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Fourth report on responsibility of international organizations*

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Contents

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I. Introduction

1. At its fifty-fifth, fifty-sixth and fifty-seventh sessions, the International Law Commission provisionally adopted 16 draft articles on the topic "Responsibility of international organizations".[1] These draft articles have been divided into four chapters, with the following headings: "Introduction" (articles 1-3), "Attribution of conduct to an international organization" (articles 4-7), "Breach of an international obligation" (articles 8-11) and "Responsibility of an international organization in connection with the act of a State or another international organization" (articles 12-16).

2. The draft articles so far adopted and the questions raised by the Commission have elicited a certain number of comments from States (mainly in the debates in the Sixth Committee) and from international organizations. After the publication of the comments in writing which were referred to in previous reports, some further comments were collected in document A/CN.4/556. More recent comments in writing were received, before the submission of the present report, from the Government of Belgium, the International Criminal Police Organization, the Organization for the Prohibition of Chemical Weapons and the World Bank.

3. Views which have been expressed on issues that the Commission has yet to discuss will be examined in the present report, while comments relating to draft articles already adopted by the Commission will be considered when the Commission revises the current draft articles.

4. In section II of the present report, circumstances precluding wrongfulness are addressed, while in section III, responsibility of a State in connection with the act of an international organization is considered.

II. Circumstances precluding wrongfulness

A. General remarks

5. As in previous reports, the present analysis follows the general pattern that was adopted in the articles on responsibility of States for internationally wrongful acts. Chapter V of part one of those articles contains eight articles under the heading "Circumstances precluding wrongfulness".[2] Chapter V of part one of the current draft articles is intended to have the same heading.

6. A few commentators noted that the articles on State responsibility group in chapter V of part one some heterogeneous circumstances and, in particular, do not make a distinction between causes of justification and excuses.[3] If one made that

[1] The text of the draft articles heretofore provisionally adopted is reproduced in *Official Records of the General Assembly, Sixteenth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[2] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 76.

[3] V. Lowe, "Precluding Wrongfulness or Responsibility: A Plea for Excuses", *European Journal of International Law*, vol. 10 (1999), p. 405; A. Gattini, "Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility", ibid., p. 397 at p. 401; I. Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-terrorism", *Columbia Journal of Transnational Law*, vol. 43 (2005), p. 337 at pp. 349-356.

distinction, the first category would group circumstances which radically exclude wrongfulness, while the other circumstances would have a more limited effect and only exceptionally provide a shield against responsibility. A distinction on the suggested lines may have some relevance with regard to the question of proof. However, a cause of justification cannot appropriately be ranged among the circumstances precluding wrongfulness, because it would rule out any breach of an international obligation. Thus, the suggested distinction was not used in the articles on State responsibility. While the commentary does use both terms "justification" and "excuse" for describing circumstances precluding wrongfulness,[4] according to the commentary on article 20:

> "[...] a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself".[5]

Only the first type of consent was considered as a circumstance precluding wrongfulness. It seems preferable for the Commission to adopt the same approach in the present draft articles, because the question of responsibility of international organizations presents no special feature in this regard.

7. The same reason of coherence with the approach taken with regard to State responsibility suggests that the present draft articles should not introduce circumstances precluding wrongfulness that were not so characterized in the articles on State responsibility but would apply in the same way with regard to States and international organizations.

8. One case in point is that of an international organization acting under coercion. Coherence with the text on State responsibility makes it preferable not to list this case among the circumstances precluding wrongfulness,[6] although article 14 (a) of the current draft suggests that a coerced State or international organization would be excused from international responsibility when it considers that:

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[4] For instance, in the commentary concerning the introduction to chapter V, para. 2. *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, p. 169, para. 2.

[5] Ibid., p. 174, para. 2.

[6] The Russian Federation held that coercion by a State or an international organization could give rise to a circumstance precluding wrongfulness (A/C.6/60/SR.12, para. 70). The inclusion of duress as a circumstance precluding wrongfulness in the articles on State responsibility had been advocated in the Commission by Mr. Dugard (*Yearbook of the International Law Commission*, 1999, vol. I, p. 178, 2592nd meeting, paras. 22-23). D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), p. 51, considered that a possible circumstance precluding wrongfulness would exist when an international organization "has in good faith sought to exercise its constitutional control to prevent the commission of an unlawful act but the control by a State over the organization has in any case caused the commission of the act". The following chapter will be the more appropriate place to discuss the view expressed in a statement by Belarus, that "[i]n certain situations, it would be appropriate to absolve international organizations of responsibility for internationally wrongful acts and to provide instead for the collective responsibility of member States, particularly with regard to international organizations with limited resources and a small membership, where each member State had a high level of control over the organization's activities"(A/C.6/60/SR.12, para. 52).

