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Chairperson: Ms. Picco (Monaco)

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The meeting was called to order at 10 a.m.

Agenda item 75: Responsibility of States for internationally wrongful acts (A/65/76, A/65/96 and A/65/96/Add.1)

1. **Ms. Quezada** (Chile), speaking on behalf of the Rio Group, said that the law on State responsibility was one of the fundamental pillars of general international law. The Rio Group was of the view that the articles on responsibility of States for internationally wrongful acts should be incorporated into a treaty. A binding legal instrument would contribute decisively to respect for international law and to peace and stability in international relations and would therefore significantly strengthen the rule of law at the international level.

2. A treaty was desirable for other important reasons, as well. First, there was an imbalance between the codification of primary and secondary rules that could in the long term be detrimental to the coherence of international law. The potential of a treaty is to ensure that coherence should not be underestimated. Second, the adoption of a treaty would contribute to the stability and certainty of the rules on State responsibility, while at the same time being without prejudice to the process of forming international custom. Indeed, the positive impact of treaties on the development of customary law was apparent from other fields of international law.

3. The State responsibility articles were not perfect nor were they ideal for each State individually, but they did represent the best possible result for all States collectively. The Rio Group considered them a well-conceived and balanced set of secondary rules, which had already begun to demonstrate value as a powerful force for consolidating the international legal order. State practice, the case law of international courts and other bodies and domestic court decisions all attested to the articles' recognition by the international community. They were an indivisible whole and should not be reopened for negotiation, not only because they represented a delicate compromise that had been reached, with difficulty, after almost 40 years, but also because they struck the proper balance between affirmation of accepted rules and careful yet warranted steps towards the progressive development of law.

4. **Mr. Haapea** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said it was clear from the Secretary-General's report (A/65/76) that international courts, tribunals and other bodies regularly referred to the articles on State responsibility as established rules or as part of customary international law, reflecting their strong and authoritative impact on international dispute settlement. The Nordic countries held the view that the strongest possible position for the articles was as an annex to a resolution. While opinions might differ on specific details, the articles reflected a widely shared consensus, and attempting to create a convention might jeopardize the delicate balance built into them. It would thus not be advisable at the present time to embark on negotiations towards a convention on State responsibility.

5. **Ms. Farhani** (Malaysia) recalled that, while generally supportive of the State responsibility articles, in 2005 her delegation had highlighted concerns regarding certain of them, such as article 7 dealing with ultra vires conduct. Having reviewed the articles, her Government was of the view that, as comprehensive as they might set out to be, they could only be considered guidelines.

6. Her delegation did not favour initiating negotiations aimed at developing a convention on State responsibility at the present time, as such a move might unravel the fragile balance in the wording of the articles, which were the product of intense negotiation and compromise. It would be difficult to reach agreement on the text of a convention, which, moreover, would be unlikely to gain wide acceptance. Although there appeared to be no reference to the articles in any of the international cases to which Malaysia had been a party, they had clearly shown themselves to be useful in their current, non-binding form as a guide for States and international courts and tribunals and as a contribution to the process of developing the fabric of international law.

7. In-depth consideration of the articles was needed before a decision was made regarding their adoption or the negotiation of a convention. Accordingly, the Secretariat should conduct a thorough study of the practice of international courts and tribunals in respect of the articles. The information in the Secretary-General's report (A/65/76) seemed to indicate that those bodies regarded the articles as customary international law, but their consistency in invoking the

articles should be the subject of an objective study. The question of adoption of the articles or other action on them should be considered at some future date in the light of further State practice and the decisions of international courts, arbitral tribunals and other bodies.

8. **Mr. Retzlaff** (Germany) said that the Secretary-General's report on decisions of international courts, tribunals and other bodies (A/65/76) made it clear that domestic and international courts assumed as a matter of course that the articles on State responsibility were legally binding statements of customary international law. That trend should continue to be monitored closely, with particular attention to whether State courts accorded the articles in their entirety — rather than individual articles — the status of customary international law. In the meantime, no binding convention should be drawn up, lest the existing consensus regarding the binding nature of the articles' main thrust should be jeopardized.

