vienna Convention on the Law of Treaties, of 1969. Other examples were the resort to court decisions as sources of obligations for the parties in a dispute or for third parties affected by the findings of an international court decision, such as those establishing the delimitation of a given area. It was also noted that judicial decisions could serve as inspiration for the inclusion of provisions in treaties.

The Drafting Committee was also motivated to include a broad reference to other uses of the materials, in light of the fact that the Commission has left open, in draft conclusion 2, the possibility of the existence of other materials that could fall within the category of subsidiary means. These could include, for example, resolutions of international organizations or resolutions adopted at international conferences, which in certain contexts could have other uses besides serving as possible subsidiary means assisting the determination of rules of international law, and as the Commission has recognized in its previous work. It was further pointed out that other uses of subsidiary means including judicial decisions could assist in providing evidence of the evolution of the content of certain rules throughout time, or to explain what international law provides in respect of a specific aspect or activity.

Finally, I wish to record the fact that the Drafting Committee will revert to the placement of the present draft conclusion 6 at a later stage, in light of a suggestion made in the Committee that it be located after draft conclusion 1.

The title of draft conclusion 6 is "nature and function of subsidiary means", as proposed by the Special Rapporteur in his second report.

Draft conclusion 7

Mr. Chair,

Let me now turn to draft conclusion 7, which concerns the absence of legally binding precedent in international law. The Special Rapporteur had proposed text that would indicate that international courts or tribunals "do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents." A preliminary round of debate indicated that the word "normally" had been used in an attempt to distinguish between the situations where decisions are actually binding, which is in relation only on the parties to the case or where that is provided for in a particular court with a formal internal hierarchy or in a legal instrument. The word "generally" was considered as alternative to "normally", but in the end, the Committee preferred a positive formulation indicating where decisions are usually followed by a general rule in a first sentence which is then followed with the exception to the rule contained in a second sentence. The draft conclusion, as adopted, comprised two sentences.

The first sentence states that "[d]ecisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration." In working on the draft conclusion, the Drafting Committee was confronted with how to approach the fact that there exists no system of legally binding precedent, or *stare decisis*, deriving from the decisions of international courts and tribunals. At the same time, it was understood that the Commission could contribute by providing clarity on the ways in which the statements of law made by a court or tribunal in a decision may be used.

The Committee settled on the phrase "may be followed on points of law" so as to identify three aspects more precisely. First, the word "may" was chosen in order to indicate that following the decision on points of law was not an obligation but rather a possibility, thus conveying greater

discretion. Second, that it is not the decision itself, but rather the legal reasoning contained therein, which could be used to solve a new case. Hence, the reference to "points of law". It was recalled in the Drafting Committee that the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria* had referred to the "reasoning and conclusions of earlier cases"[2]. Third, that the use of such legal reasoning or points of law from an earlier decision, or decisions, may be followed in a similar case. Therefore, the text refers to "the same or similar issues as those under consideration".

The Committee considered referring instead to "the same or similar factual and legal issues as those under consideration". However, it was decided that including a double requirement could narrow excessively the possibility of following the reasoning of a decision in a future case where the fact pattern was not the same. It was noted that in many instances courts and tribunals rely on the reasoning of past decisions, despite the existence of different fact patterns.

The Drafting Committee also considered other formulations, such as referring to the "persuasive" value of decisions. However, it was argued that the concept of persuasiveness was inspired by common law legal traditions, the connotations of which may not be shared by civil law, and that the text should rather be based on concepts emanating from international law itself. It was also noted that the term "persuasive" had not been used by the ICJ, nor did it appear in the recent work of the *Institut de droit international.* On the other hand, it was pointed out that the Dispute Settlement Body of the World Trade Organization and various international criminal tribunals had employed the idea of decisions being "persuasive", thereby showing the prevalence of the notion of persuasiveness in the practice.

The Drafting Committee considered drawing a distinction between the resort to the court or tribunal's own decisions, as opposed to those of other tribunals, in order to take into account the practice of some courts like that of the Inter-American Court of Human Rights. However, the Committee settled for a broader formulation, applicable generally to all courts and tribunals, but that the variation in practice among courts would be discussed in the commentary. That variation would entail that, in courts with an internal hierarchy for example, the decisions of the higher or appellate level would be binding on those of the lower court.