`"the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization".[7]

Apart from the fact that the subparagraph above refers to an international organization alongside a State, the text is identical to article 18 (a) on responsibility of States for internationally wrongful acts. Moreover, the latter provision implicitly envisages coercion as a circumstance precluding wrongfulness, although the articles on State responsibility do not list this case specifically.[8] A differentiation in this respect of the current draft articles from the articles on State responsibility would be unwarranted.

B. Consent

9. Consent is the first among the circumstances precluding wrongfulness that is mentioned. The commentary on the relevant provision (article 20) explains that this "reflects the basic international law principle of consent".[9] That principle applies to States as well as to international organizations.

10. An international organization may express consent with regard to conduct of a State or an international organization. Consent given by an organization to a State falls outside the present draft articles, because in that case consent would preclude the responsibility of the State. What needs to be considered here is consent given to the commission of an act by an international organization.

11. Like States, international organizations perform several functions which would give rise to international responsibility if they were not consented to by a State or an international organization. The most frequent relevant case is consent given by the State on whose territory the organization exercises its functions.

12. Requests for verification of the electoral process by an international organization represent relatively frequent examples of consent given by States to an organization so that it may exercise functions that would otherwise interfere with national sovereignty.[10]

13. One recent example of consent given by a State both to an international organization and to several States is provided by the deployment of the Aceh Monitoring Mission in Indonesia. This mission was sent on 15 September 2005, following an official invitation addressed by the Government of Indonesia to the European Union, five contributing countries of the Association of Southeast Asian

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[7] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[8] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[9] Ibid., chap. IV, sect. E.2, p. 173, Commentary, para. 1.

[10] With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16. A recent survey was made by R. Sapienza, "Considerazioni sulle attività di assistenza e monitoraggio elettorale dell'ONU", *Rivista di diritto internazionale*, vol. 88 (2005), p. 647.

Nations (Brunei Darussalam, Malaysia, the Philippines, Singapore and Thailand), Norway and Switzerland.[11]

14. There does not appear to be any reason for distinguishing the conditions under which consent represents a circumstance precluding wrongfulness for States and the conditions applying to international organizations. It is therefore expedient to make only the necessary textual alterations to article 20 on the responsibility of States for internationally wrongful acts.[12] On the basis of the foregoing remarks, the following text is proposed:

Article 17
Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

C. Self-defence

15. While Article 51 of the Charter of the United Nations refers to self-defence only with regard to an armed attack on a State, it is far from inconceivable that an international organization may find itself in the same situation as a State. This was taken for granted in a memorandum by the United Nations Office of Legal Affairs, which stated that:

> "the use of force in self-defence is an inherent right of United Nations forces exercised to preserve a collective and individual defence".[13]

It would indeed be odd if an international organization could not lawfully respond — not necessarily through the use of force[14] — if it were made the object of an armed attack.[15]

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[11] A reference to the invitation by the Government of Indonesia, which had been made on 12 July 2005, may be found in the third preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, 10 September 2005, L 234, p. 13.

[12] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56//10 and Corr.1), chap. IV, sect. E.1.

[13] Paragraph 6 of a memorandum dated 19 July 1993, *United Nations Juridical Yearbook* (1993), p. 372.

[14] This point was made by J. Salmon, "*Les circonstances excluant l'illicéité*", in: K. Zemanek and J. Salmon, *Responsabilité internationale* (Paris: Pedone, 1988), p. 89 at p. 169.

[15] Among the writers who held that self-defence is invocable by the United Nations and other international organizations when they are the object of an armed attack, see M. H. Arsanjani, "Claims against International Organizations: *Quis custodiet ipsos custodes?*", *The Yale Journal of World Public Order*, vol. 7 (1980-81), p. 131 at p. 176; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 421; K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militareinsätzen und Territorialverwaltungen* (Frankfurt am Main: Peter Lang, 2004), pp. 264-265; M. C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Leiden diss., 2004), p. 17.

