United Nations A/77/198

General Assembly

Distr.: General
19 July 2022
English
Original: Arabic/English/Spanish

Seventy-seventh session
Item 74 of the provisional agenda*
Responsibility of States for internationally wrongful acts

Responsibility of States for internationally wrongful acts

Comments and information received from Governments

Report of the Secretary-General

Summary

Three States submitted comments, pursuant to paragraph 2 of General Assembly resolution 74/180, by the established deadline (see sect. II of the present report).

One State provided comments on the articles on the responsibility of States for internationally wrongful acts (see sect. III).

Three States submitted information on State practice regarding the articles on responsibility of States for internationally wrongful acts, pursuant to paragraph 7 of resolution 74/180 (see sect. IV).

* A/77/150.

22-11063 (E) 280722

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts ("State responsibility articles") at its fifty-third session, in 2001. In its resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action.

2. In its resolutions 59/35 of 2 December 2004, 62/61 of 6 December 2007, 65/19 of 6 December 2010, 68/104 of 16 December 2013 and 71/133 of 13 December 2016, the General Assembly requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles. Following its consideration of the written comments received from Governments,[1] as well as the compilations of decisions prepared by the Secretary-General,[2] the Assembly, in its resolution 74/180 of 18 December 2019, continued to acknowledge the importance and usefulness of the State responsibility articles, and once again commended the articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly reiterated its request that the Secretary-General invite Governments 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, the Assembly decided to further examine, at its seventy-seventh session, 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.

3. By a note verbale dated 14 January 2020, the Secretary-General invited Governments to submit, no later than 1 February 2022, their written comments on any further action regarding the State responsibility articles. In that note, he also invited Governments to submit information regarding decisions of international courts, tribunals and other bodies referring to the articles.

4. As at 1 June 2022, the Secretary-General had received written comments from Austria (dated 1 February 2022), Czechia (dated 8 February 2022), El Salvador (dated 27 January 2022), Iraq (dated 8 September 2020) and the United Kingdom of Great Britain and Northern Ireland (dated 2 February 2022).

II. Comments on any future action regarding the articles on responsibility of States for internationally wrongful acts

Austria

[Original: English]
[1 February 2022]

In Austria's view, the compilation of information regarding decisions of international courts, tribunals and other bodies referring to the articles on responsibility of States for internationally wrongful acts is a very useful tool and it

[1] See A/62/63, A/62/63/Add.1, A/65/96, A/65/96/Add.1, A/68/69, A/68/69/Add.1, A/71/79 and A/74/156.

[2] See A/62/62, A/62/62/Corr.1, A/62/62/Add.1, A/65/76, A/68/72, A/71/80, A/71/80/Add.1 and A/74/83.

should be continued in the future. The information on State practice in this regard also provides an indication of whether States accept the articles, which in turn is of help in assessing the prospects regarding the ratification and acceptance of a possible future convention.

Austria would, in principle, be in favour of the adoption of a convention and is prepared to engage in respective discussions with interested States. However, any future work on a convention would need to ensure that the current structure and balance of the draft articles are maintained and a renewed discussion of their substantial provisions avoided. The project of a convention should be pursued only if there are realistic prospects for a wide ratification and acceptance of such a convention.

Czechia

[Original: English]
[8 February 2022]

As regards the comments on further action regarding the articles, the Czech Republic's written comments were first presented to the Secretary-General in a note dated 31 January 2007 and repeated in subsequent comments. Since then, there have been, in our opinion, no significant developments requiring a change in this position; consequently, the Secretary-General is referred to the position stated in the above-mentioned note, i.e. that the Czech Republic prefers to retain the non-binding form of the articles.

El Salvador

[Original: Spanish]
[27 January 2022]

The present report is being submitted pursuant to General Assembly resolution 74/180, entitled "Responsibility of States for internationally wrongful acts", in which Governments are invited to submit further comments on any future action regarding the articles under consideration and encouraged to submit information on their practice with regard to decisions of international courts, tribunals and other bodies referring to the articles.

The Republic of El Salvador is aware of the importance of this topic and considers the articles on responsibility of States for internationally wrongful acts to be an example of significant progress in international law and of an area in which the International Law Commission has illustrated the value of its work on the codification and progressive development of international law.

