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Chapter V

Subsidiary means for the determination of rules of international law

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* Reissued for technical reasons on 9 July 2024.



Chapter V

Subsidiary means for the determination of rules of international law

A. Introduction

1. The Commission, at its seventy-third session (2022), decided to include the topic “Subsidiary means for the determination of rules of international law” in its programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur.¹ Also at its seventy-third session,² the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant for its future work on the topic, to be submitted for the seventy-fourth session (2023); and a memorandum surveying the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic, to be submitted for the seventy-fifth session (2024).

2. The General Assembly, in paragraph 26 of its resolution 77/103 of 7 December 2022, subsequently took note of the decision of the Commission to include the topic in its programme of work.

3. At its seventy-fourth session (2023), the Commission considered the first report of the Special Rapporteur,³ which addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also considered the previous work of the Commission on the topic; the nature and function of sources of international law and their relationship to the subsidiary means; and the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and its status under customary international law. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in the previous work of the Commission that could be particularly relevant to the topic.⁴

4. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 5, as presented in the Special Rapporteur’s second report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 3, together with commentaries, and took note of the report of the Drafting Committee on draft conclusions 4 and 5.

B. Consideration of the topic at the present session

5. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/769). The Special Rapporteur addressed: the work of the Commission on the topic thus far; the functions of subsidiary means for the determination of rules of international law, including in the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the international Court of Justice, the practice of the International Court of Justice and other international tribunals, and scholarly writings concerning the functions of subsidiary means; and the general nature of precedent in domestic and international adjudication, including Article 38, paragraph 1 (*d*), and its relationship to Article 59 of the Statute of the International Court of Justice, as well as the relationship between Article 59 and Article 61 of the Statute of the International Court of Justice, and the link to the rights of third States. He proposed three draft conclusions and also made suggestions for the future programme of work on the topic.

¹ At its 3583rd meeting, on 17 May 2022. The topic had been included in the long-term programme of work of the Commission during its seventy-second session (2021), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10)*, annex).

² At its 3612th meeting, on 5 August 2022.

³ A/CN.4/760.

⁴ A/CN.4/759.

6. The Commission also had before it the memorandum it had requested from the Secretariat identifying elements in “the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic” (A/CN.4/765).

7. The Commission considered the second report of the Special Rapporteur and the memorandum by the Secretariat at its 3663rd to 3667th meetings, from 9 to 15 May 2024. At its 3667th meeting, on 15 May 2024, the Commission decided to refer draft conclusions 6, 7 and 8, as contained in the second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.

8. At its 3661st meeting, on 2 May 2024, the Commission, having considered the report of the Drafting Committee on the topic at its seventy-fourth session,⁵ provisionally adopted draft conclusions 4 and 5, as orally revised (see sect. C.1 below).

9. At its ... meeting, on ... July 2024, the Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.999) and provisionally adopted draft conclusions 6, 7 and 8 (see sect. C.1 below).

10. At its ... to ... meetings, on ... July 2024, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current session (see sect. C.2 below).

C. Text of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted thus far by the Commission

1. Text of the draft conclusions

11. The text of the draft conclusions provisionally adopted by the Commission at its seventy-fourth and seventy-fifth sessions is reproduced below.

Conclusion 1

Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Conclusion 2

Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

- (a) decisions of courts and tribunals;
- (b) teachings;
- (c) any other means generally used to assist in determining rules of international law.

Conclusion 3

General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

- (a) their degree of representativeness;
- (b) the quality of the reasoning;
- (c) the expertise of those involved;
- (d) the level of agreement among those involved;

⁵ A/CN.4/L.985/Add.1.

- (e) the reception by States and other entities;
- (f) where applicable, the mandate conferred on the body.

Conclusion 4**Decisions of courts and tribunals**

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Conclusion 5**Teachings**

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

Conclusion 6**Nature and function of subsidiary means**

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Conclusion 7**Absence of legally binding precedent in international law**

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Conclusion 8**Weight of decisions of courts and tribunals**

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

- (a) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;
- (b) the extent to which the decision is part of a body of concurring decisions; and
- (c) the extent to which the reasoning remains relevant, taking into account subsequent developments.

2. **Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-fifth session**

[See document A/CN.4/L.991/Add.1]
