

A CONVENTION ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Concept Note

Background

This is the third in a series of events organized to create awareness on the process and prepare for the taking of a decision at the 70th session of the General Assembly on the topic of the responsibility of States for internationally wrongful acts. It builds on the exchanges of views held at the first and second events on “**Responsibility of States: state of play and the way forward**” on 29 October 2014 and 15 June 2015, respectively.

The International Law Commission identified the topic “State Responsibility” as being suitable for codification in 1949. Several distinguished Special Rapporteurs have subsequently contributed to the Commission’s work on the topic, offering different views and approaches. After more than five decades of work by the International Law Commission, the General Assembly took note, in 2001, of the draft Articles adopted by the Commission and opened the way for the consideration of a future convention on the Responsibility of States for Internationally Wrongful Acts.

Since 2001, the draft Articles have been subject of scrutiny by doctrine, jurisprudence and State practice. As an example, successive studies of the Secretariat show that, until 31 January 2013, over 200 decisions of international courts, tribunals and other bodies referred to the draft Articles, which is a good indicator of their relevance. However, and as the studies by the Secretariat also demonstrate, those decisions did not always coincide in their interpretation of some of the draft Articles. Furthermore, and although the Commission’s work has been in general well received, it is known that some of those draft provisions do not share the same level of acceptance by member States.

The General Assembly has been considering since 2001 the opportunity of preparing a convention on the topic. It has returned to the possibility of convening a diplomatic conference to adopt a treaty on the basis of the articles in 2004, 2007, 2010 and 2013, without taking a decision. It is scheduled to consider the fate of the articles again in 2016. In 2013, the General Assembly, while acknowledging the increasing relevance and usefulness of the draft Articles in daily practice, decided to defer to the 71st session of the General Assembly (2016) the question of the adoption of a convention on the Responsibility of States for Internationally Wrongful Acts. The question is divisive and the General Assembly has not been able so far to reach a consensus on the need to adopt a convention on the Responsibility of States. Even though there are different perspectives on this subject, there is a growing sentiment that the time has come to seek agreement on a way forward.

The debates in the Sixth Committee (and written comments submitted by Governments) have revealed agreement that the draft Articles have, for the most part, gained widespread recognition, among governments, tribunals and academic commentators, as an authoritative restatement of existing customary international law. It is not expected that further postponement in action will change this position in any meaningful way.

The most recent debate in the Sixth Committee (2013) revealed a strong plurality of States, across all regional groups, in favor of proceeding to the adoption of a convention.

Arguments in favor include, among others:

- The articles have sufficiently solidified the law on international responsibility to justify serving as the basis for an international convention;
- Notwithstanding the generally positive reception of their content, the status of the articles remains unclear, and would be clarified through encapsulation in a treaty;
- Despite their general positive reception, the work remains incomplete in the sense that some gaps, which have been identified in the interceding years, could be addressed, and some provisions could benefit from further clarification;
- A diplomatic conference to negotiate a treaty would allow for the participation of all States, thereby further enhancing the political acceptance of the rules reflected in the articles, and would provide the forum for a political understanding/consensus on some of the most controversial provisions (e.g. countermeasures, *erga omnes* obligations); and
- A treaty negotiation in the context of a diplomatic conference would not require a renegotiation of the provisions of the articles *de novo*. Instead, the 2001 articles would serve as the “default” base-text. The widespread support for the articles would mean that many of the provisions would be accepted as part of the treaty. Any amendments to the base-text would have to be formally adopted through the established voting procedures.

Another group of States has expressly opposed the adoption of the articles as a treaty, either because the widespread acceptance of the articles minimizes the need to undertake the effort (and expense) of a treaty negotiation, or because the risk unraveling the articles, through a failed treaty negotiation, is too great. This view would rather keep the *status quo* regarding the draft Articles, leaving its stabilization, in the long term, to individual state practice and to decisions of courts and tribunals.

These positions were identified and debated in a first event organized by the Czech Republic, Guatemala, Mexico, Portugal and South Africa on 29 October 2014, prompted by the very stimulating interventions of the keynote speakers Mr. Dire Tladi and Mr. Pavel Šturma, members of the International Law Commission.

In a second event, organized on 15 June 2015 by the same delegations, this interesting debate was continued in order to better prepare for the 2016 discussion of the issue in the Sixth Committee, when this topic will return to the agenda of the 71st Session of the General Assembly. After the introductory remarks by the United Nations Legal Counsel, Miguel de Serpa Soares, in a panel moderated by Mr. Gómez-Robledo, member of the International Law Commission, Professors Laurence Boisson de Chazournes, August Reinisch and André Nollkaemper debated the state of play and the way forward concerning the draft Articles on Responsibility of States.

These two events have highlighted several issues such as:

- the importance of codification and the central role of States, as an instrument to strengthen multilateralism in the creation of international law and the role of the ILC;
- the possible steps that could be taken towards adopting a convention (the process), including the role of a Conference and the General Assembly and how to approach the substantive issues.

The 4th November event (“Containment” and “Substance”)

The next 4th November event aims at further reflecting on the scope and content of a possible convention, taking into account the fact that UNGA Resolution 68/104 (2013) decided to include in the provisional agenda of its seventy-first session (2016) the item entitled “Responsibility of States for internationally wrongful acts” in order to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

Among the topics for discussion for Part III of this ongoing debate are how to:

- “contain” the unraveling of the articles and avoid harming the work done by the ILC, building on relevant examples of previous codification processes;
- build on non-contentious and widely supported aspects of the draft articles and avoid opening the “pandora’s box” on non-essential issues and issues that could impact negatively on the existing balance of the articles;
- identify the contentious issues and find solutions to narrow down the existing differences to the extent possible; and
- prepare the debate and action to be taken by the 6th committee on this item in 2016.