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Summary record of the 16th meeting
Held at Headquarters, New York, on Friday, 29 October 2004, at 10 a.m.

Chairman: Mr. Bennouna . . . . . (Morocco)

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The meeting was called to order at 10.15 a.m.

Agenda item 139: Responsibility of States for internationally wrongful acts (*continued*) (A/56/10 and Corr.1 and 2)

1. **Mr. Boonpracong** (Thailand) said that the International Law Commission's draft articles on responsibility of States for internationally wrongful acts (A/56/10 and Corr.1 and 2, chap. IV) codified customary international law in that area and, at the same time, contained certain elements of progressive development. The draft articles were the culmination of 50 years of hard work based on careful analysis of State practice, jurisprudence and doctrine; States' comments and observations had also been taken into account. The draft was the soundest formulation of the principles of State responsibility available to the international community. Since its provisional approval, it had been used by a number of judicial and arbitral tribunals in support of their legal reasoning.

2. Nonetheless, the draft articles were far from perfect, and certain substantive issues remained in dispute. Article 54, on "Measures taken by States other than an injured State", raised the fundamental problem of whether international law in its current form recognized the concept of "obligations *erga omnes*", which the draft articles defined as obligations "to the international community as a whole", and if so, what were the legal consequences of their violation. That concept, which had appeared for the first time in the Judgment of the International Court of Justice in the *Barcelona Traction* case, had been used by the Court on many occasions. His delegation believed that the logical consequence of a violation of an obligation to the international community as a whole should be that States which had not been injured by that violation, but which had a legal interest in it, should be able to invoke the responsibility of the offending State. The possibility of taking countermeasures against the responsible State had led to disagreements and conflicting opinions in the Commission; consequently, the current article 54, which was the result of a compromise, provided safeguard clauses for all parties. His delegation noted with concern the doubts which could arise concerning the precise scope and meaning of the term "lawful measures" used in that article, as opposed to the concept of "countermeasures". The ambiguity of that provision could give rise to abuses. Consequently, it was to be hoped that subsequent developments in international law, especially those based on State practice and the jurisprudence of the Court, would clarify the application of the concept of obligations *erga omnes* in the field of State responsibility.

3. As for questions relating to the form that the articles should take and to dispute settlement, his delegation noted, first, that the two issues were related. The establishment of a detailed dispute settlement regime would be meaningful only if the draft articles were embodied in an international convention. In any case, whatever form the draft articles took, there should at least be a reference to the obligation to have recourse to the peaceful settlement of disputes in accordance with the provisions of Articles 2 and 33 of the Charter of the United Nations. Both options, the signing of a convention and the adoption of the articles in the form of a declaration, had advantages and drawbacks. Given the careful balance enshrined in the text of the draft articles, it would be inadvisable to subject it to a negotiating process at a diplomatic conference, which would probably go on for many years, might endanger the agreements that had been reached, and might lead to a convention which might not receive many ratifications.

4. **Ms. Thoma** (Cyprus) said that, thanks to the Commission's draft articles on responsibility of States for internationally wrongful acts, the topic of State responsibility had a much broader foundation and its basic norms and principles were frequently invoked by the International Court of Justice and the European Court of Human Rights in their judgements and advisory opinions. The International Court of Justice, for example, recognized that obligations *erga omnes* existed and that the interest of the international community as a whole and of international public order must be taken into account.

5. Generally speaking, her delegation shared the Special Rapporteur's approach to both the substantive issues and the drafting of the articles, and considered that one of its main concerns, namely, Part One, Chapter V (Circumstances precluding wrongfulness), had been dealt with appropriately. The issue of consent, which must in any case be freely given, should be treated with particular caution. The very essence of peremptory norms was that they could not be derogated from by agreement between the parties, since that would be contrary to international public policy and international public order. For example, any

purported derogation from the peremptory norm contained in Article 2, paragraph 4, of the Charter, which prohibited the use of force, would be invalid, even if that agreement had not been obtained through an imposed or unequal treaty. In that regard, her delegation was pleased to note that article 26 (Compliance with peremptory norms) provided that "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

6. Her delegation considered that countermeasures must conform strictly to the requirements laid down in the Charter of the United Nations. Their scope must be limited and clearly defined, they must not give rise to abuses at the expense of weaker States, and they must be subject to binding dispute settlement procedures. In addition, it should be emphasized that armed countermeasures were prohibited and that the adoption of countermeasures could not justify non-compliance with rules of *jus cogens* involving human rights. As to the form that the draft articles should take, her delegation would prefer that they be adopted as a binding convention; States could have input into the drafting of that convention, and its result would be a legal instrument which would enjoy international support and a greater degree of certainty, durability and authority.

