



IRELAND

Sixth Committee

United Nations General Assembly 79th Session

Statement of Ireland on Agenda Item 79:

**Report of the International Law Commission on the work of its
seventy-fifth session**

**Cluster II – Chapter V (Subsidiary means for the determination of
rules of international law)**

Delivered by Declan Smyth

Legal Adviser

Department of Foreign Affairs

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– CHECK AGAINST DELIVERY –

Mr Chairman,

1. Thank you for the opportunity to speak on the second cluster of topics contained in this year's Report of the International Law Commission. I will limit my comments to the topic of Subsidiary Means for the Determination of Rules of International Law.
2. Ireland wishes to thank the Special Rapporteur, Professor Jalloh, for his work on the elaboration of draft conclusions and accompanying commentaries. We also wish to express our appreciation for the work of the Drafting Committee.
3. Ireland has taken an active interest in this topic and submitted information earlier this year concerning the use of subsidiary means for the determination of rules of international law in decisions of the Irish superior courts, in Irish legislation and in Ireland's submissions to international courts and tribunals.

Mr. Chairman

4. At the outset, we agree that 'conclusions' are the appropriate form of product for the Commission's work on this topic. This is consistent with the Commission's treatment to date of the other elements of Article 38 of the Statute of the International Court of Justice. The Commission's work on the identification of customary international law and on general principles of law, as well as its work on peremptory norms of general international law, also takes the form of 'conclusions.' I should add that we have reservations on the retention of the word 'draft' in the title of the product following adoption of conclusions by the Commission as it creates uncertainty as to their status. We hope that this question of nomenclature will be addressed by the Commission's *Working Group on Methods of Work and Procedures* in its very welcome plans to prepare a Handbook.
5. Turning to **draft conclusion 3**, Ireland would suggest adding the words 'to be attached to' to the first line in place of the word 'of', so that it reads 'When assessing the weight **to be attached to** subsidiary means for the determination of rules of international law [...]'. Similarly, the words 'to be attached to' could replace the word 'of' in the title and first line of **draft conclusion 8**. We consider that this wording would better reflect the fact that, as the commentary to draft conclusion 3 notes, 'one subsidiary means may have different weight in different contexts.' Moreover, this wording would also be consistent with the phrasing used in most references to 'weight' in the commentaries. For example, the commentaries refer to 'the weight to be given to', 'to accord to' and 'to attach to' subsidiary means.

6. With respect to **draft conclusion 4**, Ireland welcomes the explanation in paragraph 5 of the commentary that the term ‘international courts and tribunals’ should be interpreted broadly. We encourage the Commission to consider expanding the definition to bodies exercising arbitral powers, where such bodies are called upon to determine the existence and content of a rule of international law.
7. Turning to the second paragraph of draft conclusion 4, we encourage greater consideration of the phrase ‘in certain circumstances’. We note that paragraph 18 of the commentary to this draft conclusion clarifies that ‘in certain circumstances’ is intended to have the same meaning as the phrase ‘as appropriate’ found in the equivalent provisions in the draft conclusions on the identification of customary international law and on general principles of law. Nonetheless, the wording ‘in certain circumstances’ suggests that there are defined circumstances in which decisions of national courts may be used as a subsidiary means. In our view, the Commission should provide further explanation in the commentary as to the types of circumstances envisaged by the second paragraph of draft conclusion 4.

Mr. Chairman

8. As regards **draft conclusion 5**, Ireland welcomes the deletion of the term ‘the most highly qualified publicists of the various nations’ and its replacement by a more modern formulation. We also welcome the emphasis on the ‘representativeness of teachings.’ We suggest, however, that the Commission elaborate in the commentary as to how a person’s ‘competence in international law’ should be assessed.
9. On **draft conclusion 6**, Ireland reiterates its agreement that subsidiary means are not a source of international law. We note the intention of the Commission to consider the placement of draft conclusion 6 and suggest that it be located most appropriately directly after draft conclusion 2.
10. With respect to **draft conclusion 7**, Ireland welcomes the discussion in the commentary of the role of precedent in international law. However, we consider that greater explanation could be provided as to the circumstances in which international courts and tribunals are likely to follow or depart from previous case law. We also wonder whether the word ‘absence’ used in the title of this draft conclusion is correct and encourage further consideration of this.

11. Finally, with respect to **draft conclusion 8**, we also suggest that some commentary on the status of courts within national judicial hierarchies be provided, including on the questions of whether a judgment of a national court is one from which there is no appeal or, indeed, is currently under appeal.
12. To conclude, Mr. Chairman, we thank the Special Rapporteur for his work on this topic and we look forward to further engagement with the Commission, the Sixth Committee and Member States as the text develops.