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Agenda item 73

**Responsibility of States for Internationally Wrongful Acts**

Report of the Working Group

Oral report by the Chair, Mr. Vinícius Trindade (Brazil)

Mr. Chair,

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 74/180 of 27 December 2019, the Sixth Committee decided, at its 1st meeting, on 3 October 2022, to establish a working group to further examine, in the light of the written comments of Governments, as well as views expressed in the debates held in the Sixth Committee over the years and at the present session of the General Assembly, the possibility of negotiating an international convention, or any other appropriate action, on the basis of the articles on responsibility of States for internationally wrongful acts.

At the same meeting, I had the honour of being elected by the Sixth Committee to Chair the Working Group.

The Working Group had before it the written comments of Governments issued in the most recent report of the Secretary-General, contained in document A/77/198, as well as a compilation of decisions in which the articles and their accompanying commentaries were referred to by international courts, tribunals and other bodies between 2019 and 2022, contained in document A/77/74.

The Working Group held three meetings on 18 and 31 October and on 7 November 2022, respectively. After a general exchange of views, held at the first

meeting, the discussions were structured on the basis of several issues and questions, which I presented to the Working Group for consideration. I propose to now briefly provide an overview of the views expressed under each issue.

1. Procedural options

At the first meeting of the Working Group, delegations were given the opportunity to make general remarks on any possible procedural steps to be taken regarding the articles. They were invited to elaborate on their concerns and reasons underlying their positions on the matter, so as to identify possible common ground on the way forward.

A group of delegations circulated a non-paper containing a list of procedural options laying out some of the alternatives for the next steps on this agenda item. The list of procedural options included four main alternatives, as presented by such delegations:

- Taking note of the product of the Commission (without deciding to further include the item on the agenda of the Sixth Committee);
- Ending/sunsetting the consideration of a topic;
- Moving a topic from the Sixth Committee to the Plenary of the General Assembly; or moving the topic from one Main Committee of the General Assembly to another;
- Establishing subsidiary organs: such as (1) an *ad hoc* committee, (2) working group of the Sixth Committee or (3) convening a diplomatic conference of plenipotentiaries.

This document has since been issued as a working paper of the working group, under the symbol A/C.6/77/W.1/1.

Upon introducing the working paper, it was noted that the options contained therein were not exhaustive and that it was simply aimed at evaluating the practice of the Sixth Committee.

Several delegations expressed appreciation for the working paper as it facilitated a more structured discussion on the possible procedural mechanisms and options for envisaging the way forward for outputs of the International Law Commission in general, and the State responsibility articles in particular.

During the exchange of views, delegations made general remarks on the possible procedural steps for the articles, including references to procedural precedents. Hence, a number of delegations considered that the articles had been well-received by States, courts and tribunals alike, which was substantiated by the reports of the Secretary-General. It was also noted that some of the articles contained rules that were part of customary international law, and thus had the same legal value as those contained in treaties, in accordance with Article 38 of the Statute of the International Court of Justice.

Some delegations recalled that the International Law Commission had recommended that the General Assembly, *inter alia*:

> "consider, at a later stage, and in the 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."

As such, in the view of those delegations, the Commission's recommendation envisaged a discussion on precisely whether or not to proceed to the convention of an international conference.

At the same time, reference was made to the importance of preserving the balance struck by the International Law Commission when it prepared the articles and a number of delegations cautioned against establishing any procedural mechanisms for considering the articles further, particularly any that might lead to an eventual negotiation of an international convention.

While there seemed to be general agreement as regards the importance of maintaining legal certainty and stability, there continued to be a range of views on whether negotiating a convention would contribute to attaining this goal or not. In

this regard, delegations exchanged views on both the risks and the benefits of either moving towards a convention or maintaining the *status quo*.

Some delegations considered that a consensus among States on the content of the articles could contribute to legal certainty, others suggested that reopening the text for an eventual negotiation could pose some risks to the delicate balance achieved at the Commission and undermine the content of the draft articles, without necessarily resulting in a convention enjoying wide ratification. Nonetheless, a number of delegations called for a discussion on procedural options, so as to find a pragmatic solution forward.

