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Subsidiary means for the determination of rules of international law

Texts and titles of the draft conclusions provisionally adopted by the Drafting Committee on first reading

Subsidiary means for the determination of rules of international law

Part One Introduction

Draft Conclusion 1 Scope

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

Part Two General provisions

Draft 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.

Draft conclusion 3 [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.



Draft conclusion 4 [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;
- (e) the reception by States and other entities;
- (f) where applicable, the mandate conferred on the body.

Part Three

Decisions of Courts and Tribunals

Draft conclusion 5 [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.

Draft conclusion 6 [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.

Draft conclusion 7 [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 4, *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.

Part Four

Teachings

Draft conclusion 8 [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.

Draft conclusion 9**Weight of teachings**

When assessing the weight of teachings, regard should be had to, as appropriate, the criteria set out in draft conclusion 4.

Part Five**Other means generally used to assist in determining rules of international law****Draft conclusion 10 [9 and 10]****Expert bodies**

The works of bodies consisting of experts serving in their personal capacity may serve as a subsidiary means for the determination of the existence and content of rules of international law.

Draft conclusion 11 [9 and 10]**Weight of the works of expert bodies**

When assessing the weight of the works of expert bodies, regard should be had to, in addition to the criteria set out in draft conclusion 4:

- (a) the character and normative value of the works produced by the expert body concerned;
- (b) the methodology used in producing its works on a particular issue;
- (c) the extent to which the works remain relevant, taking into account subsequent developments;
- (d) the extent to which the body is comprised of experts with competence in international law; and
- (e) the process and basis of selection of the experts.

Draft conclusion 12 [11]**Resolutions and other texts produced by international organisations or at intergovernmental conferences**

Resolutions and other texts produced by international organisations or at intergovernmental conferences may be used as subsidiary means for the determination of the existence and content of rules of international law.

Draft conclusion 13 [11]**Weight of resolutions and other texts produced by international organisations or at intergovernmental conferences**

When assessing the weight of resolutions and other texts produced by international organisations or at intergovernmental conferences, regard should be had to, as appropriate, in addition to the criteria set out in draft conclusion 4, the circumstances surrounding their production.
