



**United Nations General Assembly | Sixth Committee
78th Session
Report of the International Law Commission
(Agenda item 79)**

CLUSTER III

31 October 2023

(check against delivery)

Mr./Madam Chair,

Moving to the third cluster of items discussed in the report of the International Law Commission, Brazil would like to deliver some remarks regarding the topics contained in Chapters VII and IX, namely: (i) subsidiary means for the determination of rules of international law and (ii) succession of States in respect of State responsibility.

Brazil thanks the Special Rapporteur, Mr. Charles Jalloh, for his first report on subsidiary means for the determination of rules of international law. We commend the International Law Commission for provisionally adopting three draft conclusions with commentaries thereto.

We acknowledge the form of draft conclusions proposed by the Commission, which is compatible with previous products on topics related to sources of international law, such as identification of customary international law and general principles of law.

Despite their placement in article 38 of the Statute of the International Court of Justice, Brazil reiterates that subsidiary means do not constitute sources of international law. Therefore, they do not create legal rules, rights or obligations to any subject of international law. They should be conceived as auxiliary means for determining rules arising from the formal sources listed in article 38, namely treaties, customary international law and general principles of law.

As draft conclusions aim mainly at the codification of existing rules, Brazil encourages the Commission to focus its work on codification, based on established State practice.

We commend the Special Rapporteur for its proposal to include a multilingual bibliography as part of the work on the topic, and encourage him to include substantive material from Portuguese speaking countries.

Mr./Madam Chair,

Regarding draft conclusion 2(a), Brazil notes that the expression “decisions of courts and tribunals” is broader than “judicial decisions” as set out in the ICJ Statute. Brazil believes we should be cautious in broadening the meaning and scope of the Statute.

The decisions of *ad hoc* arbitration bodies are not exactly judicial, and treaty monitoring bodies are not even jurisdictional in nature. Although their reports, comments and recommendations may be invested with technical quality, there should be no equivalence between these subsidiary means and the decisions of permanent judicial bodies. The Commission could reflect on whether it could be more appropriate to consider these subsidiary means in different categories, or on how to differentiate them in the commentaries.

With regard to judicial decisions, we believe the work of the Commission may contribute to avoid fragmentation in international law. Brazil considers that the ILC should take into particular consideration the decisions of the International Court of Justice as subsidiary means, especially on topics related to general international law. In this context, we commend draft conclusion 4, provisionally adopted by the Drafting Committee.

At the same time, the decisions of other international tribunals should be taken into consideration essentially on topics that lie within the specific purview of their jurisdiction.

We also reiterate that there is no system of precedent (*stare decisis*) in international law.

Regarding draft conclusion 2(b), Brazil believes that teachings as subsidiary means should be restricted essentially to the contribution of collective bodies, such as the *Institut de Droit International*, the Inter-American Juridical Committee and the International Law Commission.

There is a need for caution when drawing upon teachings of individual publicists, as previously recognized by the ILC. They often reflect the individual or national viewpoints of their authors, and they greatly differ in quality. Furthermore, they do not always distinguish between the determination of rules of law and the advocacy for its development.

In this vein, Brazil commends the Special Rapporteur for his efforts to identify the writings of individual scholars that could be used as subsidiary means, when reflecting the “coinciding views of persons with competence in international law”. However, Brazil underscores that these so-called coinciding views are usually restricted to some legal systems, geographical regions and languages.

Brazil also considers that further clarification is needed on the scope, meaning and application of draft conclusion 2(c) on other means used to assist in determining the rules of international law.

Brazil welcomes draft conclusion 3 on the general criteria for assessment of subsidiary means. We highlight that in assessing the degree of representativeness, due regard should be had to geographic and linguistic diversity. We also stress the importance of the reception of the output by States and, where applicable, the mandate conferred on the tribunal or other body.

Mr./Madam Chair,

On succession of States in respect of State responsibility, Brazil acknowledges the important work of the former Special Rapporteur, Mr. Pavel Sturma, and the discussions held in the Working Group chaired by Mr. August Reinisch.

Brazil also takes note of the recommendation of the Working Group that the Commission continue its consideration of the topic. Taking into account its efforts in the last six years, we encourage the Commission to conclude its work on the topic under a specific timeframe.

I thank you, Mr/Madam Chair.