16. The view had been expressed that, when the United Nations force in the Congo reacted against attacks by Belgian mercenaries, the United Nations could invoke self-defence and hence did not engage its international responsibility.[16] In relation to the United Nations Protection Force, a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

> "'self-defence' could very well include the defence of the safe areas and of the civilian population in those areas".[17]

17. Reference to self-defence has often been made in texts establishing the mandate of peacekeeping forces. For instance, with regard to the United Nations Peacekeeping Force in Cyprus (UNFICYP), the Secretary-General stated:

> "Troops of UNFICYP shall not take the initiative in the use of armed force. The use of armed force is permissible only in self-defence."[18]

The actual meaning of self-defence in mandates relating to peacekeeping and peace-enforcement forces has widened over time. The Secretary-General of the United Nations had originally held:

> "A reasonable definition seems to have been established in the case of UNEF, where the rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions."[19]

According to a recent assessment, which was made by the High-level Panel on Threats, Challenges and Change:

> "the right to use force in self-defence [...] is widely understood to extend to 'defence of the mission'".[20]

While the mandates of peacekeeping and peace-enforcement forces vary, references to self-defence confirm that self-defence constitutes a circumstance precluding wrongfulness. This conclusion is not affected by the fact that the provisions in question appear to envisage a reaction against attacks that are directed against United Nations forces mainly by entities other than States and international organizations.[21] No distinction is made according to the source of the armed attack.

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[16] This view was expressed by J. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, vol. 11 (1965), p. 468 at p. 482.

[17] *The Canadian Yearbook of International Law*, vol. 34 (1996), p. 388 at p. 389.

[18] S/5653 (11 April 1964), para. 16.

[19] A/3943 (9 October 1958), para. 179.

[20] *A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change* (see A/59/565), para. 213. Recent surveys of the evolution of the role of self-defence in peacekeeping and peace-enforcement operations were provided by K. E. Cox, "Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force", *Denver Journal of International Law & Policy*, vol. 23 (1999), p. 239, and by M. Frulli, "Le operazioni di *peacekeeping* delle Nazioni Unite e l'uso della forza", *Rivista di diritto internazionale*, vol. 84 (2001), p. 347.

[21] This aspect was stressed by P. Lamberti Zanardi, La legittima difesa nel diritto internazionale (Milano: Giuffrè, 1972), pp. 298-299 and by P. Klein, supra note 15, at p. 421.

18. The invocability of self-defence should not be limited to the United Nations. Some other organizations deploy military forces or are involved in the administration of territories. The relevance of self-defence as a circumstance precluding wrongfulness of an act taken by an international organization depends on the conditions under which self-defence is admissible. The wider the concept of armed attack, the more likely it is that self-defence could apply to an international organization engaging in military operations. In this context one may recall that in its judgment in the *Case Concerning Oil Platforms*, the International Court of Justice said that:

> "The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence' [...]"[22]

19. Article 21 on State responsibility does not specify the conditions under which self-defence is invocable otherwise than by requiring that the measure of self-defence be "lawful" and "taken in conformity with the Charter of the United Nations".[23] It is clearly preferable to follow the same approach in the current draft articles. This implies that the text of the draft articles should not address the question of the invocability of self-defence by an international organization in case of an armed attack against one of its members. It may, however, be useful to raise this question here and consider whether something should be said in the commentary on the draft articles. The question arises because several organizations were established for the purpose of facilitating collective self-defence on the part of their members. Although the provisions of most treaties establishing those organizations only refer to the use of force by member States and not by the organization concerned,[24] it may have been understood that member States would act through the organization or even that the organization would respond directly.[25]

20. In any case, the invocability of self-defence as a circumstance precluding wrongfulness of an act of an international organization appears to be sufficiently

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[22] *I.C.J. Reports 2003*, p. 195, para. 72.

[23] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[24] For example, the first sentence of article 5 of the North Atlantic Treaty of 4 April 1949 (United Nations, *Treaty Series*, vol. 34, p. 243 at p. 246) reads as follows:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore or maintain the security of the North Atlantic area."

Article 3 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947 (United Nations, *Treaty Series*, vol. 21, p. 77) was written from a similar perspective.

