



CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

78th Session of the General Assembly
Sixth Committee

Report of the International Law Commission on the work of its seventy-third and
seventy-fourth session

Statement by

Mr. Marek Zúkal

Legal Adviser

New York, November 1, 2023

Check against Delivery

One Dag Hammarskjöld Plaza, 48th floor
885 Second Avenue, New York, NY 10017
tel.: +1 (646) 981 4001, fax: +1 (646) 981 4099
www.mzv.cz/un.newyork

Madam / Mr. Chair,

Chapter IX of the Commission's Report gives an account of Commission's recent dealing with the topic "**Succession of States in respect of State responsibility**". We note that rather than following the usual practice, namely appointing a new Special Rapporteur for the topic to fill the vacant post, the Commission decided to establish a Working Group. The Commission's Report is discreet about the reasons for this course of action. The Working Group, as we learn from paragraph 237, "focused its discussion on considering the way forward for the topic [namely] whether the Commission should continue developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines, or whether it should pursue a different course, as suggested in the [ILC] plenary in 2022." Further down we find out various preferences of the members of the Working Group.

Noticeably, there is no allusion to the view of the Member States expressed during the consideration of this topic in the Sixth Committee of the General Assembly last fall. Yet, the Commission had before it the Topical summary of the discussions held in the Sixth Committee in 2022 (doc. A/CN.4/755). As evidenced by the Topical Summary (see para 6), delegations generally expressed appreciation for the work of the Commission on the topic, welcomed the consolidation of the work in the form of draft guidelines and highlighted the potential usefulness of such guidance to States. Concerning the final form of the work on the topic, delegations took note of the decision of the Commission to change the final form of its work to draft guidelines and highlighted potential relevance of guidelines to the progressive development of international law (see para 28).

Regardless of the prevailing sentiment of Member States, the Working Group primarily focused on options, which are clearly reflecting a minority view among the States. It recommended that the Commission continue its consideration of the topic without the appointment of a new Special Rapporteur, in a format of an open-ended Working Group and that further reflection should be undertaken on the basis of a working paper to be prepared by the Chair of the Working Group, identifying "the various complexities surrounding the provisions adopted thus far and options open to the Commission".

No view of Member States is solicited on such a departure from the usual practice of the Commission neither in Chapter IX, nor in Chapter III of the Report, where the Commission had an opportunity to ask questions. Yet, in para 4 of its resolution A/RES/77/103 of 7 December 2022 the General Assembly "[r]ecommend[ed] that the International Law Commission continue its work on the topics in its current programme of work, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee" and in para 40 of the same resolution the General Assembly "[u]nderlines the importance of the records and topical summary of the debate in the Sixth Committee for the deliberations of the International Law Commission.

Madam / Mr. Chair,

Concerning the role that the Working Group could play in the current exercise, the Czech delegation considers it necessary to recall the following:

The completion of the work on a topic by a Working Group, previously carried on under the lead of a Special Rapporteur, is not a novelty. One such example was the completion, in 1999, of Articles on nationality in relation to succession of States. Twenty-six draft articles with commentaries resulting from the first reading were finalized on second reading by a Working Group in the light of written comments by Member States summarized in a Memorandum by the Secretariat.

Two other cases concerned the topic “Unilateral Acts of States” and the topic “Obligation to extradite or prosecute”. Their consideration by the Commission, over a number of years, did not lead to the adoption of any draft articles by the Commission. The Working Group was a means to bring the consideration of these topics to a close. In the first case, the outcome of the work of the Working Group was a set of Guiding principles applicable to unilateral declarations of States with commentaries, adopted by the Commission in 2006. In the second case, in 2014, the Commission adopted, on the basis of the work of the Working Group, the final report summarizing particular aspects of its work on the topic, thus concluding its consideration.