9. **Mr. Kowalski** (Portugal) said that the articles on State responsibility had reached a crucial stage of maturation and the time had come to take action on them. State responsibility was a domain of international law that should be incorporated into a hard-law instrument. Such an instrument would make an important contribution to respect for international law and to peace and stability in international relations. States should not be overcautious about moving forward, since the only concern was to establish the legal consequences of internationally wrongful acts. State responsibility was thus a matter of secondary rules, not the primary rules that defined the international obligations of States.

10. The compilation of State practice and decisions of international courts and tribunals, including the case law of the International Court of Justice, contained in the Secretary-General's report provided convincing evidence of the need to proceed to the development of an international convention to be adopted by a diplomatic conference. It made little sense not to proceed with the codification of rules on State responsibility while continuing to advance in the codification of other areas such as diplomatic protection and responsibility of international organizations, since the main principles guiding the development of those areas were the same as those applicable to State responsibility.

11. **Mr. Minogue** (United Kingdom) said, with regard to the future status of the articles on State responsibility, that embarking on the negotiation of a convention was neither necessary nor desirable. The articles did not reflect a settled view of customary international law, and elements within them remained disputed and unclear. Their adoption by the Commission in 2001 had been the culmination of a process stretching back decades and of much negotiation and compromise. Any move towards the formulation of a treaty might reopen discussion on individual articles. Many of them might attract reservations or declarations such as to leave the normative value of the text open to question. Such uncertainty would be exacerbated if few States decided to become parties to the instrument. The Commission's carefully considered provisions should be permitted to develop organically as a reference point for, if not always a definitive statement of, the law.

12. In its comments on the individual articles, notably in 2001, the United Kingdom had noted interpretative uncertainties in a number of aspects relating to attribution. To those concerns could now be added a growing appreciation of the interpretative challenges connected with complex composite acts in which officials of one State acted on the instructions or under the authority of another State. Experience had also indicated the need for greater clarity about the principle of aid or assistance set out in article 16. Given its potential for covering virtually all forms of State interaction, the text presented some fairly significant gaps.

13. In view of the above considerations, the General Assembly might wish to request the Codification Division to invite States to provide substantive comments on the status and content of the articles. Such a compendium of State views would provide further assistance to States, courts, tribunals and specialists in assessing the normative character and content of the articles.

14. **Mr. Gouider** (Libyan Arab Jamahiriya) said that it was time to establish a working group in order to move the topic of State responsibility forward into a new phase. Indeed, discussions on the preparation of a binding international convention were long overdue. The differences in the many comments of States on the articles lay largely in the detail, and the articles were now mature enough for codification. Overall, the articles were regarded as the result of a general

consensus and as codifying prevailing views and practices in a comprehensive and balance manner. As indicated in the Secretary-General's report (A/65/76), they were cited by high-level international judicial bodies as a codification or restatement of the rules of customary international law.

15. Any discussion concerning the conclusion of a convention on the basis of the articles would not essentially affect their existing balance or customary nature. Nor would it entail the risk of ending with a text that ultimately failed to enter into force or secure wide global participation. On the contrary, such a discussion would enable all States to express their views. Some political dimensions were involved but not to such an extent as to interfere with the negotiation and conclusion of an effective convention. Discussions were ongoing on topics based on the same principles as State responsibility, including diplomatic protection and the responsibility of international organizations. Further delay in codifying provisions on a topic generally viewed as vital to the stability and development of the international legal system was therefore incomprehensible.

