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Summary record of the 13th meeting
Held at Headquarters, New York, on Tuesday, 23 October 2007, at 3 p.m.

Chairman: Mr. Tulbure . . . . . (Moldova)

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The meeting was called to order at 3 p.m.

Agenda item 78: Responsibility of States for internationally wrongful acts (*continued*) (A/62/62, A/62/62/Corr.1, A/62/62/Add.1, A/62/63 and A/62/63/Add.1)

1. **Mr. Yoo** Hong-keun (Republic of Korea) said that the question of responsibility of States for internationally wrongful acts was of major significance in the relations of States and was also closely linked to other topics of concern to the Committee, such as diplomatic protection and the responsibility of international organizations. His delegation was pleased to see that the draft articles were increasingly being recognized in State practice, by decisions of international courts and by international lawyers as the most authoritative statement of customary international law in the field. However, the Republic of Korea took the view that it would not be advisable at the current time to enter into negations on a convention on State responsibility. Rather, it would be preferable to wait to see how State practice evolved as a result of the application of the draft articles. The topic could then be revisited by the General Assembly in a few years' time.

2. **Ms. Telalian** (Greece) said that the codification and progressive development of the rules on responsibility of States for internationally wrongful acts was the greatest achievement of the International Law Commission to date, as the articles dealt with the most important aspect of international law. The main positive aspects of the draft articles were that they codified customary rules on State responsibility, thus filling a huge gap in existing international law; that they strengthened the notion of the international community as a whole; that they significantly promoted the notion of peremptory norms of international law as envisaged in the Vienna Convention on the Law of Treaties and the regime of responsibility for grave violations of such norms; and that they dispensed with the notion of damage as a condition for the attribution of responsibility.

3. However, the draft articles did suffer from certain shortcomings. For example, no distinction was drawn between obligations of means and obligations of result, which was of undoubted importance for the law of State responsibility. In addition, unilateral action, through countermeasures, took precedence over the obligation to settle disputes peacefully, and the articles included no provision for a procedure for the settlement of disputes arising out of their interpretation or application. The positive elements, however, far exceeded the shortcomings, which, moreover, might gradually be overcome by State practice.

4. There was no doubt that the rules on State responsibility adopted by the International Law Commission should evolve into an international convention, which would make the customary rules clearer and ensure the progressive development of international law. Greece therefore supported the convening of a diplomatic conference. In their current form, the draft articles reflected a carefully achieved compromise. What remained to be done was to draft the preamble and the final clauses of a convention, including a mechanism for the settlement of disputes relating to the interpretation and application of its provisions. The General Assembly should establish a working group for that purpose.

5. **Mr. Siddiqui** (Pakistan) said that the Secretary-General's reports (A/62/62 and Add.1) demonstrated that the draft articles were of great legal value and represented a step forward in the codification of international law. Pakistan was in favour of a substantive discussion on the draft articles in order to promote better understanding and thorough evaluation thereof. Pakistan had noted that the articles did not define "wrongful act" but mainly focused on State responsibility. That would make it easier for States to move forward with the consideration of the articles.

6. His delegation understood that the articles had been adopted on the basis of a compromise and that some remained controversial, as had been highlighted by some recent judgments of the International Court of Justice. It was well-established that if an act was committed by a State organ it was attributable to the State, as the Court had stated, referencing article 4 of the articles on State responsibility, in its 2007 judgment in the Genocide case (Bosnia and Herzegovina v. Serbia and Montenegro). However, the issue of State responsibility when an act was committed under State "direction or control" would need more time to crystallize. In the same case, on the issue of responsibility for "complicity in genocide", the Court, referring to article 16, had set aside "the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity".

7. On the question of force majeure, covered under article 23, Pakistan supported the view that paragraph 2 could be deleted, as it merely stated an established general rule. In 2004 the General Assembly had postponed consideration of the articles on State responsibility until the current session. It was to be hoped that the Sixth Committee would not recommend a further postponement. In principle, his delegation supported the idea of an international convention on State responsibility, which would serve as a guide for State conduct. However, it recognized the need for careful consideration of the articles before a convention was adopted. Accordingly, Pakistan recommended that the General Assembly should set up an ad hoc committee to explore the possibility of drafting a convention on the basis of the articles.

