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Cluster Two

Chapters: IV (Settlement of disputes to which international organizations are parties) and V (Subsidiary means for the determination of rules of international law)

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Egypt welcomes the second report of the Special Rapporteur, Professor Charles Jalloh, and wishes to make the following remarks on the topic of the "Subsidiary Means for the Determination of Rules of International Law".

This topic is of special importance given the significant changes that have occurred and that are continuing to occur in the international legal system. Unlike the world of the authors of the Statutes of the PCIJ and the ICJ, today's legal universe is populated by tens of international and regional courts, some of which enjoy a broad mandate and some of which are specialized in nature, in addition to many so-called quasi-judicial bodies and thousands of arbitral tribunals that are issuing hundreds of decisions, opinions, general comments, and observations every year.

In addition, in the late-nineteenth and early twentieth centuries, most of the so-called "highly-qualified publicists" were old, white European and North American men, with some notable contributions from Latin American jurists. Today, the world is more colorful and diverse. Moreover, there are many other actors that are involved in the processes of international law – including by contributing to norm-creation and to the enforcement of international law.

Therefore, one of the principal contributions that this study can make is to provide guidance on how to achieve a measure of coherence in the international lawmaking process, much like the ILC Conclusions on the Customary International Law, and I can think of no one who is better placed to do so than my brother, Prof. Charles Jalloh to oversee this project.

Generally, Egypt is of the view that the point of departure of this study should be to reaffirm that the international lawmaking process is State-driven, and that States remain the principal authors of international law. Judges and scholars are not, and should not, be the primary lawmakers in the international legal order, unless they are members of courts specifically mandated to do so.

Egypt also encourages the Special Rapporteur and the Commission to reflect on the relation between the primary sources of international law – conventions, custom, and general principles– and the subsidiary means of determining the rules of law. Courts, tribunals, judges, and scholars are often engaged in the processes of applying and interpreting treaties and the identification and the ascertainment of the content of a customary rule. The question, however, is: How does one distinguish between these processes – namely: interpretation, application, identification, ascertainment – and the process of "determining the rules of law," which is the function of the subsidiary means.

This clarification would aid in understanding the meaning of Draft Conclusion 6 which is titled: "Nature and Function of Subsidiary Means".

Egypt agrees with the first portion of the conclusion, which reads: "Subsidiary means are not a source of international law". However, greater clarity is needed regarding the second portion of Draft Conclusion 6(1). As it stands now, this Draft Conclusion could be read to mean that the only distinction between primary sources and subsidiary means is that primary sources can generate binding rules, while subsidiary means cannot create binding rules. But beyond that, subsidiary means – and, more importantly, the actors engaged in applying subsidiary means, namely judges and scholars – are just as empowered as States in the application and interpretation of treaties and the identification and the ascertainment of customary rules.

Moreover, Draft Conclusion 6(2) does not shed enough light on what the ILC calls "other purposes" for which subsidiary means might be used. The commentary gives an example of the use of national court decisions as evidence of state practice and *opinion juris*, but in this case, these national court decisions are not a subsidiary means. Rather, they would become constituent elements of customary international law – which is a primary source of international law.

Again, this indicates that there is need for greater clarity as to the meaning of the phrase "determining the rules of law", and also to the relation and interaction between primary sources and subsidiary means. Egypt encourages the ILC to be cautious so as not to anoint judges and scholars as de facto lawmakers through the backdoor of subsidiary means.

Egypt also encourages the ILC to revisit Draft Conclusion 2(c). In this regard, Egypt cannot lend its support to the statement in the Special Rapporteur's first report that "unilateral acts, resolutions or decisions of international organizations, agreements between States and international enterprises, religious law (including sharia and Islamic Law), equity, and soft law" can be used considered subsidiary means of determining the rules of law. Some of these forms of conduct – like unilateral acts – are simply sources of state obligations, others – like resolutions of international organizations – maybe evidence of custom, and while others – including so-called soft-law – are just not law.

In this regard, I should add, that I am unsure whether the distinction between so-called formal sources and material sources, which is referred to often in the Special Rapporteur's first and second reports, actually serves to clarify the matter or whether it creates greater uncertainty regarding the exact function of subsidiary means.

On Draft Conclusion 3, Egypt is uncertain of the value of having a set of general criteria for the assessment of subsidiary means. Perhaps the Special Rapporteur might consider whether Draft Conclusions 5 and 8 would suffice in the process of determining the relative value of teachings and judicial decisions. Also on Draft Conclusion 3(e), it is unclear who or what those "other entities" are which are placed on par with states.

On Draft Conclusion 4, Egypt supports the priority accorded to the International Court of Justice. Egypt also supports the priority accorded to international as opposed to national courts as subsidiary means of determining rules of law, notwithstanding the fact that the judgments of national courts may be used as evidence of state practice contributing to developing customary international law.

Moreover, greater clarity is needed in the commentary on Draft Conclusion 4 regarding the definition of "international courts and tribunals". Does this term include co-called quasi-judicial bodies that monitor compliance with human rights treaties? Does it include regional courts? Does it include arbitral tribunals created under bilateral investment treaties? The commentaries and the Special Rapporteur's reports indicate that the answer is to these questions is yes.

Greater clarity would also be appreciated regarding relative weight of decisions of these judicial and quasi-judicial bodies, and the solution to possible conflicting opinions between such bodies. Is an opinion of the Human Rights Committee on – for example, the question of reservations to treaties – be equal in value to a judgment or opinion from the ICJ? Should the view of the ICTY on the overall control doctrine be viewed as more persuasive than the ICJ's position on the effective control standard?

Again, the purpose of these questions is just to highlight that we need greater clarity both on the definition of the phrase "international court and tribunal" and on the relative weight of the decisions of these judicial bodies.

Generally, Egypt supports the reaffirmation in Draft Conclusion 7 that there is no rule of *stare decisis* in international law, unless the specific rules of a particular court establish such a principle.

However, when reading Draft Conclusion 7 in conjunction with Draft Conclusion 8, I cannot but feel a measure of concern that these Draft Conclusions might create a *de facto* rule of *stare decisis* or open the door to unwarranted judicial activism. Read together, these Draft Conclusions may permit judges – including those serving on courts and tribunals in separate judicial national and regional systems – to borrow the reasoning and interpretation formulated by other judicial bodies in a manner that may not be consistent with the object and purpose of a treaty or the original intent of the parties.

At times, this practice might lead to normatively desirable outcomes. However, we must caution against arrogating to judges (and experts serving on quasi-judicial bodies) disproportionate influence in the international lawmaking process. Generally, it would be useful to have more examples in the commentaries of states citing the points of law in the decisions of international courts and tribunals. Indeed, most of the examples of practice relating to subsidiary means that are cited in the commentaries are the practice of courts and scholars, as opposed to states. More evidence of state practice would be useful and appreciated in this regard.

This concludes Egypt's comments on Cluster II.