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ii. Responsibility of States: Which Way Forward?
15 June 2015 - United Nations
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The Articles on Responsibility of States for Wrongful Acts constitute one of the main achievements of the International Law Commission (ILC). Another major accomplishment was the Draft Articles that gave rise to the Vienna Convention on the Law of Treaties (VCLT). In addition to being two cornerstone instruments of public international law and "superstructure" sets of rules in the international legal order, interestingly they have something else in common, i.e. the debate surrounding the nature of the legal instrument capable of encapsulating the said rules: codes, draft articles or convention?

The "success-story" of the codification of the rules on the law of treaties often leaves aside the fact that from 1955 to 1960, the Special Rapporteur Sir G. Fitzmaurice, submitted five reports based on the general assumption that the final instrument to be developed by the Commission would be a code and not a convention\textsuperscript{[147]}. In other words, before the rules on the law of treaties became a convention (and until Sir H. Waldock became the Special Rapporteur), there was no certainty that the final outcome of the ILC’s work would lead to a convention.

Questions of a similar nature currently exist around the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ‘the Articles’).

It appears from the debate surrounding the way forward for the Articles that there are three options available: (i) to negotiate a treaty based on the Articles; (ii) maintaining the status quo and, (iii) a midway position that would allow some time for reflection, for example through the endorsement of the Articles by virtue of a General Assembly resolution.

As alluded to, speculation on the “fate” of the Articles on Responsibility of States is not new. However, the VCLT should not necessarily indicate a precedent in favor of a diplomatic conference to negotiate a treaty on State Responsibility either. As is often the case, there are pros and cons, and it is clear that no straightforward answer exists. Each case presents its particular features and challenges vis-à-vis States.

This said, it should be emphasized that there is wide support for preserving the general spirit and content of the Draft Articles as they were finalized by the ILC. They have received broad support in practice. The most recent Special Rapporteur, J. Crawford (1998-2001), has spoken of the delicate balance of the text and the need to protect it. Those are important points that should guide our reflections. The Articles have to be seen and interpreted in their whole.

The question to be addressed in this short contribution is related to the possibility of adopting a convention. A focus will be put on the process and the possible ways in which the rules on State responsibility may be framed in a convention.

1. \textit{A propos the enhancement of the political acceptance of the rules reflected in the Articles.}

At the outset, one should recall the recommendation made by the ILC in 2001 to the General Assembly:

72. At its 2709\textsuperscript{th} meeting, on 9 August 2001, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution.

73. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic. The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.


\footnote{150 Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), paras. 72 and 73.}
As can be noted, the Commission had foreseen “the possibility of convening an international conference of plenipotentiaries (...) with a view to concluding a Convention on the topic”\textsuperscript{151}. The General Assembly has met on several occasions (2004, 2007, 2010 and 2013) to discuss the status of the Articles\textsuperscript{152}. The possibility of adopting a Convention was part of the debates. The next such rendez-vous will take place in 2016.

Among the reasons advanced in favor of the adoption of a convention is the argument that it would enhance the acceptance of the rules on the responsibility of States. The legal status of the Articles is sometimes considered as requiring clarification. In this context, the convening of a diplomatic conference is perceived as a means to upgrade the Articles. This would help clarify their status.

Another argument in favor of convoking a diplomatic conference to negotiate a treaty is that it would serve as an opportunity for States to confirm or negate their position on the Articles. This may be true. Moreover, participating in a conference would allow States to confirm their support in a more explicit way. It should however be borne in mind that States have earlier had the opportunity to comment on the ILC’s work, especially after the first reading of the Articles. Yet only a small number of States issued guidance on the ILC’s codification work. In one sense, this acquiescence may have been an implicit acceptance of the work that the ILC was conducting. This may also partly be a reflection of the capacities many States possessed (and still possess) in responding to the work product of the ILC. However, it must not be forgotten that if a diplomatic conference is convened, the political nature of treaty negotiations could threaten the legal acquis of the Commission’s work.