8. **Mr. Virella** (Spain) said that what had occurred in the years since the adoption of the draft articles on State responsibility in 2001 made it clear that they reflected customary international law. They enjoyed wide acceptance and were also an important reference in the practice of the International Court of Justice and other judicial organs. In principle, Spain supported the idea of a future convention, but believed that it would be premature to undertake its development at the current juncture. His delegation would not want the negotiation of a convention to jeopardize the fragile balance that had been struck with respect to the draft articles or to threaten the progress achieved. The matter should be re-examined by the General Assembly in the near future.

9. **Mr. Donovan** (United States of America) said the United States believed that no further action was needed on the issue of State responsibility for internationally wrongful acts. The work of the International Law Commission on the topic had made a valuable contribution to international law and, as was borne out by the Secretary-General's reports (A/62/62 and Add.1), the draft articles had shown themselves to be useful in their current non-binding form as a guide to States and other international actors on what the law currently was and how it might be progressively developed. His delegation doubted the utility of any further work on the topic and would be opposed to any effort to convene a diplomatic conference for the adoption of a convention on State responsibility.

10. **Mr. Butel** (France) said that the question of State responsibility for internationally wrongful acts was really a question of the authority of international law, which was the foundation for peace and for the development of States. France was of the view that a convention on the subject would be the logical and desirable outcome to the work undertaken by the International Law Commission, although that did not mean that France approved entirely of the draft articles in their current form, as was evident from its earlier statements on the matter. Still, France was convinced that the development of a convention would help to clarify the status and contribute to the development of international law in an area that was essential to the preservation of peaceful relations among States and peoples. States should, however, have the opportunity to express their views on the way in which some customary rules might be retranscribed and on the usefulness of some of the proposals for development of the law put forward by the International Law Commission.

11. General Assembly resolution 56/83 should not be regarded as an invitation to abstain from action on the subject, but as a step leading to the convening of a diplomatic conference and to the adoption of an international convention. It should be recalled that the mandate of the International Law Commission was not to develop guidelines which States might or might not choose to follow, but to offer States the possibility of harmonizing their practices by adopting binding legal instruments, which were the only means of ensuring legal certainty. For all those reasons, France believed that the Committee should recommend that the General Assembly establish an ad hoc committee to examine how some of the draft articles might be adopted as a convention.

12. **Ms. Ioannou** (Cyprus) said that State responsibility was one of the last major pillars of international law that remained unwritten. It was regrettable that the world continued to rely on customary practice in an area that was far more important than others in which the law had already been codified by the International Law Commission. The draft articles had been considered exhaustively and had reached a degree of consolidation that made them impervious to legal criticism. What remained was for States to summon up the necessary political will for their adoption in the form of a legally binding instrument.

13. Her Government considered the substantive content of the draft articles to be binding, whether as customary law or as treaty law. Nevertheless, the

formal adoption of the articles was the only natural outcome of progressive efforts to build a system of inter-State relations that operated on the basis of clear rules and that held States accountable for wrongful acts with respect to other States or, in certain grave instances, the international community as a whole.

14. Cyprus saw no convincing arguments to justify the reluctance of some to formalize a framework for State responsibility for internationally wrongful acts. With so much work having been done on the issue, the necessary tools were available to address any outstanding issues, such as the hierarchy between norms, the special legal regime pertaining to State conduct that violated the most imperative norms and the question of eligibility for reparation. Not everything in the draft articles was entirely satisfactory, of course. For example, Cyprus believed that the articles should not include such archaic notions as that of countermeasures, but rather should focus on forward-looking means for settling disputes, including judicial and other objective means for assessing violations and ensuring remedies.

15. Cyprus wished to express, in the strongest terms, its support for the holding of a conference of plenipotentiaries without delay in order to adopt the draft articles in the form of a multilateral convention, which would result in legal clarity and certainty as well as ease of reference for practitioners.

16. **Mr. Brown** (United Kingdom) said that for the reasons stated in its written comments, reproduced in document A/62/63, his Government firmly believed that further action on the draft articles was neither necessary nor desirable. The product of intense negotiation and compromise, the draft articles were not fully satisfactory to any State but had gained widespread recognition and approval, as evidenced by the Secretariat's compilation of decisions of international courts, tribunals and other bodies (A/62/62) and by a study undertaken by the British Institute of International and Comparative Law. Many States, including his own, turned to them for guidance. Little would be gained by adopting a convention, as resolution 56/83, annexing the articles, gave them firm standing, and resolution 59/35 enhanced that standing. The articles were widely cited in State practice, the decision of courts and tribunals and the writings of publicists, and their impact would likely increase with time. Moving towards a convention based on the articles might reopen old issues, undermining the careful balance represented by the scope and content of the articles. A convention whose negotiation was forced at the current stage would be unlikely to enjoy the wide support accorded to the articles and, if ratified by few States, might be a "limping" convention with little or no practical effect. It would therefore be sensible to take no further action, leaving the articles to exert a growing influence through State practice and jurisprudence.

