

Check against delivery

Seventy-fourth session

Sixth Committee

Agenda item 75

Responsibility of States for Internationally Wrongful Acts

Report of the Working Group

Oral report by the Chair, Maitê de Souza Schmitz (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 71/133 of 13 December 2016, the Sixth Committee decided, at its 1st meeting, on 7 October 2019, 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 at the sixty-second, sixty-fifth, sixty-eighth and seventy-first sessions 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. The Sixth Committee also decided to open the Working Group to all States members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.

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/74/156, as well as a compilation of decisions in which the articles and their

accompanying commentaries were referenced by international courts, tribunals and other bodies between 2016 and 2019, contained in document A/74/83.

The Working Group held three meetings on 15 and 22 October and on 7 November 2019. At the first meeting of the Working Group, delegations were given the opportunity to make general remarks on 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. They were asked to elaborate on their concerns and reasonings behind their positions on the matter so as to identify possible common grounds on the way forward.

The initial general exchange of views in the Working Group confirmed the maintenance of diverging opinions on the question of negotiating a convention, as already observed during the debate on this agenda item. There were also different views on the status of the articles, as some delegations considered them as crystallization of custom, while others emphasized that they do not consider the articles in their entirety as customary international law. Similarly, while some delegations stated that it was not necessary for all articles to constitute customary international law before moving towards a convention, others deemed necessary to wait for the development of sufficient state practice and opinion juris before negotiating a convention.

Generally, delegations referred to the importance of legal certainty and stability. They diverged, however, on whether negotiating a convention would contribute to attain this goal. 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 indicated that proceeding towards a convention would threaten the delicate balance established in the articles by the International Law Commission. They mentioned that the articles were widely accepted, and that a negotiating exercise could undermine their coherence and put into question their status in international law. Some delegations also referred to the risks of not having a universally ratified convention. They also suggested that not taking action on the

basis of the articles could have a positive effect on their development. Among those delegations opposing a convention, some suggested adopting the articles in the form of a declaration of the General Assembly.

At the same time, other delegations reiterated that continued postponement in taking a decision on the future of the articles could undermine their status. They recalled that the International Law Commission, on the report of its fifty-third session (A/56/10), recommended that the General Assembly “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.” Delegations highlighted that States should have a primary role in the law-making process, which would be made possible through a diplomatic conference. For some delegations, the absence of action regarding the articles could give rise to a perception of disagreement among States, thus potentially undermining their status. It could also affect the consideration of other projects concluded by the International Law Commission such as the articles on diplomatic protection and the articles on the responsibility of international organizations.

Member states also discussed the frequency of the debate. Several delegations argued that the item should be discussed more frequently, either in annual or biennial cycles. They claimed that more frequent debates could contribute to find a compromise position on the future action to be taken on the basis of the articles. Other delegations suggested that the periodicity of the consideration of the item should be decreased to a five-year cycle or maintained as a triennial agenda item, to further allow the articles to develop organically in customary international law. They considered that a higher frequency of consideration could jeopardize the status of the articles. Some delegations recalled that the seventy-sixth session of the General Assembly, in 2021, will coincide with the 20th anniversary of the articles.

Delegations also discussed the consideration of the relevant procedural options for the articles on State responsibility. Some delegations expressed that

such debate would not prejudice the question of whether the articles should be codified as a convention or in any other form. For them, it was important that the decision on future action on the basis of the articles was an informed decision taking into account all procedural options. Other delegations expressed the view that it would be premature to move towards a debate on procedural options. Delegations stated that positions for or against a convention were not dependent on having information on procedural options, and saw no added benefits in discussing this matter.

Following the initial exchange of views, on its second meeting the Working Group discussed more specifically what role the Sixth Committee had with regard to the future status and development of the articles. Delegations also deliberated on the current status of the articles, and on the relationship between them and other relevant products of the International Law Commission, such as the articles on diplomatic protection and the ones on responsibility of international organizations. The Working Group also continued its consideration on the modalities for the way forward.

Some delegations considered that deepening discussions on the Sixth Committee could risk putting into question the status of some articles as custom. Others pointed out that a distinction should be drawn between the concerns regarding a diplomatic conference and the risks and benefits of exploring what the Sixth Committee could do in terms of clarifying the status of the articles, which was part of its mandate.

The third meeting of the Working Group focused on the elements of a possible draft resolution. Delegations debated on the reports by the Secretary-General, the frequency of the debates and on how to better reflect the informal discussions held during the intersessional period. The exchange of views in the Working Group then formed the basis of informal consultations on a possible draft resolution. I will elaborate upon those consultations when I introduce the draft resolution for the present agenda item.

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.

This concludes my oral report of the Working Group.

Thank you, Mr. Chair.