Another question relates to the acceptance of the Articles’ content. Might that which was not controversial or not too controversial back then become controversial today? Time is an important factor to be taken into consideration when addressing this issue. As a matter of fact, there is a need to contextualize the discussion. The Articles were adopted in 2001, after the ILC had been working on the topic since the 1950s. Major political events subsequently took place that had an impact on the evolution of international law, and which were somewhat reflected in the work of the ILC. The ILC managed to overcome significant difficulties, as well as to take into account the evolution of international law over

\textsuperscript{151} Ibid., para. 73.

\textsuperscript{152} See, respectively, Res. 59/35 of 2 December 2004; Res. 62/61 of 6 December 2007; Res. 65/19 of 6 December 2010; Res. 68/104 of 16 December 2013.
the last 70 years. Almost fifteen years have passed since the General Assembly took note of the Articles\textsuperscript{153}. In the meantime, these Articles have received strong support in State and judicial practice. It is foreseeable that a diplomatic conference would largely confirm this privileged status. In other words, a large codification of the \textit{acquis} would take place. This said, besides confirmation of the \textit{acquis}, a diplomatic conference could mark its presence through different avenues.

A diplomatic conference has the potential to clarify or refine certain rules. This could be in the case of damage remedies, for example. A diplomatic conference may also have some scope to add further provisions, such as provisions on responsibility towards non-State actors or provisions on dispute settlement, which had been foreseen by the ILC in 2001 in its recommendation to the General Assembly. Further still, a diplomatic conference might also water down existing provisions, and the example of counter-measures is often given in this respect. Given the widespread consensus around the Articles, however, it would be important that their present content is preserved as much as possible.

In all events, procedural devices should be put in place so that only a large majority of States would be able to effect any changes to the Articles. I am thinking of a voting process such as the two thirds majority rule, or at least steps to address the potential blocking limitations of the consensus rule\textsuperscript{154}. Should changes to the Articles occur, they ought to be supported by a large majority of States.

One could also think of the adoption of interpretative statements that would accompany a convention on State responsibility, as had been the case with the UN Watercourses Convention, for example. With regard to the latter Convention, the relevant Working Group adopted a Statement of Understanding on the concept of vital human needs\textsuperscript{155}.

Lastly, is there a risk that negotiations fail and that no convention could come into existence? It would be important to ascertain the support given to the Articles and place the question against this scenario. However, if this were to be the case, some comfort should be derived from the fact


\textsuperscript{154} In this regard, one can take note of the recent General Assembly resolution to commence the process of the development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and its commitment to exhaust every effort to find consensus, but not to be hamstrung by such efforts; see A/RES/69/292 (currently available as A/69/L.65), para. 1 (g) -- (j).

that the Articles reflect customary international law. The parallel lives of customary and treaty law were acknowledged by the International Court of Justice in the Nicaragua/US judgment\(^\text{156}\).

2. *A propos the possible steps towards adopting a convention*

We have discussed the option of the convening of a diplomatic conference with the aim of adopting a convention on State responsibility. But is the convening of a diplomatic conference the best option?

As the Articles have received broad support in their present form, one may consider that the General Assembly would be in a position to adopt the Articles as a convention through a resolution.

Indeed, this solution would have the benefit of avoiding a diplomatic conference while keeping the existing Articles as a starting point. The recent development regarding the Rules on Transparency in Treaty-based Investor-State Arbitration is enlightening in this respect. Following negotiations for a period of eighteen months at UNCITRAL, the Rules on Transparency were eventually transformed into a convention, which opened for signature after the General Assembly adopted this convention by resolution\(^\text{157}\).

