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Seventy-first session

Sixth Committee

Agenda item 74

Responsibility of States for Internationally Wrongful Acts

Report of the Working Group

Oral report by the Coordinator, Mr. Patrick Luna (Brazil)

Mr. Chairman,

I have the honour to present the report of the Working Group on the Responsibility of States for Internationally Wrongful Acts for this year's session.

Pursuant to General Assembly resolution 68/104, the Sixth Committee decided, at its 2nd meeting, to establish a Working Group to further examine, 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. I had the honour of being elected Chair of the Working Group and take this opportunity to reiterate my gratitude to all delegations for the confidence placed in me. It was also decided that the Working Group would be open to all States members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.

The Working Group had before it the written comments submitted by Governments in the report of the Secretary-General contained in document A/71/79, as well as another update of the compilation of decisions in which the articles and the accompanying commentaries were referenced by international courts, tribunals and other bodies, now related to the period between 2013 and 2016, contained in document A/71/80.

The Working Group held three meetings on 13, 19 and 21 October 2016.

At the **first meeting** of the Working Group, the prior consideration of this agenda item by the General Assembly since the adoption of the articles by the International Law Commission was recalled. As the plenary debate had revealed that a divergence of opinion on the fate of the articles continued to exist, delegations were asked to further elaborate on their positions and underlying concerns, so as to possibly identify areas of convergence and areas of divergence.

An increased number of delegations spoke in favour of moving towards the negotiation of a convention on the basis of the articles. Pointing to the extensive reliance on the articles by international courts and tribunals, they argued that the degree of maturity for codification had been reached. They emphasized that a convention would strengthen the rule of law and enhance legal certainty, especially regarding the elements contained in the articles that would not enjoy the status of customary international law. A convention would also lessen the currently inconsistent application of the articles, including by facilitating that domestic courts take cognizance of them. It was also pointed out that continued postponement in taking a decision on the fate of the articles could give rise to a perception of disagreement among States, thereby potentially undermining their status. The indecision by the General Assembly would also be affecting the consideration of other projects concluded by the International Law Commission, such as the articles on diplomatic protection and on the responsibility of international organizations. For these delegations, a conference would allow for the participation of all States in law-making and it would not necessarily be a risky undertaking, given the general support enjoyed by the articles. Some delegations indicated that, in a conference, the articles could be presented as default position, from which deletion or modification would require qualified majority.

Some delegations argued that there would be no need for a convention on this subject. They noted, *inter alia*, that the articles were already widely accepted and had gained sufficient authority. It was also argued that the secondary norms might not be suitable for codification. In the view of these delegations, the articles would be more valuable in their current form. It was also acknowledged that it would be premature to consider the entirety of the articles as settled customary international

law and that State practice itself should be allowed to develop. A fundamental concern in a negotiating exercise would be the risk of unravelling the work of the International Law Commission and thereby endangering a carefully calibrated balance achieved in the articles. Some delegations highlighted that ordinary rules of treaty negotiation could not be enough to assuage such concern. From their vantage point, a negotiating exercise could undermine the coherence of the articles and result in a watered-down text. Some delegations stressed that, should a convention be adopted but not universally ratified, there would be a risk of decodification. Among those delegations opposing a convention, some suggested adopting the articles as an annex to a General Assembly resolution or in the form of a declaration of the General Assembly.

At the **second meeting**, I presented a non-paper entitled “Informal Working Notes from the Chair” outlining the different points of view on any possible action on the basis of the articles. Delegations generally supported the preparation of a non-paper to guide the discussion in the Working Group. The non-paper stressed that any decision on the fate of the articles, including on the process to come to such a decision, should be taken by consensus and on the basis of sufficient information. Based on elements gathered from previous discussions, the non-paper proposed short-term, mid-term, and long-term objectives on which the Working Group could focus to reach a definite decision. It was made clear that the issues raised therein would be without prejudice to the positions of delegations and that the non-paper would be subject to modification at later stages, in order to continue to be useful for an evolving debate.

Delegations then seized the **second and third meetings** of the Working Group to exchange views on the suggestions contained in the non-paper. One of them was annualizing the meetings of the Working Group. Many delegations supported the increased frequency of the consideration of the item, arguing that it would allow for a more thorough discussion. Based on another perspective regarding the value of the passage of time for this item, other delegations suggested that the periodicity of the consideration of the agenda item should be decreased. A reflection on the risks that some delegations see in embarking in a negotiating exercise was also

proposed and, in this context, the Working Group discussed whether additional safeguards could be established so as to assuage concerns.

The non-paper also suggested that the Working Group further reflect on current State practice. Delegations generally considered that it could be helpful to count with a report of the Secretary-General listing, including through tabular format, the references made to the articles in the almost 400 decisions of international courts and tribunals and other bodies already compiled by the Secretary-General since 2001, as well as to the reference to the articles in the submissions of the parties to the relevant disputes. Delegations also exchanged views on the utility of counting with information on procedural options on possible action on the basis of the articles, without prejudice to the question of whether any action is appropriate.

The exchange of views in the Working Group formed the basis of informal consultations on a draft resolution, which then continued outside the framework of the Working Group. I will elaborate on this when I introduce the draft resolution for the present agenda item.

Before concluding my statement, allow me to thank all delegations for their constructive engagement and contribution to the work of the Working Group at this year's session.

This concludes my oral report of the Working Group. Thank you, Mr. Chairman.