[25] This approach is reflected in the language of texts such as paragraph 2 of Security Council resolution 770 (1992), in which the Council requested States to "take nationally or through regional agencies or arrangements all measures necessary to facilitate" the delivery of humanitarian assistance in Bosnia and Herzegovina.

important to warrant the inclusion of a specific draft article.[26] This could be written following closely the text of article 21 on the responsibility of States for internationally wrongful acts.[27] The draft article would then read:

Article 18
Self-defence

The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

D. Countermeasures in respect of an internationally wrongful act

21. In the articles on the responsibility of States for internationally wrongful acts, countermeasures are considered in article 22 and in chapter II of part three (articles 49 to 54).[28] While the latter articles consider the conditions under which States may take countermeasures, the purpose of article 22 is simply to say that:

> "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three."

22. A similar approach could be taken with regard to international organizations, provided that the possibility that organizations may take countermeasures is not categorically ruled out. This would be an unlikely conclusion, since a substantial body of literature which analysed practice relating to the admissibility of countermeasures by international organizations shows that the fact that international organizations may in certain cases take countermeasures is not contested.[29] This finding would suggest that a provision concerning countermeasures should be included, at least within brackets, among the draft articles on circumstances precluding wrongfulness.

23. Should an international organization fail to comply with an obligation under international law towards another organization, for instance because it does not supply a certain product and, moreover, does not make reparation for its wrongful act, the question would be raised whether, and under what conditions, the injured organization could resort to countermeasures in order to ensure compliance with the primary obligation or with the obligation to make reparation. The examination of the conditions under which an organization is entitled to resort to countermeasures against another organization could be deferred to a later stage: to the time when the Commission considers the implementation of the international responsibility of an international organization.

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[26] While noting that "certain difficulties" would occur "if an attempt were made to apply certain circumstances precluding wrongfulness, such as self-defence, to international organizations" (A/C.6/60/SR.12, para. 70), the Russian Federation did not rule out that self-defence could be one of those circumstances.

[27] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[28] Ibid.

[29] See P. Klein, supra note 15, at pp. 396-409.

24. Further questions that arise in this context concern the resort to countermeasures by an international organization against a State and the reverse case of countermeasures taken by a State against an organization. These two cases are connected, because it seems difficult to admit that a State could use countermeasures against an organization without at the same time admitting that the latter could do likewise. A decision on whether these questions should also be addressed in the current draft articles will best be taken in the course of a study of the implementation of international responsibility.

25. It would be difficult to draft the text of an article concerning countermeasures as circumstances precluding wrongfulness of acts of international organizations without knowing whether the question of countermeasures taken by an organization against a State will eventually be addressed in the draft articles. One option would be to leave the text of the article provisionally blank. As an alternative, one could write a text, part of which would be placed within brackets. The provision could then be drafted on the lines of article 22 on State responsibility.[30] However, given the fact that it would make little sense to include a reference to conditions that have yet to be analysed, countermeasures could be provisionally qualified as "lawful". The draft article in its two suggested alternatives would read as follows:

Article 19
Countermeasures

Alternative A

[...]

Alternative B

The wrongfulness of an act of an international organization not in conformity with an international obligation towards another international organization [or a State] is precluded if and to the extent that the act constitutes a lawful countermeasure taken against the latter organization [or the State].

E. Force majeure

26. Legal systems generally consider that responsibility cannot be incurred in case of force majeure or similar circumstances, which may be defined as frustration, impracticability, *imprévision* or supervening impossibility.[31] The variety of approaches taken by national legal systems prompted the use of neutral terms in a treaty of uniform law like the United Nations Convention on Contracts for the International Sale of Goods.[32] Article 79, paragraph 1, of this Convention provides that:

[30] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[31] See, e.g., D. Tallon, in: C. M. Bianca and J. M. Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milano: Giuffrè, 1987), pp. 573-575.

[32] United Nations, *Treaty Series*, vol. 1483, p. 59.

> "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".

27. With regard to international law in its relation to States, a definition of force majeure and the pertinent conditions is to be found in article 23 on the responsibility of States for internationally wrongful acts.[33] There would be little reason for holding that the same conditions do not apply to international organizations.

28. One may find some instances of practice, although limited, concerning force majeure with regard to international organizations. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and the World Health Organization stated that:

> "[i]n the event of force majeure or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal".[34]

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of force majeure does not constitute a breach of the Agreement.

