



PHILIPPINES

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STATEMENT

Permanent Mission of the Republic of the Philippines to the United Nations

Agenda Item 79: Report of the International Law Commission on the work of its seventy-fourth session

Cluster III – Chapter VII Subsidiary Means for the Determination of Rules of International Law
and Chapter IX Succession of States in Respect of State Responsibility

1 November 2023

78th Session of the United Nations General Assembly

Mr. Chair,

The Philippines commends the International Law Commission (ILC) for its work at the 73rd and 74th sessions and thanks the Co-Chairs for their substantive presentation to the Sixth Committee as well as the Secretariat for its support.

We wish to share the following preliminary comments on Chapter VII Subsidiary Means for the Determination of Rules of International Law and general observations on Chapter IX Succession of States in Respect of State Responsibility.

On Subsidiary Means for the Determination of Rules of International Law

The Philippines wishes to thank Mr. Charles Chernor Jalloh, the Special Rapporteur for the first report on the topic as well as the Secretariat for developing the memorandum identifying elements in the previous work of the Commission that could be relevant to the topic.

On *Draft Conclusion 1*, we note that the phrase “the use of”, instead of phrases such as “are to be used” and “the way in which subsidiary means are used”, is utilized to emphasize that the Statute of the International Court of Justice does not actually obligate the Court to apply subsidiary means.

We also note the two senses of “determination, as a noun which means “ascertainment” and limited to a determination in the sense of finding out what is the existing law; and as a verb wherein it could mean to “decide”, or to state the law.

On *Draft Conclusion 2, Sub-Paragraph A*, on the Decisions of Courts and Tribunals, we agree with the omission of the word “judicial” so that the draft conclusion applies to a wider set of decisions from a variety of bodies. Indeed, decisions by other types of adjudicative bodies and by State-created treaty bodies may have value as subsidiary means.

We also support the position that “courts and tribunals” encompass both international courts and tribunals and national courts or municipal courts.

On *Draft Conclusion 2, Sub-Paragraph B*, we note that the ICJ Article 38, paragraph 1 (d) uses the term “the teachings of the most highly qualified publicists of the various nations” and that this sub-paragraph utilizes only “teachings.” The phrase “most highly qualified publicists of the various nations” has been omitted as this is considered to be an elitist notion that focuses heavily on the status of the author/s rather than their work.

We can go along with such deletion, noting that *Draft Conclusion 3* contains relevant general criteria for the assessment of subsidiary means for the determination of rules of international law.

In particular, in the case of teachings, we agree that the quality of reasoning, as evident in the work, should prevail over the renown of an author. As regards the expertise of those involved, the focus on demonstrated expertise on the subject matter rather than the renown or the titles of a particular individual is a step in the right direction, particularly in relation to promoting diversity of sources.

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*: their degree of representativeness; the quality of the reasoning; the expertise of those involved; the level of agreement among those involved; the reception by States and other entities; and where applicable, the mandate conferred on the body.

We note the Special Rapporteur’s initial approach that the weight and authority would depend on, *inter alia*, the legal context, the way in which they were drafted, the expertise of the individuals involved in the drafting, the mandate of the institution that produced the material, as well as the level of agreement within and beyond the relevant body.

The Philippines agrees that reference should also be made to the degree of representativeness in the context of the draft conclusions and when assessing subsidiary means. This could include, *inter alia*, considerations of equitable geographic distribution, representative legal traditions, and gender.

In general, on the scope, we are inclined to agree that in addition to decisions and teachings, the Commission’s work should reflect the extensive practice of international lawyers using a variety of additional subsidiary means and materials to determine rules of international law.

Like the Special Rapporteur, we are of the view that the category of subsidiary means for the determination of rules of international law is not exhaustive. Thus, we could support the proposal that further analysis be done on the work of expert bodies and resolutions of international organizations.

On the other hand, we would recommend caution on the inclusion of certain types of unilateral acts capable of producing legal obligations as part of additional subsidiary means that could be used to determine rules of international law.

We welcome clarification as to the role and status of subsidiary means and its relationship to the source of international law, noting the agreement within the Commission that the main function of subsidiary means is to assist in the determination of rules.

We note with interest the position of some members that the term used in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice in French and Spanish expressly referred to the auxiliary function of such materials, which confirmed that they are not, in themselves, sources of international law.

We could support a proposal for the inclusion of a draft conclusion concerning the functions, which could also refer to the use of subsidiary means to interpret other sources or to determine the effects and legal consequences of certain rules. The inclusion of a draft conclusion addressing the relationship between subsidiary means and sources of international law could provide further clarity.

On *Draft Conclusion 4* on the decisions of courts and tribunals, we could consider the proposal for additional criteria specifically applicable to the decisions of national courts. a starting point could be to focus only on the decisions of national courts applying international law which could be considered as constituting subsidiary means.

On *Draft Conclusion 5* on teachings, we agree that efforts should be exerted to address the lack of diversity in teachings addressed, Nevertheless, questions on diversity and representativeness should not, of course, come at the expense of the other criteria in Draft Conclusion 3, including quality of reasoning.

However, we also wonder whether the addition of the qualifier in draft conclusion 5 'especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world' could result in the narrowing of the relevant teachings which could be resorted to as subsidiary means.

We look forward to the future work of the Commission on this topic.

On Succession of States in Respect of State Responsibility

Briefly, we welcome the Commission's decision to re-establish the Working Group at the 75th session with the open-ended composition, to undertake further reflection on the way forward for the topic, and to report to the Commission for further deliberation and decision.

Noting the important work already accomplished by the Special Rapporteur Mr. Pavel Šturma, including the submission of five reports from 2017 to 2022, as well as the Secretariat, with its memorandum on information on treaties which may be of relevance to its future work on the topic. We look forward to hearing from the Commission on the future of the work on this topic.

Mr. Chair,

Finally, having reached the end of our statement on the last cluster of topics, the

Philippines wishes to commend, once again, the International Law Commission for their work and their engagement with the delegations and to extend gratitude to the Secretariat for their support. We look forward to further reports of the Commission detailing progress in their work as they discharge their important mandate on the codification and progressive development of international law. The Philippines recognizes the Commission's role in upholding and promoting the rule of law. **END**