Concerning the current topic “Succession of States in respect of State responsibility”, the situation is far different from that characterizing two lastly mentioned topics. Since 2017, the Commission provisionally adopted on the first reading in total 17 draft guidelines with commentaries, covering the essential part of the topic. In various stages of their elaboration, these provisions were thoroughly commented by the Member States whose majority also supported last year’s proposal by the Commission to continue its work on this topic in the format of draft guidelines.

The ensemble of these draft guidelines amounts to a nearly complete set of provisions on the topic, the first reading of which should therefore be finalised by the Working Group. Such draft guidelines, together with commentaries, should then be submitted to the Member States for their comments and observations, including on the most appropriate way towards the completion of Commissions work on this topic.

Madam / Mr. Chair,

Now, I would like to turn to the topic of “**Subsidiary Means for the determination of rules of international law**”. The Czech Republic welcomes the first report of the Special Rapporteur, Mr. Charles C. Jalloh, and appreciates the work of the Drafting Committee and the Commission on the draft conclusions. The Czech Republic recalls that the present topic complements the prior work of the Commission on sources of international law.

The Commission agreed that subsidiary means are not formal sources of international law; their function is to assist in the identification and determination of rules of international law. Therefore, we are of the opinion, that in the work on the current topic, it is not necessary to produce extensive theoretical studies on this subject. The Czech Republic encourages the Commission to focus on the practical aspects of the use of subsidiary means in order to provide guidance to practitioners and to clarify relevance and, as the case may be, increase the impact of these instruments for the determination of rules of international law. In this respect, a representative overview of the use of subsidiary means for the determination of rules of international law would contribute to such clarification. Therefore, we would welcome the envisaged memorandum from the Secretariat surveying the decisions of international courts and tribunals and other bodies, showing how they employ subsidiary means.

We also welcome and fully agree with the consensus among the members of the Commission on the necessity to maintain continuity and consistency with the prior work of the Commission on other topics relating to the sources of international law. We are convinced that the Commission should draw on its previous work and should avoid reopening issues already settled under other topics.

As regards the wording of the draft conclusion 2, we share the view that the decisions of any international body exercising judicial powers that is entitled to consider the rules of international law should be taken into consideration when determining the rules of international law. Therefore, we welcome the suggested broad concept of the term “decisions”.

The decisions of national courts may be also relevant as subsidiary means for the determination of norms of general international law, however, it should be made clear that they should be resorted to with caution and on the basis of the quality of reasoning in the concrete decision. Therefore, with regard to draft conclusion 4, paragraph 2 on the use of decisions of national courts, provisionally adopted by the Drafting Committee, the Czech Republic is of the view that the wording is too broad and that additional criteria need to be established.

Further, the Czech Republic appreciates the introduction of the term “teachings”, which implies an inclusive approach to the work of scholars and the doctrine of international law.

As regards the category of additional subsidiary means for the determination of the rules of international law (draft conclusion 2 (c)), we suggest that the Commission clarify its approach to Article 38, paragraph 1 (d) in the context of its previous work on other topics. This provision of the Statute of the International Court of Justice mentions expressly two categories, namely judicial decision and teachings, as subsidiary means for identification of international law. In line with Article 38 of the Statute, the Commission, in its draft conclusions on identification of customary international law, characterized as subsidiary

means only decision of courts and tribunals and teachings of the most highly qualified publicists. In the draft conclusions on peremptory norms of international law, it included under the heading of subsidiary means the decision of courts and tribunals, teachings and the work of expert bodies, and added that the subsidiary means thus identified are not exhaustive. We invite the Commission to elaborate on the character of resolutions and decisions of international organizations or work of other expert bodies or treaty bodies in light of Article 38 of the Court's Statute and previous work of the Commission on similar topics.

Finally, with respect to the debate of the Commission on unilateral acts of states, we are convinced that these acts cannot be characterized as subsidiary means. According to the conclusions adopted by the Commission in 2006 on the topic of "unilateral declarations of States capable of creating legal obligations", unilateral acts *stricto sensu* are formal declarations formulated by a State with the intent to produce obligations under international law, and thus they are a source of law.

Thank you, Madam / Mr. Chair.