A proposal was made to request the Secretary-General to prepare a report setting out the procedural options, based on existing precedents, in advance of the next rounds of meetings of the Working Group, and that a review of such alternatives could also be useful for the work of the Sixth Committee in relation to other agenda items. Other delegations were of the view that there remained no clear general desire to move forward with the articles at the time and that accelerating the pace of discussion could affect the coherence of the law.

2. Possible procedural safeguards

The Working Group was also invited to express views on any possible procedural safeguards that could be envisaged so as to appease the concerns certain delegations had about the risks of embarking on a process that could involve, amongst other possible outcomes, the transformation of the articles into an international convention.

Some delegations considered that it would be premature to identify procedural safeguards for the draft articles. Reference was made to the potential of harming the delicate balance struck by the International Law Commission.

Some delegations suggested attempting to identify those provisions that enjoyed a customary nature, with a view to excluding them from a subsequent

deliberative process so at to protect their integrity, and focusing the discussion instead on other articles that did not enjoy such legal nature. It was noted in that vein, that while some provisions were being referred to and applied by States, that did not necessarily preclude their future further development or codification. Some delegations referred to the possibility of inviting experts and practitioners to provide views on the customary international law basis of the articles and on possible safeguards that could be put into place, including in advance of a treaty negotiation.

Reference was also made to the examples of the procedural safeguards put in place in advance of the two conferences on the law of treaties held in Vienna, including in particular those agreed to in advance of the second Vienna Conference, in which the General Assembly adopted a "package" identifying groups of provisions, drawn from the 1969 Vienna Convention on the Law of Treaties, which were to be excluded from the negotiation of the subsequently adopted Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986. The possibility of establishing different voting requirements for the modification of provisions based on the 2001 articles, as opposed to new provisions proposed at a future conference, was also referred to.

3. Criteria for ascertaining the necessary "critical mass" of opinion

During the debate, both in the plenary and in the Working Group, the view was expressed that after more than twenty years since their adoption, there had not yet been sufficient convergence of opinion as to the customary international law status of the articles as a whole to justify proceeding to the conclusion of an international convention. Thus, I invited delegations to express their views on the criteria for ascertaining more precisely the point at which such a threshold of opinion had been reached; or what I called the necessary "critical mass" of opinion. In that regard, I invited delegations to reflect on the extent to which the information provided by the Secretary-General in the various reports prepared over the years

could be useful in making such assessment. Likewise, I recalled that member Governments also now had the benefit of the conclusions on identification of customary international law, adopted in 2018 by the International Law Commission, to help inform their thinking on such matters.

Several delegations supported the position that a “critical mass” of opinion has been achieved and would allow for the implementation of the second part of the International Law Commission’s recommendation.

Other delegations expressed strong opposition to such a view. Reference was made to the importance of allowing State practice around the articles to continue to evolve naturally. A view was also expressed that the possibility of the articles, as whole, enjoying the status of customary international law was actually an argument against concluding a treaty, which would be unnecessary and could precisely risk the stability of the customary rules embodied in the articles.

Some delegations pointed out that the possibility of embodying the articles in an international convention had been raised by the Commission itself in its recommendation, which envisaged Member States considering the possibility of undertaking such further step at some stage in the future. As such, seeking to establish objective criteria for assessing – with a view to taking a decision – whether or not the time was ripe to proceed to such a step seemed a useful undertaking to guide future interaction between delegations.

As I have already mentioned, all delegations agreed on the need to ensure legal certainty. For some delegations, the fact that there were customary rules reflected in the draft articles, regardless of the status of the articles as a whole, was a reason for not moving forward with a convention, due to the risk of disrupting such settled rules of customary international law. Other delegations considered that the fact that some of the rules contained in the articles enjoyed a customary nature did not preclude including them in a treaty, and that having a treaty would, in fact, provide for greater certainty and stability. It was unlikely, accordingly to some views, that converting the articles into treaty-based rules would be as risky an undertaking

as was being made out, in light of their status of customary international law and, subsequently, of the general agreement among states as to the rules in question..

