Statement by H.E. Archbishop Gabriele Caccia
Apostolic Nuncio and Permanent Observer of the Holy See
Agenda item 79: Report of the International Law Commission on the work of its seventy-third and seventy-fourth sessions
Cluster III – Chps: VII (subsidiary means for the determination of rules of international law) and IX (Succession of States in respect of State responsibility)

New York, 2 November 2023

Mr. Chair,

The Holy See welcomes the International Law Commission's consideration of the issue of the subsidiary means for determining the rules of international law. As noted by the Special Rapporteur, Article 38 of the Statute of the International Court of Justice is indeed widely recognized by States, practitioners, and scholars as the most authoritative restatement of the sources of international law. In this respect, the subject of the subsidiary means goes to the very core of international law by addressing the foundational sources from which the legal norms of the international community emerge. With all that in mind, my Delegation considers that the formulation by the Commission of guidelines on the use of subsidiary means would be an important contribution to the development of international law.

Subsidiary means possess significant implications for international law and its interpretation. Therefore, a thorough scientific analysis is necessary to address this crucial issue, ensuring the validity and strength of conclusions that will be drawn. Thus, as acknowledged by the Commission, to strengthen the usefulness and legitimacy of its work, the Commission itself should make greater efforts to incorporate diverse sources and references from various regions, legal traditions, and languages.

Mr. Chair,

As it can clearly be inferred from the French and Spanish versions of the Statute of ICJ, subsidiary means serve an auxiliary function and thus they are

not, sources of law themselves. Regrettably, there is an increasingly common confusion within the international community regarding binding and non-binding sources of international law. We must ensure that suggestions *de lege ferenda* are not prematurely granted the status of subsidiary means for the determination of rules of international law without due consideration of the views of States. In this context, including under draft Conclusion 2, a) “decisions of courts and tribunals”, the opinions of certain bodies which do not have a judicial character would greatly increase this risk. My Delegation is of the view that the recommendations and general comments issued by the human rights treaty bodies should not be equated with judicial decisions, since they are not adjudicative, do not observe due process, are not always immune to political considerations and sometimes their members are not experts in international law and treaty law.

Mr. Chair,

My delegation attaches great significance to the general criteria outlined in draft Conclusion 3 for the assessment of the subsidiary means, in particular to the reception by States and the level of consent. These criteria are objective, universal and based on consensus and should therefore be given priority in order to promote a more transparent decision-making framework for the international community. Conversely, criteria based on subjective standards, such as the quality of reasoning or the expertise of those involved, are highly problematic and may be subject to divergent interpretations.

Moreover, decisions of national courts, referred to in draft Conclusion 4, paragraph 2, as provisionally adopted by the Drafting Committee, should be used with caution in order not to favor the jurisprudence of the courts of one State over those of other States. Similarly, decisions of regional courts and tribunals with limited membership should be used with caution in situations involving States outside of their jurisdiction. National and regional legal principles should not be as assumed to be universal.

Thank you, Mr. Chair.