16. **Ms. Silkina** (Russian Federation) pointed out that the articles on State responsibility were already being used by international courts and tribunals as rules of customary international law and constituted a solidly reasoned and balanced text, although certain provisions, such as articles 25 and 41, could be improved. Accordingly, the idea of drafting a convention on State responsibility should be considered. Such a convention, if adopted, would take a well-deserved place among such international legal instruments as the 1969 Vienna Convention on the Law of Treaties and the 1961 Vienna Convention on Diplomatic Relations. Her delegation advocated the convening of a diplomatic conference to develop a legally binding instrument on the responsibility of States for internationally wrongful acts.

17. **Mr. Phan Duy Hao** (Viet Nam) said that the articles on State responsibility were extensively invoked in decisions taken by courts, tribunals and other bodies at the national, regional and international levels, as was apparent from the reports of the Secretary-General (A/65/76 and 96). Nevertheless, nine years after the International Law Commission had adopted the articles, States still held differing views on specific details of the text. Given the importance of State responsibility under international law, a binding

instrument needed to be concluded in order to enhance legal certainty on the obligations of States and institute specific guidelines for fulfilling those obligations. Experience gained from the conclusion of a number of earlier instruments suggested the utility of convening an international conference to examine the text with a view to concluding a treaty on State responsibility.

18. **Mr. Johnson** (United States of America) said that his delegation continued to hold its previously expressed view that the articles were most valuable in their current form and that there was little to be gained in terms of additional authority or clarity through the negotiation of a convention. As evidenced by the Secretary-General's report on the application of the articles by international courts and tribunals, they already had tremendous influence and importance. For States and for international actors, the articles had proved a useful guide both on what the law was and on how it might be progressively developed. His delegation shared the concern expressed by others that the process of negotiating a convention risked undermining the important work undertaken by the Commission over several decades, particularly if the resulting convention deviated from important existing rules or did not enjoy widespread acceptance. The better course would be to allow the articles to guide the continuing development of the customary international law of State responsibility.

19. **Mr. Valero Briceño** (Bolivarian Republic of Venezuela) said that the issue of State responsibility for internationally wrongful acts was of the utmost importance for the preservation of the international order, the development of relations between States based on respect and equality and the strengthening of the rule of law internationally. His delegation believed that the item should remain on the agenda of the General Assembly and that the years of effort invested by the International Law Commission in developing the articles should lead to the adoption of a legally binding instrument which, together with other instruments that had codified important areas of customary international law, would become one of the fundamental pillars underpinning contemporary public international law.

20. The Sixth Committee should therefore take steps towards the adoption of the articles on State responsibility in the form of a binding international convention, recognizing that in the negotiating process the content of some articles might be subject to further

discussion, particularly with regard to political considerations. To that end, the Committee should set up a working group. His delegation would be pleased to participate in the group's work.

21. **Mr. Delgado Sánchez** (Cuba) said that his delegation supported the adoption of the articles on State responsibility in the form of a convention. The International Law Commission had devoted nearly half a century to developing the articles, and Member States had an obligation to translate those efforts into a concrete outcome. Those who opposed the development of a convention claimed that opening up the text to negotiation could jeopardize the current consensus on the articles and damage the delicate balance in the text. They saw no benefit to the adoption of a convention and suggested that if one was adopted it would not be ratified by some States. While it was true that opening up the text to negotiations might enable the delegations of certain States to try to change some of the articles' provisions, it was no less true that those same States were contesting those provisions in domestic and international courts, with the attendant risk that some courts might accept their arguments, thus weakening the status of the articles in their current form.

22. A study of the deliberations and decisions of domestic and international courts on the issue had led his delegation to conclude that those decisions did not always reflect the majority consensus of Member States regarding the binding nature of the articles, which arose not from the mere fact of their adoption by the International Law Commission, but because they were rooted in customary international law, reflected the traditional practices of States and enjoyed recognition in case law. That situation would not change simply because some States did not ratify a future convention. Delaying the adoption of a convention, however, would enable some States to continue acting with impunity and evading their responsibility for internationally wrongful acts. It would also lead to additional court rulings that were ambiguous or contradictory because decisions on the crucial issue of State responsibility were left in the hands of judges who were free to interpret the articles as they chose.

