



**UN General Assembly – Agenda item 79
Report of the International Law Commission on the work of its seventy-fifth session**

**Cluster 2
Subsidiary means for the determination of rules of international law**

**Statement by the Federal Republic of Germany
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Regarding the Cluster II, Germany wishes to make comments on the topic of “Subsidiary means for the determination of rules of international law”.

Allow me to start by thanking the Special Rapporteur, Charles Jalloh, for his valuable second report and the Commission for the work it has undertaken on the topic during this year’s sessions. Germany welcomes the progress made on this important project the completion of which will bring to full circle the Commission’s work on Art. 38 of the ICJ’s Statute. There is often confusion as to the exact nature of the “subsidiary means” mentioned in Art. 38 (1) (d) of the Statute. It is indeed important to keep in mind that decisions and scholarly work, while undeniably of high practical relevance, are not in themselves sources of international law. Germany appreciates that the Commission has been very clear in this regard.

Germany furthermore welcomes the particular focus the Commission has put, throughout the draft articles, on the aim to achieve representativeness. Germany agrees with the Commission whole-heartedly. The more voices and perspectives we can integrate into international law the stronger the fundamentals of international law will be. Germany, however, respectfully proposes that the structure of the draft articles could be improved. While Germany agrees with the content of draft article 6, it might be more fitting to place it further at the top, as the conclusion has to do with the nature of Art. 38 (1) (d) of the ICJ’s

Statute. Furthermore, the catalogue of criteria on evaluating decisions by courts and tribunals might better be placed after the current draft article 4, that is in close proximity to the definition of decisions.

Turning to draft article 4 regarding decisions by courts and tribunals. Germany continues to wonder whether it is appropriate to drop the qualifier “judicial” before the word “decision”. While *judicial* decisions might best be dealt with under draft article 4, any other and non-legal decision might be considered “another means” in the meaning of draft conclusion 2(c). Furthermore, Germany wishes to align itself with the comments made by the EU and suggest that a definition of what constitutes a “court” be included in the commentaries. In that regard, the Commission should also expound on the difference between a “court” and a “tribunal”.

Finally, Germany agrees with the Commission’s emphasis on the ICJ. While there is no formal hierarchy among international courts and tribunals, the ICJ is representative of all the regions of the world and established under the UN Charter as its main judicial organ. Germany would, however, suggest a slight reformulation of the second paragraph to draft article 4. In line with other work on similar topics, it could read “as appropriate” rather than “under certain circumstances”. While the latter formulation suggests an all-or-nothing-approach, the former allows for a more nuanced approach that seems more in line with the Commission’s reasoning.

Thank you.