Subsidiary Means for the Determination of Rules of International Law

(Chapter VII)

Statement by Denmark on behalf of the Nordic countries

31 October 2023

Mr./Madam Chair,

I have the honor to speak on behalf of the Nordic countries Finland, Iceland, Norway, Sweden and my own country, Denmark.

I will start with Chapter VII of the ILC report, concerning Subsidiary Means for the Determination of Rules of International Law.

On behalf of the Nordic countries, I would like to congratulate the International Law Commission for having commenced its work on the topic of subsidiary means for the determination of rules of international law. We are grateful to the Special Rapporteur, Mr. Charles C. Jalloh, and the Commission for the work done on the topic thus far.

The Nordic countries welcome the Commission's attention to the topic and look forward with interest to its further consideration. Overall, we support the approach of working towards a set of draft conclusions as the outcome for this topic.

At this early stage of work, The Nordic countries would like to make the following general comments as regards the Special Rapporteur's first report and the Commission's work on the topic during its seventy-fourth session:

First of all, we would like to fully support the important contributions made by the Commission in promoting conceptual clarity and consistency in the application of the term "source of law" in the context of the Commission's engagement with Article 38 of the ICJ Statute thus far. While there is no single operative definition of the term "source of law" in international legal practice or theory, it is clear that subsidiary means referred to in Article 38 (1) d are of a different nature than "sources of law" insofar as this term is applied as a reference to *formal* sources of law, as the first report sets out to do.

Article 38 (1) d refers to something qualitatively different from the latter, namely a *material* source; i.e. helpful, material evidence that may assist in and influence interpretation and

provide added perspective. As rightly pointed out in the commentaries provisionally adopted by the Commission to draft conclusion 1, notably a careful study of various authentic language versions of the provision sheds important light in this regard.

The French authentic text of article 38 speaks of "*moyen auxiliaire*", while the Spanish authentic text similarly speaks of "*medio auxiliar*". Both underline the auxiliary, i.e. helpful, character of such means for the determination of rules. Incidentally, this does not contradict one of the earlier established interpretations of the meaning of "subsidiary" in the English language when the provision was originally drafted in 1920. Judicial decisions and teachings are thus auxiliary to the sources in article 38 (1) a-c, and not functionally analogous to them.

We would like to commend the Commission for applying such a multilingual effort to interpretation of the Statute, in conformity with the rules of interpretation of treaties authenticated in several languages, contained and reflected in article 33 of the Vienna Convention on the Law of Treaties.

Mr./Mme chair.

The Nordic countries would also like to stress the importance of promoting clarity in distinguishing between analysis *lex lata* and theoretical assessments of the practical effects of decisions and teachings as seen from a sociological or anthropological perspective. The causes of law, i.e. the factors that may influence the growth of international law, must not be confused with the formal sources of law.

The Nordic countries agree that the practice of the ICJ has had strong impact on the clarification and progressive development of international law. We welcome that, and we strongly support the role of the ICJ as an essential gravitation point for the international legal system as such, and promotion of systemic integration of this system.

But this is not to be confused with a claim that the practice of the Court is itself a formal source of rights and obligations for states not party to a dispute, as for instance also recalled in article 59 of the statute where it is stipulated that a decision of the court has no *binding* force except between the parties and in respect of the particular case. In this regard the Nordic states agree with the statement of the Special Rapporteur in his concluding remarks

cited in the report of the Commission, namely that "following the methodology of legal reasoning adopted in previous cases [is] not the same as being bound by past decisions".

We are also of the view that it is important to distinguish between various roles that teachings may play. These may not least inspire political action and legal reasoning that may lead to creation of new rules of international law. However, this is not to be equated with the auxiliary function of teachings which Article 38 (1) d is concerned with, nor is it an argument to say that teachings are sources of the law. The provision is concerned with the relevance of teachings as evidence to support the identification or determination of the existence and content of a rule of international law, the source of which is independent of the teachings themselves.

Mr./Mme chair.

As to the scope of Article 38 (1) d, care should also be taken to the issue of what constitutes a judicial decision or teachings. As to the term "judicial decision" in particular, this is normally taken to refer to a decision by an institution exercising judicial powers. This does not include, for example, statements and assessments of treaty bodies that may comment on legal issues but that do not have the mandate to exercise judicial powers. As for the term "teachings of the most highly qualified publicists of the various nations", the Nordic states believe that this – read in its context - refers not to the most highly qualified persons *simpliciter*, but to the most highly qualified persons in international law specifically.

The Nordic states welcome the Commission's engagement with the question of whether there may be categories of subsidiary means beyond those listed in the text of Article 38 (1)d.

Following from the observation that subsidiary means are evidence used to aid or assist identification or determination of rules of law, and not formal sources, there is certainly good reason to think that the concept of "subsidiary means" as referred to in Article 38 (1)d is not exclusive, but rather a snapshot of the types of evidence most prominently applied at the point in time when the statute was written. We welcome the Commission's further examination of this issue in future work.

The provisionally adopted formulation in draft conclusion 2 (c) "any other means generally used to assist in determining rules of international law", is very broad and inclusive. As highlighted in the report, this formulation avoids the danger of being too restrictive as to future developments and does remove any collateral risks of exclusion of factors that may at some point in time prove useful as additional auxiliary means. At the same time, however, there are certain useful and, in our view, important requirements that must be met. The threshold "generally used" indicates that a degree of qualification and usage in practice must be satisfied. Moreover, the reference to "assist in" is an important reminder of the auxiliary function of subsidiary means. Furthermore, the question of their relative weight is also to be carefully considered to ensure jurisprudential legitimacy and broad acceptance by the international community.

The Nordic countries reiterate our appreciation to the Commission for engaging with the topic of subsidiary means for the determination of rules of international law. We will continue to collaborate with the Commission on the topic with great interest.

Mr./Mme chair.

I will now turn to Chapter IX of the ILC report, concerning the succession of states in respect of state responsibility.

Mr./Mme chair.

The Nordic countries note with interest the discussion in the Commission and the different views expressed regarding the future direction of the topic *succession of States in respect of State responsibility*. We also note that a Working Group on the topic was established for the 74th session, as the Special Rapporteur of the topic was no longer with the Commission.

The Nordic countries would like to reiterate their gratitude to Professor Pavel Šturma for his valuable contribution to the topic.

We take note of the recommendations of the Working Group on the topic chaired by Mr. August Reinisch. We see merit in the pause for reflection about the way forward in this topic. The continuation of this reflection in a Working Group format during the 75th session

appears as a sensible choice. We look forward to the further deliberations of the Working Group to be re-established for the 75th session, and those of the Commission as whole.

Finally, as has been said before, State succession is a rare occurrence and the availability of State practice is limited. Therefore, we encourage the Commission to maintain a prudent approach as work with this topic continues on the basis of the excellent groundwork laid by Professor Šturma. We look forward to the continuing collaboration with the Commission on this topic as the work progresses.

Thank you.