



# General Assembly

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## Seventy-fifth session

Item 88 of the provisional agenda\*

### Responsibility of international organizations

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### Comments and information received from Governments and international organizations

### Report of the Secretary-General

## I. Introduction

1. The International Law Commission adopted the articles on the responsibility of international organizations at its sixty-third session, in 2011. In its resolution [66/100](#) of 9 December 2011, the General Assembly took note of the articles on the responsibility of international organizations, presented by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action.

2. In its resolution [69/126](#) of 10 December 2014, the General Assembly requested the Secretary-General to invite Governments and international organizations to submit information on their practice regarding decisions of international courts, tribunals and other bodies referring to the articles on the responsibility of international organizations, as well as written comments on any future action regarding the articles. Following the consideration of the written comments received from Governments and international organizations,<sup>1</sup> as well as the compilation of decisions prepared by the Secretary-General,<sup>2</sup> the Assembly, in its resolution [72/122](#) of 7 December 2017, once again commended the articles to the attention of Governments and international organizations, without prejudice to the question of their future adoption or other appropriate action. The Assembly reiterated its request that the Secretary-General invite Governments and international organizations to submit their written comments on any future action regarding the articles and also requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles. In addition,

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\* [A/75/150](#).

<sup>1</sup> See [A/72/80](#).

<sup>2</sup> See [A/72/81](#).



the Assembly decided to include the item in the provisional agenda of its seventy-fifth session, with a view to examining, inter alia, the question of the form that might be given to the articles.

3. By notes verbales dated 8 January 2018 and 17 January 2019, the Office of Legal Affairs invited Governments to submit, no later than 1 February 2020, their written comments on any future action regarding the articles on the responsibility of international organizations. In those notes, it also invited Governments to submit information regarding practice relating to decisions of international courts, tribunals and other bodies referring to the articles. The Under-Secretary-General for Legal Affairs and United Nations Legal Counsel also addressed a communication, dated 9 January 2018, to 23 international organizations and entities bringing to their attention resolution [72/122](#) and inviting them to submit, no later than 1 February 2020, comments and information in accordance with the request of the General Assembly.

4. As at 1 July 2020, the Secretary-General had received written comments from three Governments: El Salvador (dated 24 January 2020), Niger (dated 12 April 2019) and United Kingdom of Great Britain and Northern Ireland (dated 19 May 2020). He had also received written comments from two entities: International Organization for Migration (dated 31 January 2020) and United Nations Industrial Development Organization (dated 29 January 2020).

## **II. Comments on any future action regarding the articles on the responsibility of international organizations**

### **A. Comments by Governments**

#### **El Salvador**

[Original: Spanish]  
[24 January 2020]

Although the articles adequately reflect the principle of responsibility in international law, adopting a binding instrument on the subject still poses multiple difficulties due to the scarcity of practice on its application to the large variety of international organizations. To continue to discuss the form that the articles drafted by the Commission should take in the future, it would be immensely useful to be able to examine the updated compilation of decisions of international courts, tribunals and other bodies that will be submitted by the Secretary-General in advance of the next session.

In the light of the above, El Salvador considers that the item should remain on the agenda of the Sixth Committee, with a view to monitoring the consolidation of practice regarding the responsibility of international organizations and to then deciding at a later date whether the articles are ripe for uniform application.

#### **Niger**

[Original: French]  
[12 April 2019]

The competent authorities of the Niger favour a vote on the draft articles on the responsibility of international organizations.

## United Kingdom of Great Britain and Northern Ireland

[Original: English]

[19 May 2020]

The position of the United Kingdom on this topic has not changed since the Sixth Committee last considered it in 2017 at its seventy-second session. The United Kingdom remains of the view that the draft articles on the responsibility of international organizations are best left in their current form and that the time is not yet ripe to consider a draft convention.

In its previous statements to the Sixth Committee, the United Kingdom noted that there was limited practice on the responsibility of international organizations. It appears that there have been no significant developments in this regard. It remains unclear how the draft articles on the responsibility of international organizations are being applied in practice, as reflected in the report of the Secretary-General (A/72/81). As such, several of the draft articles continue to represent progressive development rather than codification of international law. We consider it unlikely that an inevitably long and complex process of negotiation would lead to sufficient consensus for the adoption of a convention.