29. Force majeure has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals. In Judgement No. 24, *Torres et al. v. Secretary General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of force majeure, which had been made in order to justify termination of an official's contract:

> "The Tribunal considers that in the present case there is no force majeure that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by force majeure is meant an irresistible happening of nature".[35]

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[33] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[34] United Nations, *Treaty Series*, vol. 1691, p. 325 at p. 331.

[35] Paragraph 3 of the judgement, made on 16 November 1976. The text is available at <http://www.oas.org/tribadm/decisiones_decisions/judgements>. In a letter dated 8 January 2003 to the United Nations Legal Counsel, the Organization of American States (OAS) noted that:

> "The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law". (See A/CN.4/545, sect.II.I, Organization of American States.)

Although the Tribunal rejected the plea, it clearly recognized the invocability of force majeure.

30. A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgement No. 664, in the *Barthl* case. The Tribunal found that force majeure was relevant to an employment contract and said:

> "Force majeure is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent".[36]

It is immaterial that in the case in hand force majeure had been invoked by the employee against the international organization instead of by the organization.

31. The International Criminal Police Organization pointed to the relevance of financial distress that, in circumstances beyond an organization's control, may affect the ability of an organization to comply with its obligations:

> "Unlike States and other territorial entities, generally international organizations do not possess jurisdiction to tax, and cannot therefore generate their own income. International organizations are dependent on the financial contributions by the participating countries. Should it happen that a significant amount of countries fail to pay their contributions, a situation may arise in which an organization would not be able to meet its financial obligations. As proven by the demise of the International Tin Council, unlike the case of States, insufficient funding can be a life-threatening situation for an international organization. This issue demands special attention in the codification and progressive development of the law of responsibility of international organizations, either under the heading force majeure or necessity or in an arrangement for dealing with the insolvency of international organizations".[37]

Financial distress might constitute an instance of force majeure that the organization concerned could invoke in order to exclude wrongfulness of its failure to comply with an international obligation. The fact that the situation of force majeure may be due to the conduct of the organization's member States would not prevent the organization, as a separate entity, from availing itself of that situation. Non-compliance by the organization would raise the question, to be discussed in the following part, whether member States incur responsibility.

32. Taking article 23 on the responsibility of States for internationally wrongful acts[38] as a model for a provision concerning the invocability of force majeure by an international organization, the following text may be proposed:

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[36] Paragraph 3 of the judgement, made on 19 June 1985. The Registry's translation from the original French, available at <http://www.ilo.org/public/english/tribunal>.

[37] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, p. 41). Footnotes have been omitted in the quotation.

[38] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

Article 20
Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to force majeure, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) The organization has assumed the risk of that situation occurring.

F. Distress

33. Article 24 on the responsibility of States for internationally wrongful acts[39] considers that distress constitutes a circumstance precluding wrongfulness when "the author of the act in question has no other reasonable way [...] of saving the author's life or the lives of other persons entrusted to the author's care". Instances in which distress was invoked in order to preclude the wrongfulness of an act of a State are rare. It is therefore not surprising that known practice does not offer examples of the invocation of distress by an international organization in a similar situation. However, there does not seem to be any reason for not applying the same circumstance precluding wrongfulness to an international organization, should the wrongful act of an organization be caused by the attempt of an organ or agent of that organization to save the organ's or agent's life or the lives of other persons entrusted to the organ's or agent's care.[40] There is also no reason for suggesting that different rules should apply to States and international organizations.

34. Thus, a draft article based on the wording of article 24 on State responsibility[41] is here suggested:

Article 21
Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

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[39] Ibid.

[40] P. Klein, supra note 15, at pp. 415-416, gives as a hypothetical example the unauthorized crossing of a border by agents of the United Nations High Commissioner for Refugees in order to save some refugees under the protection of the organization from the effects of the bombing of a refugee camp.

[41] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

G. Necessity

35. Necessity is probably the most controversial circumstance precluding wrongfulness. It has almost always been considered only in relation to States. It is true, as was noted by the International Monetary Fund,[42] that in the *Gabcíkovo-Nagymaros Project* case the International Court of Justice did not specifically refer to States when it said that:

> "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation".[43]

However, if one takes this passage in the context of the facts of the case and of the full quotation of the draft article on necessity adopted by the International Law Commission at first reading, it is clear that the Court only considered the relations between States. It would thus be difficult to agree with the comment of the International Monetary Fund to the effect that:

> "one could use the quoted observation to lend support to the proposition that necessity might preclude the wrongfulness of acts of international organizations".[44]

36. Little can be deduced from the fact that some agreements concluded by certain international organizations allow for non-compliance with international obligations in case of serious troubles or difficulties.[45] This practice, which is not widespread, is not sufficiently indicative of the fact that an international organization could invoke necessity as an excuse for non-compliance as a matter of general international law.