El Salvador emphasizes its position that the articles respond to the needs of the current times in a globalized world in which the relations between States and other subjects of international law have undergone significant changes. El Salvador also wishes to highlight that, since the adoption of the articles by the International Law Commission at its fifty-third session, in 2001, a significant proportion of their provisions have become rules of customary international law and have been recognized as such in certain decisions of international courts, tribunals and other bodies referring to the articles. Since 2007, such decisions have been valuably compiled by the Secretary-General, who was given a mandate to do so in General Assembly resolution 59/35. The compilations also reveal that the articles have also been used as soft law, with a guiding character.

It is clear that the scope and importance of the topic go beyond this. It is necessary to provide greater legal certainty by crystallizing the articles on State responsibility in a normative text, with a view to strengthening the recognition of their content, given that – as reflected in the rulings of various international courts and tribunals that have used the articles as a basis for their decisions or have made other references to them – the articles reflect the current *opinio juris sive necessitatis*. The above-mentioned courts include the Inter-American Court of Human Rights, of which El Salvador is a member. The rulings of the Court are binding, and its jurisprudence is a binding source of law for El Salvador and all other States members of the Court.

El Salvador recognizes that this issue has been a subject of deliberation for a long time. However, it considers that it is now time for States to work more actively to advance the dialogue and promote consensus, with a view to increasing the impact of the articles. The objective is to ensure that no areas are outside the control of the law and to provide legal certainty and effective protection in the event that the rules set out in the articles are violated.

On this occasion, El Salvador wishes to reiterate its support for the possibility of drafting a binding legal instrument crystallizing State responsibility as a principle of international law so that, upon their codification in a convention or other international instrument, the articles will become a binding source of law for States.

In view of the foregoing, El Salvador considers it necessary for the discussion to be focused on the procedural and practical aspects of the question of how to use the foundation provided by the articles as a basis for the negotiation of a draft convention. The possibility of establishing forums or subsidiary bodies to carry out such work should be examined.

III. Comments on the articles on responsibility of States for internationally wrongful acts

Iraq

[Original: Arabic]
[8 September 2020]

The observations of the Republic of Iraq on the draft articles on the responsibility of States for internationally wrongful acts are as follows:

1. Draft article 1 contains no mention of omitting to perform an act that States are required to perform under the rules of international law. An “internationally wrongful act” could take the form of an act of omission by States, particularly since article 2 contains a reference to such wrongful acts.

2. Article 7 provides that the conduct of an official of a State shall be considered an act of the State even if that official exceeds his or her authority. This is a matter that requires further study.

3. With a view to combating terrorism and the recruitment of mercenaries for terrorist operations, a paragraph should be added to draft article 8 expressly providing that it is not necessary for there to be a relationship of affiliation if the person engaging in the wrongful commission or omission is acting at the direction of a State.

4. The draft contains no reference to the responsibility of a State for recruiting mercenaries to carry out internationally wrongful acts.

5. Article 21 refers to self-defence when providing that the wrongfulness of an act of a State is precluded if the act constitutes a self-defence measure. It should be

indicated that such acts may not be committed across international borders and specifically that internal problems may not be invoked.

6. Article 25 of the draft provides that necessity may not be invoked as grounds for precluding wrongfulness. Here we propose to add a restriction that the necessity may not arise from internal State policy, actions or laws.

7. The draft does not contain a definition of "serious impairment" as mentioned in article 25, paragraph (b). That begs the question of whether any kind of impairment could be invoked to legitimize the commission or omission of internationally wrongful acts.

8. Article 45 does not provide for conditions for the validity of the waiver.

9. Article 50 provides that fundamental human rights shall not be affected. That raises the issue of the lawfulness of economic blockades from an international humanitarian perspective. There should be an explicit reference to prohibiting the use of the economic blockades, which affect human rights, notably the right to food and medicine.

IV. Information on State practice regarding the articles on responsibility of States for internationally wrongful acts

Austria

[Original: English]
[1 February 2022]

Austria provided information regarding domestic jurisprudence on a decision of the Court of Appeals of Linz, 9 Bs 269/16x, of 16 November 2016.