### B. Comments by international organizations

#### International Organization for Migration

The International Organization for Migration (IOM) recalled that, on 31 January 2017, it was part of the joint submission made in response to the request of 8 February 2016 for comments and information relating to the draft articles on the responsibility of international organizations pursuant to General Assembly resolution 69/126. The joint submission presented the shared views of 24 international organizations regarding the draft articles and responded to the request for information regarding practice in connection with decisions of international courts, tribunals and other bodies referring to the articles. Most notably, the international organizations participating in the joint submission considered that many of the draft articles remained controversial and that negotiating a treaty based on the draft articles would be premature.

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Given that the draft articles had not been further developed since the joint submission, and that further examples of practice had not been identified, the concerns detailed in the joint submission remained valid.

On that note, since many of the draft articles remained controversial and largely unsupported by practice, IOM remained of the view that no further action by the General Assembly was necessary at the present time.

#### United Nations Industrial Development Organization

The United Nations Industrial Development Organization (UNIDO) reported that it had not, to date, initiated any action regarding the articles and that no such action was currently envisaged.

### III. Information on practice regarding the articles on the responsibility of international organizations

#### A. Information submitted by Governments

##### El Salvador

[Original: Spanish]

[24 January 2020]

With regard to the requested information on national practice in the matter, there is no record of the application of the articles on the responsibility of international organizations in El Salvador.

However, it should be noted that the Constitutional Chamber of the Supreme Court of Justice of El Salvador recognizes in its case law certain legal characteristics of international organizations that are in line with the general content of the articles. The Constitutional Chamber has stated that, regardless of the terminology used to describe them, agreements between States or between States and international organizations create international legal ties that give rise to obligations for the contracting parties and authorize them to act in accordance with what has been agreed (unconstitutionality proceeding No. 3-91 of 7 September 2009). The Constitutional Chamber thus recognizes that international organizations can be subject to obligations in respect of other subjects of international law.

El Salvador both recognizes the existence of legal ties that affect the functioning of international organizations and respects the immunities and privileges attributed to them to ensure the effective performance of their functions. In this regard, the Constitutional Chamber has stated that “the aforementioned organizations and their agents enjoy privileges and immunities designed to ensure the independence necessary for the exercise of their functions and the attainment of the objectives set out or implicit in their rules” (amparo judgment 25-S-95 of 22 September 2002).

Taking into account the aforementioned case law, El Salvador reiterates the importance of the principle of responsibility in international law. By that principle, every act attributable to a State or an international organization that constitutes a breach of an obligation in force for the same is an internationally wrongful act and entails international responsibility. Therefore, as in the case of States, when an international organization interacts with other subjects of international law, it must also be required to incur certain consequences as a result of its acts.

##### United Kingdom of Great Britain and Northern Ireland

[Original: English]

[19 May 2020]

##### International decisions

In addition to the decisions included in the report of the Secretary-General (A/72/81), the United Kingdom is aware of one 2018 arbitral decision which refers to the draft articles on the responsibility of international organizations: *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*.<sup>3</sup> In this case, the respondent (and the European Commission, intervening) argued that the Energy Charter Treaty was not applicable to investment disputes between European Union

<sup>3</sup> Stockholm Chamber of Commerce Case No. V (2015/095), Final Award, 23 December 2018.

investors and a State member of the European Union. The sole reference to the draft articles on the responsibility of international organizations in the award is as follows:

The [European Commission] advances a principle of international law, expressed as “liability follows competence”, whereby international obligations and liability among an international organization and its member states are allocated according to special rules of the organization itself and not necessarily shared between the organization and its member states. This principle, asserts the [European Commission], has been recognized in the International Law Commission’s 2011 Draft Articles on the Responsibility of International Organizations (“DARIO”), [World Trade Organization] panel reports, and a decision of the International Tribunal for the Law of the Sea. The [European Commission] asserts that the principle applies to the [European Union] and the Member States.

