

**Report of the International Law Commission on the work of its seventy-third
session
(Agenda item 79)**

Cluster III

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

**Subsidiary means for the determination of rules of international law – Chapter
VII of the ILC Report**

Mr./Madam Chair,

Allow me to begin my statement by addressing the topic of “**Subsidiary means for the determination of rules of international law**”, and by expressing my country’s appreciation to the Commission and Special Rapporteur Mr. Charles Jalloh for the work done so far on this subject matter.

Portugal has continuously welcomed the attention provided to this topic in this forum, and we have made such position clear in previous statements. We find this study to be a particularly relevant contribution to the codification and progressive development of International Law, as well as to the mitigation of the negative consequences of fragmentation of International Law.

We find it essential that States and other relevant actors have a basic common understanding on how subsidiary means are expected to be applied, thus enhancing legal certainty.

Mr./Madam Chair,

It is well known that, in International Law practice, the decisions of national courts and tribunals, teachings and other means, including State practice, which are *more often invoked* as subsidiary means for the determination of rules of international law are those coming from certain countries; or that most academic books and articles are written by authors of certain regions. There are several reasons for this, which we do not seek to discuss here. Nevertheless, we feel it is important to be aware that the risk of universalizing certain views on, and interpretations of, International Law is well evident in the History of International Law, and the present context is not an exception.

We thus invite the Commission *to be cautious* in advancing its work on this topic.

Mr./Madam Chair,

In its Draft Conclusion 2, the Commission has included as subsidiary means for the determination of rules of international law decisions of courts and tribunals, teachings, and any other means generally used to assist in determining rules of international law.

Decisions of courts and tribunals are established subsidiary means in this regard, with Draft Conclusion 4 accepting decisions of national courts as producing a similar effect. Portugal finds it necessary to establish more discernible guidelines in this respect.

States should be made aware in a rigorous manner of the circumstances in which decisions by national courts, potentially of another State, can influence their international obligations, and the international obligations of other States in affairs that are of their interest. The explanation of the parameters that enable national court decisions to be auxiliary sources will be beneficial across the board.

Mr./Madam Chair,

In Draft Conclusion 5 concerning teaching, the Commission concludes that they are relevant, "especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world".

Portugal welcomes such guidelines, which provide much needed clarity to all States. Portugal also welcomes the Commission's concern with national, gender and linguistic diversity, which my country finds to be of the utmost importance.

Regarding what the Commission defined as "any other means generally used to assist in determining rules of International Law", Portugal considers that the Commission must substantially deepen this analysis.

A fragmented International Law is a concern for my country, and we would not wish to provide all States with undefined or insufficiently defined legal sources with which different potential claims could find simultaneous and incompatible support.

Stability and predictability are important goals in the relationship between States and other subjects of International Law, and we believe that these discussions will be particularly useful if they succeed in providing relevant actors with a clear idea of what to expect.

Article 38 (1) (d) of the Statute of the International Court of Justice is purposefully not exhaustive, which provides it with the capacity to be malleable and adaptative to advancing understandings of International Law.

We believe that this openness requires careful consideration regarding such sources, as they are used in the practice of international courts, and in exercises of consolidation of legal practice as the one occurring in such fora.

We, therefore, hope that the result of these discussions is an understandable and useful definition of these sources, and their scope, amplitude, definition, and applicability.

My country notes the examples advanced as possible “other means” of determining rules of International Law - unilateral acts, resolutions or decisions of international organizations, agreements between States and international enterprises, religious law, equity, and soft law – but questions their relevance in this context. We are not convinced that all these means are unequivocally subsidiary means of determination of rules of International Law, or that it is the interest of the international community to establish them as such.

Mr./Madam Chair,

Portugal hopes that the result of these discussions will translate a settled international understanding of each of these subsidiary means and not in a blurring between the sources of international law and subsidiary means. We look forward to continuing participating in these discussions.

Succession of States in respect of State responsibility – Chapter IX

Mr./Madam Chair,

Regarding the topic “**Succession of States in respect of State Responsibility**”, we would like to begin by thanking the Commission for not only providing an overview of the state of play concerning this topic, but also for identifying more than one alternative to move this issue forward.

As noted in last year's statement, Portugal is aware that the codification of international law with respect to the Succession of States in respect of State Responsibility is particularly challenging due to the lack of coherent and consistent international practice. However, it is undeniable that much valuable and enriching work has been produced since the inclusion of this topic in the programme of work of the Commission in 2017, under the guidance of Mr. Pavel Šturma.

Mr./Madam Chair,

Regarding the approach to be taken, Portugal is confident that the Commission, after further deliberation next session, will find the best way to propose a meaningful and useful outcome for this topic.

Thank you, Mr./Madam Chair.