[2] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, at para. 28.

Finally, the phrase "as those under consideration" was included to provide further clarity by way of confirming that the relevance of the reasoning employed in an earlier decision was to be considered in comparison with the new case or legal issue at hand. Thus, the existence of precedent, even if not binding, was to be assessed on a case-by-case basis. Such terminology was chosen over other possible options, including the use of earlier decisions for the "resolution of the issue", which was considered to be a formulation that suggested a link to the context of dispute settlement, whereas the draft conclusions could also be helpful in other contexts and for entities and persons other than adjudicators.

Mr. Chair,

Let me now turn to the second sentence of draft conclusion 7 which seeks to clarify the legal implications of the first sentence, by confirming that the possibility that decisions of international courts or tribunals may in certain circumstances be followed on points of law does not, as a general proposition, mean that such decisions constitute legally binding precedent, unless otherwise provided in a specific instrument or rule of international law. It was the Drafting Committee's overall preference to include this general proposition and then qualify it in the commentary by noting specific exceptions to it.

The Drafting Committee noted that there may be certain instances where, pursuant to a specific rule, the court or tribunal would have to follow other decisions, for example, when the court or tribunal is located within a structure with various chambers. Reference was in the Committee to the impact of internal hierarchy in the practice of some of the international criminal tribunals, particularly as regards the resort to earlier decisions handed down by chambers within the tribunals.

It was the view of the Drafting Committee that possible *lex specialis* or exceptions to the general assertion that there exists no legally binding precedent was best addressed through the detailing of examples in the commentary. Such explanations will include the possible implications and practice in the context of the Dispute Settlement Understanding of the World Trade Organization as well as the practice of the international criminal tribunals. The practice and characteristics of other international courts was also suggested as illustrative. Examples in the commentary, could include the applicable rules and practice of the Caribbean Court of Justice, the Court of Justice of the European Union and the Inter-American Court of Human Rights.

Additionally, the that the commentary will elaborate on additional scenarios, such as the reliance on a court's prior decisions on procedural matters.

Finally, at the end of the second sentence of draft conclusion 7, the Committee decided to refer to a "specific instrument or rule of international law" to acknowledge the range of possibilities that exist in practice. In particular, the phrase is intended to cover situations where a system of binding precedent in an international court or tribunal is established in instrument such as the statute of the tribunal, or in other forms such as by the internal rules of the court or tribunal or in a decision whether of the court or another body or in a series of such decisions. The term "specific" is meant to qualify both the instrument or the rule in question establishing an obligation to follow prior decisions.

Mr. Chair,

Let me now turn to the title of draft conclusion 7, which is "[a]bsence of legally binding precedent in international law". I would like to emphasize that the Committee decided to add the term "legally" before "binding", to the title initially proposed by the Special Rapporteur, in order to follow more closely the general rule reflected in the draft conclusion.

Draft conclusion 8

Mr. Chair,

I will now turn to the last draft conclusion adopted this year on this topic. Draft conclusion 8 comprises a chapeau and three subparagraphs and deals with the specific criteria that may be taken into consideration when using the decisions of courts and tribunals as subsidiary means to assist with the determination of the existence and content of rules of international law, in addition to those listed in draft conclusion 3.

Draft conclusion 3, adopted last year, contained a list of general criteria to assess the weight to be given to subsidiary means, namely: the degree of representativeness, the quality of the reasoning, the expertise of those involved, the level of agreement among those involved, the level of reception by those involved and, where applicable, the mandate conferred on the body.

The commentary to draft conclusion 3 anticipated the possibility of the Commission elaborating further criteria for the assessment of specific subsidiary means and noted that the relevant factors to be considered in the assessment of their weight "would depend on the specific subsidiary means in question and the prevailing circumstances."[3] A specific subsidiary mean to which this position applies relates of course to decisions of courts and tribunals as in the case of the present draft conclusion.