### National decisions

Two national court judgments in the United Kingdom, decided in 2017 and 2019, respectively, refer to the draft articles on the responsibility of international organizations: *Mohammed (Serdar) v. Ministry of Defence*; *Qasim and others v. Secretary of State for Defence*; *Rahmatullah v. Ministry of Defence and another*; *Iraqi Civilians v. Ministry of Defence and another*;<sup>4</sup> and *Tomanovic and others v. Foreign and Commonwealth Office*.<sup>5</sup>

#### Supreme Court of the United Kingdom

In *Mohammed (Serdar) v. Ministry of Defence*, *Qasim and others v. Secretary of State for Defence*, *Rahmatullah v. Ministry of Defence and another* and *Iraqi Civilians v. Ministry of Defence and another*, the Supreme Court of the United Kingdom referred to *R (Al-Jedda) v. Secretary of State for Defence (Justice intervening)*<sup>6</sup> in considering the test for attribution of conduct:

In his speech, Lord Bingham of Cornhill (with whom Baroness Hale of Richmond and Lord Carswell agreed for the reasons he gave) explained that it was common ground between the parties that the governing principle was that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organisations:

“The conduct of an organ of a state or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.” (para. 5)

The Supreme Court then considered *Al-Jedda v. United Kingdom*<sup>7</sup> and commented:

Referring to article 5 of the International Law Commission’s draft articles on the responsibility of international organizations, the Grand Chamber considered that the [United Nations] Security Council had neither executive control nor ultimate authority and control over the acts and omissions of troops within the multinational force and that, accordingly, the applicant’s detention was not attributable to the [United Nations]. (para. 84)

<sup>4</sup> [2017] UKSC 1.

<sup>5</sup> [2019] EWHC 3350 (QB).

<sup>6</sup> [2008] AC 332.

<sup>7</sup> (2011) 53 EHRR 23.

The Supreme Court concluded by endorsing the findings of the Court of Appeal of England and Wales that the Security Council “has ‘effective control’ (‘ultimate authority and control’) over [the International Security Assistance Force (ISAF)] in the sense required to enable conduct of ISAF to be attributed to the [United Nations]”.

#### *High Court of England and Wales*

In *Tomanovic and others v. Foreign and Commonwealth Office*, the High Court of England and Wales considered the applicable test for attribution:

The correct test for attribution was the subject of considerable debate in *Kontic*. In that case the question of attribution concerned action by [the Kosovo Force (KFOR)]. That had been addressed by the Grand Chamber of the European Court of Human Rights in *Behrami v. France*. The Grand Chamber concluded that action by KFOR within the scope of Security Council Resolution 1244 was attributable to the [United Nations] (see at paras. 129 and 135). It rejected the arguments of the applicants that the level of control over KFOR troops by their home states was such that their conduct was to be attributed to those states. The test it applied for attribution was derived from the Draft Articles on the Responsibility of International Organisations (“DARIO”) prepared by the International Law Commission:

“The conduct of an organ of a state ... that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”

As Irwin J explained in *Kontic* (see at [89]–[99]) the approach to attribution set out in *Behrami* was applied (albeit with a different result) by the House of Lords in *R (Al-Jedda) v. Secretary of State for Defence*,<sup>8</sup> and then by the Grand Chamber in *Al-Jedda v. United Kingdom*. Irwin J followed *Behrami* in finding that the action of KFOR was attributable to the [United Nations], not the [United Kingdom]. In doing so, he recognised that the decision in *Behrami* had been subject to significant criticism. That criticism concerned the application of the “effective control” test in DARIO and whether it was necessary to focus on the question of “ultimate” control (in the sense of “ultimate authority and control over the security mission”) or “operational” control (in the sense of being able to direct or control the operational act that is in question).

Lloyd-Jones LJ granted permission to appeal on the question of attribution because the controversy over the decision in *Behrami* was such that the issue might properly be considered by the Court of Appeal, although he had “great difficulty in seeing how the matters complained of could be attributable to the [United Kingdom]”.

Resistance to summary judgment on the grounds of the controversy over the application of the effective control test does not gain any traction on the facts of the present case. That is because the distinction between “ultimate” and “operational” control does not make any practical difference on the facts. As I have explained, Mr Ratel was seconded to the [European Union Rule of Law Mission in Kosovo (EULEX)] in a manner which did not give the [United Kingdom] any control over the overall mission of EULEX or [the EULEX Special Prosecution Office of Kosovo], far less any ability to direct or control Mr Ratel in his prosecutorial functions. There was no ultimate control. And there was no operational control.

<sup>8</sup> [2007] UKHL 58; [2008] AC 332.

It follows that whichever test is correct, Mr Ratel's conduct is not attributable to the [United Kingdom].

## **B. Information submitted by international organizations**

### **International Organization for Migration**

IOM reported that, to its knowledge, there had not been any change to the practice relating to the responsibility of international organizations since the joint submission of 31 January 2017.

### **United Nations Industrial Development Organization**

UNIDO reported that there was no relevant UNIDO practice to date which referred to the articles.

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