The case concerned a request of a court of law of Sevastopol on the Crimean Peninsula, directed to the competent Austrian authorities through the office of the prosecutor general of the Russian Federation, asking for the extradition of a Ukrainian citizen for crimes committed in Sevastopol between 2011 and 2013.

In assessing Austria's extradition obligation under article 1 of the 1957 European Convention on Extradition, the Court of Appeals held that the incorporation of the Autonomous Republic of Crimea, including the City of Sevastopol, into the Russian Federation on 18 March 2014 was achieved by the threat of armed force and the deployment of troops controlled by Russia, thus in violation of the prohibition of the threat or use of force according to Article 2 (4) of the Charter of the United Nations as a peremptory norm of general international law. Hence, such integration constituted an (attempted) annexation contrary to international law. Referring to article 41 (2) of the articles on responsibility of States for internationally wrongful acts (General Assembly resolution 56/83), which codified customary international law, the Court of Appeals held that all States were under a legal obligation not to recognize the situation created by a violation of international law. The Assembly, in its resolution 68/262 of 27 March 2014 on the territorial integrity of Ukraine, had affirmed its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders and had called upon all States not to recognize any alteration of the status of the Autonomous Republic of Crimea and the City of Sevastopol and to refrain from any action or dealing that might be interpreted as recognizing any such altered status. Accordingly, Austria had not recognized the (attempted) annexation contrary to international law of the Crimean Peninsula by the Russian Federation and continued to consider Crimea as part of the territory of Ukraine. Consequently, all sovereign acts by Russian authorities for or relating to the Autonomous Republic of Crimea and the City of

Sevastopol as part of Ukrainian territory were contrary to international law and therefore void. International agreements of the Russian Federation also did not extend to the territory of the Republic of Crimea and the City of Sevastopol. The Court concluded that there was no extradition obligation for Austria and that the requested extradition was inadmissible.

Czechia

[Original: English]
[8 February 2022]

The Czech Republic hereinafter provides updated information concerning State practice regarding the articles on responsibility of States for internationally wrongful acts in the period 2016–2021 and supplements its information transmitted in previous years.

The Constitutional Court of the Czech Republic, in its judgment (I. ÚS 1154/20 of 23 February 2021)[3] concerning the responsibility of States for the length of proceedings before the European Court of Human Rights, stated that, in public international law, the responsibility of States is regulated by the codified customary international law enshrined in the articles on responsibility of States for internationally wrongful acts of 2001. According to the Court, the responsibility for internationally wrongful acts is established when two cumulative conditions are met: (a) the existence of an internationally wrongful act of a subject of international law, which is (b) attributable to it. Without the attribution of an internationally wrongful act to the State, its responsibility cannot be established. Membership of a State in an international organization as such cannot constitute responsibility of that State for internationally wrongful acts of the international organization, since the international organization (including the Council of Europe) is endowed with its own international legal personality and autonomous character and exercises its own will distinct from that of its member States.

The Czech Republic is aware of 11 arbitral awards issued between the years 2016 and 2021, which referred to the articles on responsibility of States for internationally wrongful acts in disputes to which the Czech Republic was a party.

Award in *WNC Factoring Ltd (WNC) v. the Czech Republic*, PCA Case No. 2014-34, issued on 22 February 2017

The International Law Commission articles were discussed in connection with the attribution of acts to the State in paragraphs 230, 234, 244, 247, 248 and 376, and in relation to acts contributing to injury in paragraph 286.

Final award in *J.P. Busta and I.P. Busta v. the Czech Republic*, SCC Case No. 2015/014, issued on 10 March 2017

The International Law Commission articles were discussed in connection with the attribution of acts of the Police to the State in paragraphs 398 to 400.

Partial award in *Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. the Czech Republic*, PCA Case No. 2013-35, issued on 20 December 2017

The International Law Commission articles were discussed in relation to necessity as grounds for precluding the wrongfulness of an act in paragraphs 340 and

[3] A summary in English of the judgment is available on the Court's website (www.usoud.cz).

359, in connection with the specific types of reparation in paragraphs 481 and 483 and in relation to causation in paragraph 486.

