



Statement on behalf of the European Union*
**by Mr Thomas Ramopoulos, First Secretary, European Union Delegation to the
United Nations**

at the General Assembly

on the Agenda item 79:

**‘Report of the International Law Commission on the work of its seventy-third and
seventy-fourth sessions’**

‘Subsidiary Means for the determination of Rules of International Law’

United Nations

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– CHECK AGAINST DELIVERY –

*In accordance with Resolution 65/276 (Participation of the European Union in the work of the United Nations).

Mr/Ms Chairperson,

1. It is an honour for me to address the 6th Committee, on behalf of the European Union, on subsidiary means for the determination of rules of international law that is under consideration before the International Law Commission (ILC), and is discussed in Chapter VII of the ILC Report.
2. In this regard, the European Union would like to congratulate the ILC and the Special Rapporteur, Mr. Charles Chernor Jalloh, with the progress made in the consideration of this important topic and to express its appreciation for the work done so far.
3. The European Union welcomes the provisional adoption of the first three draft conclusions on subsidiary means for the determination of rules of international law and the commentaries to them, and would like to present some first remarks in relation to them.

Mr/Ms Chairperson,

4. In the first place, the European Union would like to express its support for the envisaged form of the final output of the work of the ILC on this topic. Indeed, “conclusions” would be the appropriate form and it would be consistent with the form of the output of the work of the ILC on other topics addressing the sources of international law and other related issues of international law, as indicated in paragraph 6 of the General commentary.
5. In the second place, the European Union would like to address the nature and role of subsidiary means that are referred to in the commentaries and in particular in the section “General commentary” and in the commentary to draft conclusion 1.
6. As regards the commentaries to draft conclusion 1, the European Union notes the analysis on the subsidiary character of the means (paragraphs 4 -7) and concurs that the subsidiary means referred to in Article 38 (1) (d) of the Statute of the ICJ are not

sources of law that “*may apply in and of themselves*” but “*are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules*” (paragraph 6). In that respect, the ILC may consider further developing the arguments in support of the above by referring to the fact that each source of international law is based on the will/consent of subjects of international law. This will/consent can be explicitly expressed or be implicit and the role of subsidiary means is to assist in the interpretation, application and development of the will expressed by subjects of international law.

7. There is also another aspect of the subsidiarity that could be further elaborated by the ILC, namely the question of the relationship between different means for the determination of rules of international law. This relationship is different as regards different sources of international law.
8. The European Union invites the ILC to develop more clearly in the commentaries the relationship between the rules contained in Article 32 of the Vienna Convention on the Law of Treaties (VCLT) and Article 38(1)(d) of the Statute of the ICJ, as suggested during the debate within the ILC (paragraph 93 of Chapter VII). In particular, the distinction between supplementary means of interpretation of treaty rules and subsidiary means for determination of rules of international law should be clearly stated.
9. As regards customary international law and general principles, the subsidiary character of means referred to in Article 38 of the ICJ Statute has been analysed in the ILC draft conclusions on the identification of customary international law and in the draft conclusions on general principles of law.
10. These above explanations could be inserted, for example, in the commentaries to conclusion 1 in the sections explaining what the term “determination of rules of

international law” means. Alternatively, they could be referred to in the commentaries to conclusion 2.

11. Thirdly, the European Union would like to make a couple of comments concerning conclusion 2, where decisions of courts and tribunals are referred to. In this regard, the European Union would like to suggest that additional explanations be added in the commentaries as regards what a “court or tribunal” is. While accepting a broad notion of these terms, there should be some criteria that distinguish these from other bodies. Examples of these criteria could be: (1) whether the body is established by law, (2) whether the body's jurisdiction is compulsory and/or whether the body has the power to issue binding decisions for the parties to the dispute, (3) whether the body applies rules of law or decides on the basis of *ex aequo et bono* principles, (4) whether the body is independent and impartial. All other bodies which do not fulfil the criteria but yet their work is useful for the determination of rules of international law, should fall under letter c) of conclusion 2. On the distinction between an international and a national court, the European Union would like to refer to commentaries to conclusion 13 of the draft conclusions on the identification of customary international law.

12. What is more, the European Union would like to raise the issue of the level of national courts, whose decisions should be taken into account. Not all court decisions necessarily carry the same weight and that the context of the decision, including the placement of a court within the national system, should be taken into account. In the view of the European Union, the highest courts’ decisions in a given case, in other words decisions of courts against whose decisions there is no judicial remedy under national law, enjoy the highest authoritative value. In turn, a national court’s decision that has been overturned (or is currently on appeal) could not be relied upon under Art. 38 (1) (d) of the ICJ Statute.

13. The European Union welcomes that the commentaries to draft conclusion 2 explicitly refer to the Court of Justice of the European Union (paragraph 7). Indeed, the CJEU has substantial case-law dealing with matters of international law and its jurisprudence could be an instructive subsidiary means for the determination of rules of international law.
14. Finally, as regards conclusion 3, it might be useful if the ILC provide general guidance which criterion is relevant for which subsidiary means. It is to be noted that letter a) and e) coincide and they could be merged into one single criterion.

Mr/Ms Chairperson,

15. In conclusion, the European Union wishes to once again express its appreciation for the work done so far by the ILC on this important topic. This topic is of particular importance for the Union as an international actor who actively contributes to the formation of various sources of international law. Indeed, the Union does not only have treaty-making powers, but in view of its special characteristics as an international organisation, it also contributes to the formation of customary international law (which was recognised by the ILC in its work on the related topic and is also subject to academic studies) and of general principles of law, as explained in the Union's intervention on the work of the ILC on that topic.
16. The European Union will, thus, actively participate in the consideration of this topic and is looking forward to continuing further debates on the matter in the 6th Committee.

Thank you for your attention.