17. **Mr. Nesi** (Italy) said that the International Law Commission's adoption of the draft articles on State responsibility had been an achievement of enormous significance for the international community. There seemed to be no major disagreement among Committee members on the need to preserve the results of the Commission's work, but opinions about how to do so differed: some favoured the immediate codification of the draft articles, while others feared that convening an international diplomatic conference could jeopardize the carefully crafted content of the articles. His delegation was of the view that the opening of a negotiating process with unforeseeable results could waste resources and pose a threat to the delicate compromise reached on the articles within the International Law Commission.

18. He had read the reports of the Secretary-General (A/62/62 and Add.1) and noted that only some of the articles had been the object of international jurisprudence. Hence, only some of their provisions had been put to a judicial test. Italy had said in 2004, and it continued to believe, that further consolidation of the draft articles was needed. His delegation therefore wished to suggest that the General Assembly should request the Secretary-General to prepare another compilation of decisions of international courts, tribunals and other bodies referring to the articles, inviting Governments also to submit information in that regard. Then, in a few years' time, the Sixth Committee might re-examine the matter and, depending on the feelings of the international community at that time, take appropriate action on the draft articles.

19. **Mr. Yokota** (Japan) said that the reports by the Secretary-General (A/62/62 and Add.1) clearly showed that the draft articles on State responsibility had begun to play a useful role in dispute settlement. The articles relating to attribution of responsibility had proved particularly useful. More controversial provisions, such as those on countermeasures and peremptory norms, on

the other hand, had not yet been supported by many decisions of international courts. Japan therefore believed that the question of whether or not to draw up a convention should be set aside for several years, during which time further State and international court practice could be accumulated.

20. **Ms. Zabolotskaya** (Russian Federation) said that the compilation of decisions of international courts, tribunals and other bodies (A/62/62 and Add.1) demonstrated the importance of the articles on responsibility of States for internationally wrongful acts, since they were already being used in practice. The articles were well balanced, and her delegation reiterated its position, stated on previous occasions, that they should be used as the basis for an international convention. However, a number of issues would require further consideration at the time of preparation of any such convention.

21. One of the most controversial of those issues was countermeasures. Her delegation had always been in favour of including provisions on countermeasures in the articles because, while they were not part of State responsibility, they constituted an important aspect of its implementation. Countermeasures were the most effective means for an injured State to induce a responsible State to cease a wrongful act and make reparation for the injury. However, they were justified only until such time as their aims had been achieved, and her delegation endorsed the provisions in part three, chapter II, of the articles concerning the object, limits, and proportionality of countermeasures and conditions for resort to such measures.

22. Many States had objected to article 54, which entitled States other than the injured State to take countermeasures, because its scope was virtually unrestricted and could mean that countermeasures would be taken to protect a collective interest even while action taken by the competent United Nations organs was in progress. Another argument had been that the means whereby an injured State could seek legal protection, and the corresponding right of a State having a "legal interest", could not be identical in scope. On the other hand, article 54 was of practical interest for the purposes of cooperation between States under article 41 and could be used to "stimulate" the responsible State to fulfil its obligations if the injured State was unable to resort to countermeasures of its own accord.

23. Turning to part two, chapter III, she expressed approval of the differentiated approach taken to breaches of obligations, depending on their seriousness. International law certainly contained principles and norms the breach of which could be defined as serious, and the process of defining a distinct set of such breaches had been a lengthy one. The concept of jus cogens was recognized in international practice, the practice of international and national courts, the theory of law and articles 53 and 64 of the Vienna Convention on the Law of Treaties, and her delegation supported the definition of a serious breach of an international obligation as a breach of an obligation arising under a peremptory norm of general international law. In that connection, she also welcomed article 26, which provided that no circumstance could be regarded as precluding the wrongfulness of an act which was not in conformity with an obligation arising under a peremptory norm of general international law.

24. Article 41 required further consideration, since it remained unclear what the "particular consequences" of a serious breach were. One solution might be to specify the forums in which States were to cooperate in order to bring the breach to an end.