7. In accordance with the position consistently advocated by her delegation, i.e., that multilateral treaties concluded under the auspices of the United Nations should have an effective, comprehensive, expeditious and viable dispute settlement regime, entailing a binding decision on all disputes arising out of their substantive provisions, it was particularly important that an effective dispute settlement regime should be established; that was an essential requirement for a well-functioning legal regime of State responsibility.

8. The General Assembly should adopt the draft articles in the form of a convention, as soon as possible. In that regard, a working group of the Sixth Committee should be set up in order to draft the preamble and final clauses of the draft convention, including those relating to dispute settlement.

9. **Ms. Collet** (France) said that her country endorsed the General Assembly decision contained in its resolution 56/83, of 12 December 2001, to commend to the attention of Governments those articles relating to State responsibility for internationally wrongful acts submitted by the International Law Commission "without prejudice to the question of their future adoption or other appropriate action". Considering that Assembly resolution 56/83 was only a stage in the codification and progressive development of the law of State responsibility for internationally wrongful acts, France preferred the solution recommended by the commission that appeared in the preamble to the aforementioned resolution, to the effect that the Assembly "should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic". In keeping with that approach, she recalled that as provided for in the Commission's terms of reference, its mandate was not only to formulate guidelines which would serve as a point of reference for Member States, but also and especially to promote the progressive development and codification of international law through the drafting of international conventions. In the case under review, opting for the form of a convention was particularly appropriate, given the importance to Member States of the norms contained in the draft articles. The text finally submitted by the Commission was a significant improvement on previous drafts and a good point of departure for negotiating a treaty instrument.

10. Given that some provisions in the draft went beyond the scope of codification of international customary law and encroached upon the progressive development of international law, while others, such as those on countermeasures, seemed to exceed the conceptual scope normally attributed to the law of international responsibility, the most appropriate way of proceeding would be for States to voice their opinions on all those questions within the framework of a conference of plenipotentiaries. France clearly reaffirmed the possibility of drafting an international convention on the topic using the text submitted by the Commission as a starting point. All said, France would not oppose the idea of the General Assembly setting a new time frame so that it could conduct a deeper study of the evolution of international practice in the area of State responsibility.

11. France considered it reasonable for the topic of State responsibility for internationally wrongful acts to

be reinscribed in the agenda of the General Assembly no later than its sixty-first session.

12. **Mr. Hmoud** (Jordan) said that the articles on responsibility of States annexed to General Assembly resolution 56/83 were balanced; they generally reflected the rules of international law on the subject, avoided controversial concepts which would have hindered their acceptance by States, and had been continuously cited by States, judicial organs and jurists. In the *LaGrand* case, the International Court of Justice had referred to the articles even before they had been finalized and had recently, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, cited the articles on responsibility in its response to the question raised by the General Assembly. Both the articles codifying international law and those which were considered as developing certain rules of law had become authoritative and were in fact a restatement of the law. Among the issues provided for in the articles was the legal regime on countermeasures, whose codification constituted a safeguard against political and arbitrary countermeasures, and included a set of legality tests which any such countermeasure would have to satisfy. Another important achievement was the laying down of legal grounds for *actio popularis.* Regulation of such a concept and the measures which States were to adopt in response to, or as a consequence of, a serious breach of peremptory norms of international law was a key legality safeguard. In addition, article 41 made it clear that action by the international community against a serious breach of such norms was obligatory and not discretionary, a point which the Court had reiterated in its advisory opinion on the construction of a wall in the occupied Palestinian territory. The Court had thus confirmed that the substance of Chapter III of Part Two of the draft articles, which had been the subject of debate for some time, actually reflected the rule of international law on that issue. Jordan preferred for the articles to take the form of a convention, for which reason they should be supplemented by a section dealing with the settlement of disputes together with a preamble and final articles. Nevertheless, it would be flexible regarding the final form that the General Assembly might wish to give to them, because they had already become part of the general rules of international law.