Award in *Antaris Solar GmbH and Dr. Michael Göde v. the Czech Republic*, PCA Case No. 2014-01, issued on 2 May 2018

The International Law Commission articles were discussed in relation to necessity as grounds for precluding the wrongfulness of an act in paragraphs 318 and 359.

Award in *I.C.W. Europe Investments Limited v. the Czech Republic*, PCA Case No. 2014-22, issued on 15 May 2019

The International Law Commission articles were discussed in relation to necessity as grounds for precluding wrongfulness of an act in paragraphs 629 and 634.

Award in *Photovoltaik Knopf Betriebs-GmbH v. the Czech Republic*, PCA Case No. 2014-21, issued on 15 May 2019

The International Law Commission articles were discussed in relation to necessity as grounds for precluding wrongfulness of an act in paragraphs 588 and 593.

Award in *Voltaic Network GmbH v. the Czech Republic*, PCA Case No. 2014-20, issued on 15 May 2019

The International Law Commission articles were discussed in relation to necessity as grounds for precluding wrongfulness of an act in paragraphs 593 and 598.

Award in *WA Investments-Europa Nova Limited v. the Czech Republic*, PCA Case No. 2014-19, issued on 15 May 2019

The International Law Commission articles were discussed in relation to necessity as grounds for precluding wrongfulness of an act in paragraphs 676 and 681.

Final award in *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. the Czech Republic*, PCA Case No. 2017-15, issued on 11 May 2020

The International Law Commission articles were discussed in relation to the sources of law in paragraph 499 and in connection with attribution of specific acts to the State in paragraphs 509 to 552.

Award in *Fynerdale Holdings BV v. the Czech Republic*, PCA Case No. 2018-1, issued on 29 April 2021

The International Law Commission articles were addressed by the claimant in connection with the attribution of acts to the State in paragraph 420.

Award in *Pawlowski AG and Project Sever s.r.o. v. the Czech Republic*, ICSID Case No. ARB/17/11, issued on 1 November 2021

The International Law Commission articles were discussed in paragraph 373 in relation to attribution of wrongful acts of territorial self-government units to the State, in paragraphs 723 to 727 in connection with the consequences of internationally wrongful acts, in paragraphs 728 to 733 as part of the tribunal's discussion on

compensation and, finally, in paragraphs 738 to 741, where the tribunal considered satisfaction as the appropriate remedy for internationally wrongful acts of the State.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[2 February 2022]

The following are extracts from recent[4] cases before the courts of the United Kingdom in which the articles were referenced. One of the occasions was by a participating governmental expert from the United Kingdom as part of the Group of Governmental Experts process, in accordance with the mandate of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.

> "State responsibility and attribution
>
> "11. A State is responsible under international law for cyber activities that are attributable to it in accordance with the rules on State responsibility. The responsibility of a State for activities that occur on its territory including in relation to activities in cyberspace is therefore determined in accordance with the rules of international law on State responsibility. As well as bearing responsibility for acts of its organs and agents, a State is also responsible in accordance with international law where, for example, a person or a group of persons acts on its instructions or under its direction or control.
>
> "12. UNGGE Norm 13(c) provides that States should not knowingly allow their territory to be used for internationally wrongful acts using information and communications technology. This norm provides guidance on what may be expected to constitute appropriate State behaviour. The UK recognises the importance of States taking appropriate, reasonably available, and practicable steps within their capacities to address activities that are acknowledged to be harmful in order to enhance the stability of cyberspace in the interest of all States. But the fact that States have referred to this as a non-binding norm indicates that there is not yet State practice sufficient to establish a specific customary international law rule of 'due diligence' applicable to activities in cyberspace.
>
> "13. The term 'attribution' is used in relation to cyberspace in both a legal and non-legal sense. It is used in a legal sense to refer to identifying those who are responsible for an internationally wrongful act. It is also used in a non-legal sense to describe the identification of actors (including non-state actors) who have carried out cyber conduct which may be regarded as hostile or malicious but does not necessarily involve an internationally wrongful act.
>
> "14. For the UK, there are technical and diplomatic considerations in determining whether to attribute publicly such activities in cyberspace. The decision whether to make a public attribution statement is a matter of policy. Each case is considered on its merits. The UK will publicly attribute conduct in furtherance of its commitment to clarity and stability in cyberspace or where it is otherwise in its interests to do so.
>
> "15. Whatever the nature of the attribution, there is no general legal obligation requiring a State to publicly disclose any underlying information on which its decision to attribute conduct is based.