Another source of inspiration might be the Draft Articles on the Law of Non-Navigational Uses of International Watercourses. The ILC adopted a set of 33 Articles in 1994\(^\text{158}\) and recommended the elaboration of a Convention by the General Assembly or by an international conference of plenipotentiaries\(^\text{159}\). In its resolution 49/52, the General Assembly decided to submit the Draft Articles to the Sixth Committee of the United Nations convened as a Working Group of the Whole “to elaborate a framework Convention on the law of the non-navigational uses of international watercourses”. The meetings of the Working Group were held in October 1996 and in March-April 1997 in New York. As amended by the Working Group, the General Assembly adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses as an annex to Resolution 51/229 on 21 May 1997.

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\(^{156}\) *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America), 1986 ICJ Rep 14, paras. 177-178.


Another example of the same kind is the UN Convention on the Jurisdictional Immunities of States and Their Property. There, the UN General Assembly’s Sixth Committee undertook to elaborate a draft convention on the basis of the ILC’s draft articles\textsuperscript{160}. Two Working Groups sought to resolve points of contention in the draft articles and an ad hoc Committee, mandated by the General Assembly, finalized the text before it was submitted to the General Assembly for adoption\textsuperscript{161}.

This process would avoid the convening of a diplomatic conference of States. While giving political support to the Articles and leveraging their visibility, this option might avoid “opening the Pandora’s box” that may be more readily present with the convening of a diplomatic conference. As a first step, States could adopt a resolution demonstrating a clearer endorsement of the Articles than was the case with the resolution adopted in 2001. This could help frame discussions towards the eventual adoption of a convention. Material benefits deriving from the involvement of the Sixth Committee would include that it would be less expensive than convening a diplomatic conference.

The last point to touch upon is concerned with the fact that a convention, should it be adopted, may not receive a sufficient number of signatures and/or ratifications or would not enter into force, at least in the near future. This risk should be put into perspective. In addition to the broad acceptance and implementation of the Articles, it is also expected that the States supporting the adoption of a convention would then sign and ratify it.

A confidence-building measure could be to ensure reservations are not prohibited such as is the case with the VCLT. Should reservations be permitted wholly or partially, there is the possibility of framing a specific regime as to their admissibility and potential phasing-out. In this context, it would be important to take into account the holistic nature of the Articles when defining the contours of a reservation regime.

As an additional point, one may think of the possibility that the convention is implemented provisionally. Here, I refer to Article 25 of the Vienna Convention on the Law of Treaties. States may consider integrating a provision related to the provisional application of the Convention on State Responsibility.


\textsuperscript{161} General Assembly resolution 59/38 of 2 December 2004.
Article 25 of the VCLT ("Provisional application") states:

"A treaty or a part of a treaty is applied provisionally pending its entry into force if:
- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

The ILC has also been working on the topic and has made a clear distinction between the provisional application of a treaty and the provisional entry into force of a treaty: "An analysis of the concept of the provisional application of treaties must begin with the distinction between 'provisional application' and 'provisional entry into force'; these terms are not synonymous and refer to different legal concepts. In his first report in 2013, the ILC Rapporteur Mr. Juan Manuel Gómez-Robledo recognized that: "in light of the lack of uniform regulations on the matter, the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty to be applied provisionally. In some cases, a single clause establishes the applicable regime while in others its inclusion is far more complex and detailed and may lead to the establishment of some form of special regime."\(^{162}\)

Utilizing 'provisional application' or 'provisional entry into force' of a convention on State responsibility would mitigate the concern about the risk of a low number of ratifications or the delayed entry into force of the convention, and might encourage States to become parties to the treaty. This treaty-regime feature should not obviate the fact that the Articles reflect customary international law and that those provisions would continue to produce their legal effects.

In case a decision is taken to adopt a convention on State responsibility, be it through the convoking of a conference of plenipotentiaries or through the General Assembly, it is hoped that States would cooperate in good

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162 First report of the Special Rapporteur on the provisional application of treaties, 3 June 2013, A/CN.4/664, para. 21.
faith with a view to concluding and ratifying a convention which would best serve legal certainty in the area of the responsibility of States and enshrine respect for the general spirit and content of the Articles.