13. **Ms. Mavroudi** (Germany) commended the Commission for its successful work on State responsibility for internationally wrongful acts and said that, given their significant impact on bilateral and multilateral relations between States, the draft articles should be seen as a landmark in the development of international law. The draft articles on State responsibility reflected international customary law to a large extent and had been used as a model law. They were also frequently used in practice, as national and international courts had referred to them in their judgements and advisory opinions when dealing with cases related to the consequences of internationally wrongful acts. Her delegation was of the opinion that, while the draft articles should receive wide recognition, there was no need to rush into the drafting of a convention. The question of whether the draft articles should be embodied in a binding international convention should be reconsidered after a couple of years, but that should not lead to a renegotiation of those articles which were substantive in character.

14. **Ms. Zabolotskaya** (Russian Federation) reaffirmed her delegation's view regarding the timeliness of drafting an international convention which used the draft articles on State responsibility for internationally wrongful acts as a point of reference. Generally speaking, the Russian Federation considered that the Commission had drafted a balanced document that embodied the basic principles of State responsibility. Together with its commentaries, the draft had been most helpful for resolving some international controversies and had been used by the International Court of Justice and other prestigious international bodies. Although some aspects of the draft raised concerns, those were issues that could be duly addressed during the drafting of the international legal instrument, for which a working group of the Sixth Committee or an ad hoc committee of the General Assembly should be established. Regulation by means of a convention of some of the most controversial aspects of an issue as sensitive as the international responsibility of a State would be a good testimony to the strengthening of the role of international law in international relations.

15. **Mr. Lauber** (Switzerland), commending the important work done by the commission, welcomed the progress made in the preparation of the draft articles on State responsibility for internationally wrongful acts. Nevertheless, Switzerland considered that it would be premature to draft an international convention on the topic. Given the importance of the issue, time was

needed to further elaborate the draft articles and achieve the widest possible consensus. Switzerland wished to see the discussion of the topic continue and supported the adoption of a convention at the sixty-second or even the sixty-third session of the General Assembly.

16. **Mr. Rodiles** (Mexico) reiterated his delegation's sincere congratulations to the Commission for the draft articles on the responsibility of States for internationally wrongful acts. The draft articles represented the most significant development in international law in recent decades. They involved a shift from a restrictive conception of international liability, one that was basically confined to the protection of persons and their property in foreign States, to a fundamental legal concept which made international rights and obligations into entitlements that could be claimed within a centralized system. They also involved a shift from an understanding of people's rights as a set of contractual bilateral regimes to an understanding of a genuine universal legal order which, without excluding the foregoing, was distinguished by its concern to protect the most fundamental values of the international community as a whole.

17. Mexico was of the view that the function of the draft, as an engine of development of international law on State responsibility for internationally wrongful acts, was not complete. While the progress made by the Commission had been used by States and recognized by international courts for several decades, it had been barely three years since the final result had entered the diplomatic sphere of the General Assembly. Given the importance of the topic, States should be given a reasonable opportunity to properly absorb the significance and scope of the draft articles. Mexico therefore considered it premature to seek to finalize the draft at the current session and agreed with other delegations that the topic should be revisited at another session in the not-too-distant future when it had had sufficient time to ripen. The possibility of adopting a treaty should not be rejected out of hand, because that would negate the unquestionable benefits of the normative force of written law, which was one of the basic goals of the codification and progressive development of international law.

18. **Mr. Nesi** (Italy) said that the draft articles on State responsibility for internationally wrongful acts were the outcome of a lengthy process in which several generations of jurists had participated. Among them he recalled, in addition to the Special Rapporteurs who had worked on the draft, Professor Ago and Professor Arangio-Ruiz.