Concerning the possible criteria, a doubt was expressed if it would be feasible to require general agreement as the customary international law status of the entire set of articles. It was argued that the very point of a treaty negotiation would be to reach agreement on possible remaining issues. As such, in terms of that view, it would be sufficient if there were a convergence of opinion around most of the articles, particularly those dealing with Part One.

Other suggestions for criteria for assessing whether such "critical mass" of opinion had been attained, included assessing the extent and nature of the discussion, and the frequency of the consideration of the topic on the agenda of the Committee, as well as the fact that a Working Group continued to be established. The information provided in the reports requested from the Secretary-General on the topic was also considered to be relevant in any such assessment.

4. Structure of the Working Group

The Working Group was also invited to comment on how best to structure its work and improve its working methods. Some delegations referred to the value of maintaing continuous discussion under the current arrangement of the Working Group. Others raised the need for a more structured exchange on the topic, including during the inter-sessional period.

Some delegations referred to a need for more predictability and suggested that there be an indication provided in advance of when the inter-sessional discussions would take place so as to ensure an effective interactive dialogue. A suggestion was made that the views of technical experts could be solicited, and the interactive discussions could be guided by concept notes or lists of questions. Reference was made to the need for continuity between sessions, since the composition of delegations was not the same from one session to the next, in light of the triennial

periodicity of the agenda item. It was said that having intersessional discussions could contribute to continuing the exchanges, without needing to revert to points that had been addressed at previous sessions, and it could thus help delegations from smaller missions.

5. Frequency of the consideration of the agenda item

Delegations were further invited to express their views on the question of the frequency of the consideration of the agenda item by the General Assembly. Various delegations acknowledged the importance of the matter and noted that the fact that there was a discussion with multiple views confirmed its relevance.

A number of delegations considered that the agenda item should be discussed more frequently, preferably on an annual basis, so as to allow meaningful interaction and exchanges on all possible procedural action to be taken on the basis of the articles. The need for consistency with the treatment of other outputs of the International Law Commission, which required similar continuous discussion, was also referred to. Some delegations also noted that having more frequent discussions did not necessarily imply support for a treaty negotiation.

Other delegations expressed a preference for the periodicity of the consideration of the agenda item to be decreased, to a five-year cycle from the current three years. They considered that the positions of delegations were not likely to change in a short period of time, and that less frequent consideration would allow for developments in State practice.

Some delegations signalled openness to more frequent dialogue in an informal setting and treated such informal debates as complementary to the consideration of the topic in the Sixth Committee. The view was expressed that a three-year cycle for the consideration of the topic would necessitate a more robust intersessional dialogue. Alternatively, if the topic was to be considered more frequently, the intersessional dialogue could be less frequent.

6. Future work

The Working Group was also invited to exchange views on possible future work. As I already mentioned, this would include the possibility of continuing the discussion during the inter-sessional period, in a more structured manner.

Various proposals were made by delegations, including convening side events during international law week on an annual basis, and preparing a list of issues to be discussed at the annual informal meetings of legal advisors. Another suggestion was for the Working Group to develop a list of questions on particular draft articles, to be discussed at or before the next occasion on which the working group will meet. Two elements were proposed by some delegations for more focused discussions for the next time the Working Group meets: first, finding of areas of possible convergence and divergence, and second, identifying those parts of the articles which already enjoyed the status of customary international law. Other delegations expressed concern about discussing the merits and demerits of a possible convention as it could devalue the product of the Commission's work. Instead, a preference was expressed for allowing State practice to continue to evolve naturally around the articles.

At this stage, I would suggest delegations to keep consulting each other during the inter-sessional period and continue exchanging views on the themes discussed during the Working Group this year, namely:

1. Procedural options
2. Possible procedural safeguards
3. Criteria for ascertaining the necessary "critical mass" of opinion
4. Structure of the Working Group
5. Frequency of the consideration of the agenda item; and
6. Future work

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

Thank you, Mr. Chair.