23. An international convention would establish binding criteria for States, ensure adherence to those criteria by the legal institutions envisaged in the articles and thus enhance their effectiveness and help

curb the dangerous trend towards unilateral action by some States in violation of the Charter of the United Nations and the principles of international law. It would also help to protect States that were victims of wrongful acts committed by other States, including acts as serious as aggression and genocide. His delegation urged the Committee to challenge States that were violating international law to sign an international convention on State responsibility and to lend greater support to judges in their pursuit of international justice.

24. **Mr. Baghaei Hamaneh** (Islamic Republic of Iran) noted that the articles on State responsibility had taken 46 years to complete and reflected a wealth of intellect and deliberate consideration. The final form they took should correspond to that high standard of work. Articles 41, 48 and 50 not only reflected existing international law but were also consistent with authoritative pronouncements in international case law, including decisions by the International Court of Justice, and with the prevailing doctrine. The rules for State responsibility should be clear and known to all subjects of international law. The only way to achieve that was to crystallize them in the form of a treaty. Accordingly, his delegation believed that the time was ripe to convene a diplomatic conference to adopt an international convention on State responsibility.

25. **Ms. Telalian** (Greece) said that the articles on State responsibility had immense legal value: they codified customary rules, thus filling a huge gap in international law, and they dispensed with the notion of damage as a condition for the attribution of responsibility. They currently enjoyed wide acceptance and were important references in the judgments of the International Court of Justice and of other judicial bodies. The rules incorporated in the articles should take the form of an international convention in order to provide States with legal clarity in a sensitive and complex area. However, the elaboration of a convention should not jeopardize the delicate balance and the careful compromise achieved on the text, which must remain as it now stood, without any changes to its substantive provisions. With those considerations in mind, her delegation was willing to support the convening of a diplomatic conference to adopt the articles in the form of an international convention.

26. **Ms. Zarghami** (Canada), speaking on behalf of the CANZ group of countries (Australia, Canada and

New Zealand), said that while the Sixth Committee had been contemplating the future of the articles on State responsibility, a growing body of practice was emerging as international courts, tribunals and other bodies referred to the articles in analysing and resolving sensitive issues. The articles had proved their worth as a persuasive source of guidance for both governments and courts. The CANZ countries considered that it would be unhelpful to try to negotiate the articles as a convention, preferring to avoid a course of action which might see the delicate balance of the text disturbed. They feared that the current force and practical authority of the text might be weakened by a convention that did not gain wide adherence. The most appropriate method of ensuring the integrity of the valuable work done by the Commission would be to adopt the articles in the form of a resolution.

27. **Mr. Rryan** (India) said that the articles on State responsibility dealt with some of the most contentious issues in international law. They required careful analysis in the light of existing and evolving State practice, especially with respect to the development of universal jurisdiction and punishment for grave breaches of international obligations such as genocide, aggression, torture, piracy, slavery and racial discrimination. Some of the rules set out in the articles were subject to other specialized treaty regimes, however.

28. The commentaries to article 48 presented the right of self-determination as a peremptory norm of international law, yet State practice and numerous General Assembly resolutions showed that many States viewed that right as confined to the colonial context. The regime for countermeasures should not be construed as legalizing or authorizing punitive measures: article 50 clearly specified that countermeasures were to be used only to induce a State to comply with its obligations, not as a tool for punishment or vengeance.

29. Any attempt to negotiate a convention on State responsibility would add little value and might destroy the fragile consensus already achieved. Due to the complexity of the issues involved, States might be hesitant to adopt the articles as binding rules. If the convention produced did not receive the ratifications required for its entry into force, the excellent work done by the International Law Commission on the text would be undermined. Accordingly, India considered

that no further action on the topic was necessary at the present stage.

The meeting rose at 11.20 a.m.