The chapeau of draft conclusion 8 serves to contextualize the provision by containing an explicit reference to the criteria established by draft conclusion 3, while at the same time confirming the purpose of draft conclusion 8 as being to specify additional criteria for assessing the weight to be given to decisions of courts and tribunals as subsidiary means in particular. The terms used in the chapeau track the formulation of the chapeau of draft conclusion 3, while emphasizing that the criteria are additional to those in draft conclusion 3. While draft conclusion 3 thus concerns the general criteria for assessing their weight to be given to subsidiary means, draft conclusion 8 serves the specific purpose of clarifying how the decisions of courts and tribunals are to be assessed by adding additional relevant criteria. The criteria listed in subparagraphs (a) to (c) are not intended to be exhaustive, as is confirmed by the phrase "*inter alia*". The chapeau also merely provides that "regard should be had", in order to emphasize that the listed criteria are only a form of guidance and not requirements *per se*.

Mr. Chair,

I will now discuss the three subparagraphs contained in draft conclusion 8.

Subparagraph (a) refers to the mandate of the court or tribunal and the question of "whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question." This formulation is similar to the criterion contained in draft conclusion 3, subparagraph (f) referring to the specific mandate conferred on a body. However, it is specific to the competence given to a court or tribunal to apply a particular rule. The criterion takes into account the decisions of the ICJ, including in the *Diallo* case, where the ICJ, in referring to the Human Rights Committee and its mandate related to the International Covenant on Civil and Political Rights, considered "that it should ascribe great weight to the interpretation adopted

[3] Para. (3) of the commentary to draft conclusion 3, A/78/10, para. 127.

by this independent body that was established specifically to supervise the application of that treaty"[4]. During the Committee debate, it was pointed out that the ICJ had also ascribed, irrespective of how it had formulated the threshold, some weight to the decisions of other bodies such as regional human rights courts and tribunals with competence over a regional treaty. Generally, the Court had indicated that such decisions ought to be taken into due account, since there were of the bodies mandated with the specific task of interpreting and applying those regional treaties. That too was illustrated by the findings of the ICJ in the *Diallo* case in relation to the African Commission and Court on Human and Peoples' Rights.

Subparagraph (b) refers to "the extent to which the decision is part of a body of concurrent decisions". Hence, the subparagraph anticipates the existence of other prior decisions following the same reasoning. In other words, whether, as indicated by the ICJ, there exists a *jurisprudence constante* or an established case law that would suggest that the same legal reasoning could be used to address the legal issues at hand. The Drafting Committee considered using the alternative formulation "established case law" but decided against doing so. Some members were of the view that use of such expression conveyed connotations from national legal systems, which could be confusing (especially in light of the absence of legal binding precedent in international law). Other members considered the formula appropriate since it had been used in the Court's case law as well as the phrase "constant jurisprudence." In the end, the Committee opted for terms used in the context of the Angers Resolution of the *Institut de droit international* which it considered to be more neutral and descriptive.

Subparagraph (c) suggests the need to take into consideration "the extent to which the reasoning remains relevant, taking into account subsequent developments". Such criterion seeks to take into account the possible evolution of international law, which might result in less weight being given to previous decisions. Decisions are issued and may be overtaken by developments, and in especially those from national courts, there could even be legislation or other governmental actions that limit their effects after they have been issued. The phrase "subsequent developments" was chosen to introduce a measure of flexibility in allowing for changes to the weight to be given to a decision, or group of decisions, in light of new events, including not only decisions of courts

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

and tribunals, but also factual or legal developments, such as the emergence of a different rule, for example through the adoption of a treaty, or through the subsequent practice of States, that would limit the applicability or relevance of the reasoning of a court or tribunal in an earlier decision.

The title of draft conclusion 8 is "[w]eight of decisions of courts and tribunals", which is a broad reference to the additional criteria for the assessment of the weight to be given to such materials.

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Mr. Chair,

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

The Drafting Committee recommends that the Commission adopt the draft conclusions contained in its report. It is my sincere hope that the Commission will now adopt draft conclusions 6, 7 and 8 on subsidiary means for the determination of rules of international law, as presented. The Special Rapporteur will submit the commentaries to the draft conclusions in due course, with a view to them being considered by the Commission at the current session. I would like to once more thank Mr. Jalloh for his continuing exemplary work on this important topic.

I thank you Mr. Chair, and all colleagues for your kind attention.

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