25. With regard to article 25, her delegation still doubted whether it was right to include the provision that necessity could be invoked as a ground for precluding the wrongfulness of an act if the act was "the only way for the State to safeguard an essential interest against a grave and imminent peril".

26. Lastly, if controversial issues in such a sensitive area as the international responsibility of States could be resolved within the framework of a convention, that would demonstrate the strengthening of the role of international law in international relations.

27. **Mr. Nega** (Ethiopia) said that the General Assembly's 2001 decision regarding the draft articles on responsibility of States for internationally wrongful acts had been a significant step in the development and consolidation of legal principles on the topic. The compilation of decisions of international courts, tribunals and other bodies (A/62/62) revealed the practical relevance of those principles in adjudicating cases before international tribunals. He urged the Secretariat, in future reports, to refer also to the Eritrea-Ethiopia Claims Commission, which had relied heavily on the draft articles in the resolution of

disputes. States should share information on their practice relating to the implementation of the draft articles and a binding legal framework should be created. Member States should move forward to enable the General Assembly to consider adoption of the draft articles in the form of a convention.

28. **Ms. Nworgu** (Nigeria) said that the draft articles were an important addition to the framework of international law and were fast becoming an authoritative reference on questions of State responsibility. There was no urgency in concluding a convention on the topic, as the draft articles were already in use in their current form. Opening up the articles for negotiation could lead to watering them down, and it might be difficult to garner the required number of ratifications. More time was needed to consider the relevance or otherwise of a convention.

29. **Ms. Celis** (Bolivarian Republic of Venezuela) said that the responsibility of States for internationally wrongful acts was a topic vital to preserving world order, developing relations between States based on respect and equality, and strengthening the rule of law internationally. The many years of work which the International Law Commission had invested in developing the draft articles should culminate in the adoption of a legally binding instrument which would become, together with other major codifications of customary international law, one of the pillars of public international law. A conference should be convened for that purpose. Making the international responsibility of States "soft law" would weaken its governing principles by making them subordinate to treaty law, the primary source of international law. Her country therefore welcomed the Commission's proposal that the General Assembly convene a conference at a later stage for the adoption of the draft articles in the form of a convention.

30. **Mr. Kanu** (Sierra Leone) said that the draft articles on responsibility of States for internationally wrongful acts formed a comprehensive and balanced text which his delegation found acceptable, although not perfect. It appeared to be an authoritative exposition of international law on the topic and had been cited by many international courts, writers, ad hoc tribunals and national courts, as set out in the invaluable compilation of decisions of international courts, tribunals and other bodies (A/62/62). However, opening negotiations with a view to adopting the articles as a convention at the current stage would not be a profitable exercise, especially since it was impossible to predict how many States would become parties to such an instrument.

31. He reiterated his delegation's view that States could not rely on domestic law to derogate from their responsibility and international obligations. On the issue of countermeasures, his delegation welcomed the clarity provided by ensuring a proper balance between flexibility, effectiveness and prevention of abuses, especially when countermeasures were employed against smaller and weaker States. Greater clarity and uniformity were needed on the issue of the unilateral determination of the legitimacy of countermeasures.

32. **The Chairman** informed the Committee that Mr. Grzegorz Zyman of Poland would coordinate the preparation of the draft resolution on agenda item 78.

Agenda item 158: Observer status for the Regional Centre on Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa in the General Assembly (*continued*) (A/C.6/62/L.2/Rev.1)

33. **Ms. Orina** (Kenya) announced that Niger and Somalia had joined the sponsors of the draft resolution.

34. *Draft resolution A/C.6/62/L.2/Rev.1 was adopted.*

Agenda item 159: Observer status for the Italian-Latin American Institute in the General Assembly (*continued*) (A/C.6/62/L.5)

35. *Draft resolution A/C.6/62/L.5 was adopted.*

Agenda item 160: Observer status for the Energy Charter Conference in the General Assembly (*continued*) (A/C.6/62/L.3 and A/C.6/62/L.3/Corr.1)

36. *Draft resolution A/C.6/62/L.3 and A/C.6/62/L.3/Corr.1 was adopted.*

Agenda item 162: Observer status for the Eurasian Development Bank in the General Assembly (*continued*) (A/C.6/62/L.4)

37. *Draft resolution A/C.6/62/L.4 was adopted.*

The meeting rose at 4.10 p.m.