[4] Cases that referenced the State responsibility articles in the period between March 2016 and January 2019.

"Countermeasures

"16. Resort may be had to countermeasures in response to an internationally wrongful act, in accordance with international law, in relation to States' activities in cyberspace as in relation to their other activities. This includes both resorting to countermeasures against a State whose cyber activities constitute internationally wrongful acts and carrying out countermeasures by means of cyber operations. Countermeasures need not be symmetrical: where the internationally wrongful act is itself not a cyber activity, the response may nonetheless involve cyber-based countermeasures (and vice versa).

"17. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations. Any measures adopted must be commensurate with the injury suffered. They must be carried out in accordance with the conditions and restrictions established in international law and must in particular not contravene the prohibition on the threat or use of force, must be necessary and proportionate to the purpose of inducing the responsible State to comply with its obligations and must not contravene any other peremptory norm of international law.

"18. The application of international law to the use of countermeasures in cyberspace must take account of the nature of cyber activities, which might commence and then cease almost instantaneously or within a short timeframe. In those circumstances, a wider pattern of cyber activities might collectively constitute an internationally wrongful act justifying a response.

"19. The UK does not consider that States taking countermeasures are legally obliged to give prior notice (including by calling on the State responsible for the internationally wrongful act to comply with international law) in all circumstances. Prior notice may not be a legal obligation when responding to covert cyber intrusion with countermeasures or when resort is had to countermeasures which themselves depend on covert cyber capabilities. In such cases, prior notice could expose highly sensitive capabilities and prejudice the very effectiveness of the countermeasures in question. However any decision to resort to countermeasures without prior notice must be necessary and proportionate to the purpose of inducing compliance in the circumstances."

The articles on responsibility of States for internationally wrongful acts were also referenced in a recent[5] case before the courts of the United Kingdom concerning the proper interpretation of the words "public official or person acting in an official capacity" in section 134 of Criminal Justice Act 1988, which gives effect to article 1 of the Convention against Torture and creates the offence of torture in United Kingdom domestic law.

***R v. Reeves Taylor* [2019] UKSC 51 (also known as *R v. TRA*)**

"Relevance of State responsibility

"54. Before the Court of Appeal the prosecution sought to rely on principles concerning the responsibility of an insurrectional movement which ultimately succeeds in replacing the government of a State, as the NPFL did in Liberia. The General Commentary to the International Law Commission Draft Articles on State Responsibility explains that whereas the conduct of an unsuccessful insurrectional movement is not in general attributable to the State, where the movement achieves its aims and installs itself as the new government of the

[5] Cases from the period April 2019–January 2022.

State it would be anomalous if the new regime could avoid responsibility for conduct earlier committed by it. The continuity which exists between the new organisation of the State and that of the insurrectional movement leads to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. As a result, article 10 of the Draft Articles provides for the attribution of the conduct of the successful insurrectional movement to the State (J Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, (2002), 117). This led the prosecution to submit before the Court of Appeal that it would be anomalous if torture committed by a public official of an insurrectional movement exercising governmental functions over territory in which it exercises de facto control should be treated as outside the scope of the Torture Convention, so as to attract no individual responsibility, because the acts were not those of a de jure State, in circumstances where the very same acts would constitute acts of the State for which the State would assume responsibility, if the insurrectional movement was successful and became the de jure government.

"55. This submission was not pursued before the Supreme Court, rightly in my view. The question of the attribution of conduct to States for the purposes of State responsibility is distinct from the responsibility of individuals whether under international law (article 58 of the Draft ILC Articles) or, as in this case, under national law where it implements an international convention. It would, moreover, be an unsatisfactory state of affairs if the question whether conduct constituted torture within article 1 of UNCAT were to depend on whether the entity to which the perpetrators belonged subsequently succeeded in replacing the government of the State concerned."