

 Permanent Mission  
of Austria to the  
United Nations in New York

**78<sup>th</sup> Session of the General Assembly**  
**Sixth Committee**

**Agenda item 79: Report of the International Law Commission on the work of  
its seventy-third and seventy-fourth session**

**Cluster III - Chps: VII (Subsidiary means for the determination of rules of international  
law) and IX (Succession of States in respect of State responsibility)**

**Statement by Mr. Maximilian Gorke**

**Legal Adviser**

**Permanent Mission of Austria to the United Nations**

**New York, 31 October 2023**

Chairperson,

With regard to the topic **“Subsidiary means for the determination of rules of international law”** Austria congratulates Special Rapporteur Charles Jalloh on his first report.

In this intervention, Austria intends to focus on the draft conclusions and commentary as adopted by the Commission. We appreciate very much the work of the Special Rapporteur but we would have preferred more succinct commentaries.

As regards **draft conclusion 2 on categories of subsidiary means for the determination of rules of international law**, Austria remains sceptical about the existence of additional types of subsidiary means as paragraph 5 of the general commentary appears to suggest and as is explicitly mentioned in **draft conclusion 2 subparagraph (c)** referring to “any other means generally used to assist in determining international law.” Austria continues to support the view mentioned in the commentary that the existing list of subsidiary means contained in Article 38 paragraph 1 subparagraph (d) of the Statute of the International Court of Justice is sufficiently broad. In any event, we consider that the Special Rapporteur and the Commission would have to make a very cogent case for the existence of additional subsidiary means.

We wonder whether the works of expert bodies and resolutions/decisions of international organizations would be useful candidates for such a third category of subsidiary means. Since the work of expert bodies is usually non-binding, it could be better subsumed under the concept of teachings. As a matter of drafting, we have the impression that subparagraph (c) of draft conclusion 2 is circular and we wonder whether this definition could not be refined.

With regard to **subparagraph (a) of draft conclusion 2**, we appreciate the idea to cover the entire jurisprudence of courts and tribunals under this provision, but we are uncertain whether the change from “judicial decisions” to “decisions of courts and

tribunals“ achieves this goal in a satisfactory manner. In our view, a decisive criterion should be whether any third-party dispute settlement institution is empowered to decide disputes, interpret the law authoritatively or render advisory opinions. However, even other bodies not qualifying as courts or tribunals might be empowered to do so, and should thus be included which could be easier achieved by referring to “jurisprudence of courts and tribunals and other bodies“.

In this context, we should consider the reference in paragraph 6 of the comment to draft conclusion 2 to the views of the UN Human Rights Committee. As is generally known, the UN Human Rights Committee is not a court or tribunal empowered to decide cases, but can only issue legally non-binding views.

Austria agrees in substance with paragraph 14 of the comment to draft conclusion 2, i.e. that the representativeness of teachings is an important aspect. We wonder though why paragraph 14 refers to draft conclusion 5. It seems that the question of representativeness is addressed much more prominently in the current draft conclusion 3.

Let me turn to the suggested **draft conclusion 3 on general criteria for the assessment of subsidiary means for the determination of rules of international law**, containing a list of criteria relevant for the assessment of the value of subsidiary means for the determination of rules of international law. While Austria generally agrees with the criteria mentioned therein, it considers that **subparagraph (b)** on “the quality of the reasoning“ should be regarded as the paramount aspect that should be mentioned first. As much as Austria appreciates a reference to the reception by states, it doubts whether this is really a crucial aspect in assessing the weight of subsidiary means. At least it seems that like in subparagraph (f) the introductory phrase “where applicable“ should be inserted as well.

Chairperson,

Allow me to turn now to the topic of **“Succession of States in respect of State responsibility”**. Before addressing the substance of this topic, Austria wishes to express its appreciation to the former Special Rapporteur, Professor Pavel Šturma, for his dedication and hard work on this topic, which was clearly one where it was very difficult to reach consensus.

With regard to the consideration of the topic during the last session, Austria welcomes the idea expressed in the Commission to produce a report on the topic. In our opinion, it would be most valuable to have a report outlining the scarce but important practice in this field and analysing the legal problems involved. We therefore agree with the decision of the Commission to establish a working group considering the next steps. Austria would very much welcome if the work on this topic could be speedily finalised next year by a report of the Commission.

Thank you.