



MALAYSIA

Permanent Mission to the United Nations, New York

**STATEMENT BY
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**ON AGENDA ITEM 79:
REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SEVENTY-FOURTH SESSION**

**CLUSTER III – CHAPTERS: VII (SUBSIDIARY MEANS FOR THE DETERMINATION
OF RULES OF INTERNATIONAL LAW) AND IX (SUCCESSION OF STATES IN
RESPECT OF STATE RESPONSIBILITY)**

**AT THE SIXTH COMMITTEE OF
THE 78TH SESSION OF THE GENERAL ASSEMBLY**

NEW YORK, 1 NOVEMBER 2023

Mr. Chairman,

My delegation would like to record its utmost appreciation to Mr. Charles C. Jalloh, the Special Rapporteur for preparing the First Report on “Subsidiary means for the determination of rules of international law” (A/CN.4/760) as well as to the Secretariat for preparing the Memorandum on “Elements in the previous work of the International Law Commission that could be particularly relevant to the topic” (A/CN.4/759) that serve to assist the Special Rapporteur in preparing his First Report.

2. Malaysia also acknowledges and appreciates the efforts and commitment that have been put in by the International Law Commission (“ILC”) on this topic.

3. In this regard, Malaysia notes that draft conclusions 1, 2 and 3 together with its commentaries as proposed by the Special Rapporteur in his First Report were provisionally adopted by the ILC. Malaysia further notes that the ILC took note of the draft conclusions 4 and 5 that were provisionally adopted by the Drafting Committee. Accordingly, Malaysia would like to express its views and concerns on the draft conclusions 1 to 5.

Mr. Chairman,

Draft conclusion 1: Scope

4. Malaysia notes draft conclusion 1 reflects the scope of the present draft conclusion, viz. “concern the use of subsidiary means for the determination of rules of international law”. However, the present draft conclusion is silent on the meaning of the phrase “subsidiary means” and its effect. On this note, Malaysia observes that the ILC agreed with the Special Rapporteur that “subsidiary means” are not sources of international law and the main function of subsidiary means was to assist in the determination of rules of international law.

5. Taking into consideration that the purpose of the present draft conclusion is to contribute greater clarity on the use of subsidiary means, it is Malaysia’s view that the meaning of the phrase “subsidiary means” and its effect need to be reflected in the present draft conclusion.

Draft conclusion 2: Categories of subsidiary means for the determination of rules of international law

6. Regarding the category of subsidiary means in subparagraph (b) of draft conclusion 2, Malaysia notes that the ILC decided to use the term “teachings” instead of the phrase “teachings of the most highly qualified publicists of the various nations” as contained in Article 38, paragraph 1(d). This is following ILC’s views that the original phrase focused too heavily on the status of the individual as an author as opposed to the scientific quality of the individual’s work, which ought to be the primary consideration.

7. In this regard, Malaysia observes that the original phrase is used in the various draft conclusions by the ILC, for example, the draft conclusions on the identification of customary international law that was adopted by the ILC at its 70th session (2018) and the draft conclusions on general principles of law adopted by the ILC on first reading at its 74th session (2023). As such, Malaysia underscores that “teachings” under Article 38, paragraph 1(d) are not reflected in subparagraph (b).

8. Further, in Malaysia’s view, the formulation of subparagraph (b) which refers to teachings in their general form may cause uncertainty on the threshold that would need to be met in considering whether the teachings can be considered as one of the categories of subsidiary means.

9. Concerning the category of subsidiary means in subparagraph (c) of draft conclusion 2, Malaysia notes that the ILC has left the category open in order not to foreclose the possibility of other subsidiary means. However, this non-exhaustive

formulation seems to be an over-emphasis on the broad scope of categories of subsidiary means. The only qualifier that has been reflected in the broad catch-all provision is the term “generally used to assist in determining rules of international law”. Malaysia believes that it remains unclear as to the level and significance of assistance of such means that is required in order to fulfil the qualifier under subparagraph (c). As such, Malaysia is of the view that it is prudent to include additional qualifiers to provide clarity.

10. Finally, although the category of subsidiary means in subparagraph (c) is left open, the word “include” in the chapeau of draft conclusion 2 indicates that there will be other categories of subsidiary means. Hence, Malaysia seeks clarification as to the other category of subsidiary means apart from those in subparagraphs (a), (b) and (c).

Draft conclusion 3: General Criteria for the assessment of subsidiary means for the determination of rules of international law

11. Malaysia notes six (6) criteria are to be used as general factors for determining the relative weight to be given to subsidiary materials under draft conclusion 2, but they are not intended to determine whether a particular material is to be considered a subsidiary means.

12. In this regard, Malaysia wishes to highlight that since the ILC has agreed with the Special Rapporteur that “subsidiary means” are not sources of international law but merely to assist in the determination of rules of international law, it is not clear as to the purpose of weighing the subsidiary materials.

13. On another note, Malaysia takes note of the subjective nature of the criteria since not all criteria would be applicable to all the categories of subsidiary means. Malaysia believes that subjectivity may introduce inconsistency in interpretations, potentially undermining the reliability of the assessment in practice. This subjectivity may also lead to varying interpretations of the weight and authority of subsidiary materials weight in different cases.

Draft conclusion 4: Decisions of courts and tribunals

14. In light of the fact that no commentary is provided for draft conclusions 4 and 5, Malaysia’s comments and observations for both draft conclusions are preliminary in nature.

15. At the outset, Malaysia observes that draft conclusion 2 overlaps with draft conclusion 4, since both reflect the decision of international courts and tribunals as well as national courts as the category of subsidiary means.

16. The only difference between draft conclusions 2 and 4 is that the former draft conclusion makes reference to the “subsidiary means for the determination of rules of international law” whilst the latter refers to the “subsidiary means for the determination of the existence and content of rules of international law”. As such, Malaysia is of the view that further clarity is needed on the differences between “rules of international law” under draft conclusion 2 and “existence and content of rules of international law” under draft conclusion 4.

Draft conclusion 5: Teachings

17. Similarly, to draft conclusion 5, Malaysia is of the view that further clarity is needed on the differences between “rules of international law” under draft conclusion 2 and “existence and content of rules of international law” under draft conclusion 5.

18. Additionally, based on the First Report, Malaysia observes that apart from the criteria of “coinciding views of persons with competence in international law from the various legal systems and regions of the world” in draft conclusion 5, some members of ILC proposed to include criteria that are similar to the criteria in draft conclusion 3 i.e. quality of the reasoning, and the reception by other entities. In this regard, Malaysia seeks clarification as to whether both draft conclusions 3 and 5 are overlapping.

Mr. Chairman,

19. Malaysia wishes to draw the attention of the Sixth Committee to the fact that States only have the benefit of studying the present draft conclusion within the context of what has now been provided by the ILC. It is in Malaysia’s view that the entire draft conclusion should be read in its entirety to ensure that all concerns have been addressed as a whole, since they are interrelated to one another. For this reason, Malaysia would like to reserve the right to make further statements on all the draft conclusions once the entire draft is completed.

20. In conclusion, Malaysia acknowledges the importance of this area of study and we remain committed to further engagements in the development of this topic in a supportive and constructive manner.

Thank you.