

[check against delivery]



Sixth Committee

“International Law Commission: Cluster III”

**Statement by Anne Aagten
Legal Officer in international law from the Ministry of Foreign Affairs of the Kingdom of the
Netherlands**

NEW YORK, 1 November 2023

Cluster III

Chp VII (Subsidiary means for the determination of rules of international law)

1. [Mr/Mme Chair, please allow me to start with the topic subsidiary means for the determination of rules of international law.] The Kingdom of the Netherlands wishes to thank the Special Rapporteur for his first report. It also wishes to thank the Commission as a whole for its work on this topic.
2. Although my Government initially expressed some doubt as regards the inclusion of this topic in the programme of work of the ILC, it has now been convinced of its potential. The work on this topic could, for example, help to identify how soft law, including non-binding instruments agreed by States, may contribute to the identification and application of international law, which is of particular practical relevance. This may even be more so the case now that the topic of non-legally binding international agreements is now included in the work programme of the ILC as well. The Netherlands also recently submitted examples of State practice in response to the request by the ILC in its reports from 2022 and 2023, to support the future work of the Special Rapporteur and the ILC.
3. My Government agrees with the notion of the Special Rapporteur that subsidiary means for the determination of rules of international law are not sources of international law in the formal sense. However, subsidiary means are not only documentary and auxiliary sources, but may also be considered to confirm or determine the meaning of a particular rule. My Government concurs with the Special Rapporteur that subsidiary means do have varying levels of authority.
4. My Government will focus in its comments on suggestions for the scope of the draft conclusions. With respect to the first category of subsidiary means, which are decisions as encompassed in draft conclusion 2, the Kingdom believes that, at this stage, the quality of decisions should be leading in the assessment of whether it is a subsidiary means. Therefore, the Netherlands is not convinced that decisions as mentioned in draft conclusion 2 could only be judicial decisions of courts or tribunals established by law.

These could for instance also include decisions of quasi-judicial bodies, such as human rights treaty organs or compliance committees established under multilateral environmental agreements. Also, my Government believes that there should be no hierarchy between decisions from different courts or bodies. In this regard, decisions from national courts should not be excluded from the scope of the work.

5. When it comes to any other subsidiary means as encompassed in draft conclusion 2 sub (c), the Kingdom of the Netherlands questions at this stage whether unilateral acts and legally-binding resolutions of international organizations should be included as constituting as subsidiary means.
6. Single unilateral acts only bind the author. For that reason, my Government shares the preliminary view of the Special Rapporteur and does not consider that they readily constitute subsidiary means. With respect to parallel, or uniform unilateral acts of multiple States, we would note that they may rather point in the direction of the formation of customary international law, instead of serving as subsidiary means. My Government would therefore appreciate further clarification on whether unilateral acts could function as both a formal source and as subsidiary means.
7. At the same time, my Government would suggest that the Special Rapporteur addresses non-legally binding decisions of international organizations and supreme treaty bodies as a particular form of action by States that could be identified as subsidiary means. My Government would like to point out the relevance of supreme treaty bodies as a framework within which States seek to discuss and review the implementation of a treaty and that decisions adopted at meetings of such bodies could contribute to the identification, interpretation and application of rules of international law. The starting point for determining the legal effect of a decision adopted by a supreme treaty body should always be the treaty concerned and any applicable rules of procedure.

8. A focus on non-legally binding resolutions and decisions of international organizations would also help to clarify the relationship between the various subsidiary means. Non-legally binding agreements and instruments do not produce legal effects by themselves and cannot be considered a formal source of law nor a source of international legal obligations. Yet, they are capable of producing indirect legal effects or having a direct impact on State practice. They may do so as preparatory acts in connection with a legally binding instrument, as interpretative guidance for such binding instruments, or as subsidiary means for the determination of rules of international law.
9. The Kingdom considers favorably the general criteria for the assessment of subsidiary means that are mentioned in draft conclusion 3. In this respect, the Netherlands does believe that greater weight should be attached to decisions and teachings that are collectively supported by groups of judges, or groups of experts such as the members of the ILC.
10. My Government looks forward to the second report of the Special Rapporteur and to discuss this topic further during the next session of the Sixth Committee.

Chp IX (Succession of States in respect of State responsibility)

11. [Mr/Mme Chair, I lastly turn to the topic on Succession of States in respect of State responsibility.] My Government has taken note of the decision of the Commission to establish a working group to discuss the way forward for this topic.
12. In that respect, my Government also noted the preponderance of views within that Working Group favouring the conversion of the present format into a Working Group-based process, with the goal of producing a final report. Meanwhile, the Working Group has preferred to recommend to defer a definitive decision on the way forward to the Commission's seventy-fifth working session in order to allow more time for reflection. The Working Group has also recommended not to proceed with the appointment of a new Special Rapporteur.

13. My Government supports that approach, and would reiterate its views previously expressed, namely that the Netherlands does not support an outcome in the form of draft articles, principles, conclusions or guidelines. My Government concurs with the view that the preparation of a final report on the topic would be a suitable outcome.

14. Thank you for your attention.