19. On numerous occasions, Italy had expressed reservations on various aspects of the final draft, but it had nonetheless accepted the compromise solution adopted by the Commission in 2001. Those reservations had referred mainly to the following: deletion from the draft articles of a category of particularly serious wrongful acts, the so-called "international crimes", while maintaining the substance of the specific norm; the use of the concept of peremptory norms of general international law (*jus cogens*); the requirement that a breach be "serious" before it could qualify as a violation of an international obligation under article 40; the consequences of a serious breach of an obligation under peremptory norms of international law under article 41; and the implementation of State responsibility, i.e., compliance with the obligation of cessation and reparation by a State which had committed an international breach.

20. Italy joined other delegations in maintaining that an international convention was not the appropriate instrument for preserving the work of the Commission. The opening of a negotiating process whose results were unforeseeable could amount to a waste of resources and could also threaten the delicate compromises reached in the Commission.

21. International practice could contribute to the development of customary law in those areas where the draft articles were not to be considered as general international law. For that reason, Italy proposed that the General Assembly should task the Secretariat with preparing compilation of international practice in that area so that the Sixth Committee might consider, on the basis of practice and not before the sixty-third session, how the draft articles were perceived in international relations.

22. **Ms. Rivero** (Cuba) said that Cuba attached great importance to the topic of State responsibility for internationally wrongful acts in international law and considered that the draft articles constituted the basis for initiating negotiations which might lead to the adoption of a legally binding international instrument.

23. The topic of serious breaches of the obligations arising from peremptory norms of general international law was of great importance in protecting States

injured by wrongful acts committed by other States, which could include acts as serious for the international community as aggression and genocide. A clear definition of what was meant by "serious breaches" was required, for if it were stated that a "serious" breach implied the flagrant or systematic violation of an obligation without defining what was meant by "flagrant or systematic", that could give rise to differing interpretations.

24. Cuba maintained its reservations concerning countermeasures even though progress had been made in regulating them. Such measures were highly controversial and should be well regulated so that States would not use them indiscriminately. In the final analysis, they must be aimed at inducing States to fulfil their obligations. A step forward had been taken by limiting countermeasures, imposing restrictions on their implementation and prohibiting their implementation through recourse to the threat or use of force or the violation of humanitarian law or any other peremptory norm of general international law.

25. Her delegation was in agreement on article 52, which established the conditions relating to resort to countermeasures, mainly involving notification of the decision to take countermeasures and negotiation with the infringing State before taking countermeasures. The draft should include a prohibition of countermeasures involving economic and political constraints directed against the territorial integrity or political independence of a State. Likewise, the question of whether the infringing State was making efforts to settle a dispute in good faith should be taken into account.

26. The elimination of the clause on collective countermeasures was a positive development since it constituted a kind of legitimization of collective action. Nevertheless, she drew attention to the fact that article 54 provided States other than the injured State with the possibility of taking action against another State to secure the cessation of the violation.

27. The draft articles contained no dispute settlement provisions. As that was a very sensitive issue at the international level, it should be regulated. The draft should include references to the peaceful settlement of disputes on the basis of Article 33 of the Charter of the United Nations which held that international disputes should be settled by peaceful means so as not to endanger international peace and security.

28. Cuba was of the opinion that, as explained earlier, an ad hoc committee or a working group should be established to negotiate a convention on the item in order to provide States with the possibility of initiating negotiations that could result in the adoption of a universally accepted and legally binding instrument.

29. **The Chairman** said that the Committee had thus concluded its discussion of agenda item 139.

Agenda item 140: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (A/59/321 and A/C.6/59/L.13)

Draft resolution A/C.6/59/L.13

30. **Mr. Makarowski** (Sweden), introducing draft resolution A/C.6/59/L.13 on behalf of its 84 sponsors from all regional groups, proposed an oral revision in the sixth preambular paragraph of the English version. The words "the possibility that the International Fact-Finding Commission will facilitate" should be replaced by "the possibility for the International Fact-Finding Commission to facilitate". The speaker hoped that the change would be reflected in all official languages.

31. In 2004, a number of amendments had been made to the text of the draft resolution. For example, the preamble emphasized the importance of the International Fact-Finding Commission established in accordance with article 90 of Protocol I. Also, note was taken of the fiftieth anniversary of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague in 1954.

32. It was clear that humanitarian norms were being discussed in many forums throughout the world. A number of States and organizations had launched various initiatives to highlight the importance of such norms. In June 2000 the Asian-African Legal Consultative Organization had adopted the Seoul Declaration on the importance of humanitarian norms in contemporary armed conflicts. Activities to disseminate those norms were being conducted at various levels.

Agenda item 141: Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives (*continued*) (A/59/125 and Add.1 and A/C.6/59/L.14)

Draft resolution A/C.6/59/L.14

33. **The Chairman** informed the Committee that El Salvador had become a sponsor of draft resolution A/C.6/59/L.14.

34. *Draft resolution A/C.6/59/L.14 was adopted.*

35. **The Chairman** said that the Committee had thus concluded its discussion of agenda item 141.

Agenda item 160: Observer status for the Organisation of Eastern Caribbean States in the General Assembly (*continued*) (A/59/233 and A/C.6/59/L.7)

Draft resolution A/C.6/59/L.7

36. The Chairman informed the Committee that Trinidad and Tobago and the United Kingdom had become sponsors of draft resolution A/C.6/59/L.7.

37. *Draft resolution A/C.6/59/L.7 was adopted.*

38. **The Chairman** said that the Committee had thus concluded its discussion of agenda item 160.

Agenda item 143: Report of the United Nations Commission on International Trade Law on the work of its thirty-seventh session (*continued*) (A/59/17, A/C.6/59/L.11 and A/C.6/59/L.12)

Draft resolution: Report of the United Nations Commission on International Trade Law on the work of its thirty-seventh session (A/C.6/59/L.11)

39. **The Chairman** informed the Committee that Kenya and Tunisia had become sponsors of draft resolution A/C.6/59/L.11.

40. *Draft resolution A/C.6/59/L.11 was adopted.*

41. **Mr. Rosand** (United States of America), speaking in explanation of position, said that his delegation strongly supported the work of the United Nations Commission on International Trade Law (UNCITRAL) and the recommendation that the Secretary-General should publish the Legislative Guide on Insolvency Law, which would encourage economic growth and investment through the development of strong, effective and efficient insolvency regimes.

42. His delegation, while regretting that it was unable to be a sponsor of the draft resolution, did not agree with the statement in the draft resolution that the General Assembly should "approve" the Commission's conclusions that "the regulations on page limits such as those contained in the report of the Secretary-General (A/57/289) should not apply" to its documentation. The United States was firmly committed to supporting the Secretary-General's reform package, which included the imposition of page limits on United Nations reports. Furthermore, the Commission recalled that it was "fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and would continue to bear such considerations in mind". In the light of that statement, the United States called upon the UNCITRAL secretariat to continue to make every effort to be as concise and economical as possible in the preparation of reports and to exclude any unnecessary or repetitious material.

43. **Mr. Arai** (Japan) said that his Government appreciated the contribution made by UNCITRAL in promoting the progressive harmonization and unification of international trade law. With regard to the imposition of page limits referred to in paragraph 9 of the draft resolution, Japan held that while the special characteristics of the mandate and work of the Commission must be given due consideration, the relevant paragraphs of previous General Assembly resolutions, such as section III, paragraph 2, of resolution 58/250, of 23 December 2003, should also be respected.

Draft resolution: Legislative Guide on Insolvency Law of the United Nations commission on International Trade Law (A/C.6/59/L.12)

44. **The Chairman** drew the attention of the members of the Committee to operative paragraph 1 of the French version of the draft resolution, in which "Conférence des Nations Unies sur le commerce et le développement" should read "Commission des Nations Unies pour le droit commercial international". He requested the Secretariat to correct the technical problems in the French text.

45. *Draft resolution A/C.6/58/L.12, as orally revised, was adopted.*

46. **The Chairman** said that the Committee had thus concluded its discussion of agenda item 143.

The meeting rose at 11.30 a.m.