37. A more significant element of practice is given by statements that assert that United Nations forces may invoke "operational necessity" or "military necessity".[46] In his report on financing of the United Nations peacekeeping operations, the United Nations Secretary-General held that:

> "The liability of the Organization for property loss and damage caused by United Nations forces in the ordinary operation of the force is subject to the exception of 'operational necessity', that is, where damage results from

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[42] Letter dated 1 April 2005 from the General Counsel of the International Monetary Fund to the Secretary of the International Law Commission (see A/CN.4/556, p. 42).

[43] *I.C.J. Reports 1997*, p. 40, para. 51.

[44] See supra note 42.

[45] P. Klein, supra note 15, at pp. 417-419, referred to some cooperation agreements that were concluded by the European Economic Community with certain non-member States. The same agreements were referred to in a statement by Belgium (A/C.6/59/SR.22, para. 77).

[46] For the distinction between the two concepts, see D. Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", *American Journal of International Law*, vol. 94 (2000), p. 406 at pp. 410-411. The wide scope given to "military necessity" has raised some criticism. See P. Sands and P. Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 520, note 64.

necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates".[47]

In this perspective, operational necessity would seem to render interference with private property lawful. In other cases, what is invoked is "military necessity", for instance, in a memorandum prepared by the United Nations Office of Legal Affairs in relation to the occupation by the United Nations Operation in Somalia II (UNOSOM II) of a compound in Mogadishu:

> "If it is established [...] that occupation of the compound by hostile factions would have exposed UNOSOM II to serious threat so that effective protection to 'the personnel, installations and equipments of United Nations and its agencies, ICRC as well as NGOs' [...] could not have been assured without UNOSOM II taking physical possession of the compound, the occupation thereof may be considered as an act of military necessity to ensure the achievement of the objectives laid down in Security Council resolution 814 (1993).
>
> "From this perspective, the occupation of the compound may be considered legal".[48]

38. A reference to the invocability of necessity by an international organization was made by the ILO Administrative Tribunal in its Judgement No. 2183, in the *T.O.R.N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> "[...] in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care".[49]

While this passage specifically concerns relations between an international organization and its employees, the Tribunal's statement is of a more general character and conveys the view that an organization may invoke necessity as a circumstance precluding wrongfulness.[50]

39. Even if practice is scarce, as was noted by the International Criminal Police Organization:

> "[...] necessity does not pertain to those areas of international law that, by their nature, are patently inapplicable to international organizations".[51]

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[47] A/51/389, para. 13.

[48] *United Nations Juridical Yearbook* (1994), p. 403 at p. 405.

[49] Paragraph 9 of the judgement, made on 3 February 2003. The Registry's translation from the original French, available at <http://www.ilo.org/public/english/tribunal>.

[50] In a yet unpublished letter of January 2006, the International Criminal Police Organization "noted that although the Tribunal utilized the term 'state of necessity', it could be argued that the test set forth in article 16 (a) of the Commission's articles on State responsibility was not met" (p. 3).

[51] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, pp. 40-41).

The invocability of necessity by international organizations was also advocated by the Commission of the European Union,[52] the International Monetary Fund,[53] the World Intellectual Property Organization[54] and the World Bank.[55] Although comments made in the Sixth Committee in reply to a question raised by the Commission were divided, the majority of the views expressed by States were in favour of including necessity among the circumstances precluding wrongfulness.[56] Statements that were negative mainly stressed the lack of relevant practice, the risk of abuse or the need to provide stricter conditions than those applying to States. The latter concern could be met by taking into account the specific features of international organizations when stating the conditions of invocability of necessity.

40. When considering necessity as a circumstance precluding wrongfulness, article 25 on State responsibility requires that the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril".[57] In its Judgment in the *Gabcíkovo-Nagymaros Project* case, the International Court of Justice also stressed the requirement that there be a threat to an "'essential interest' of the State which is the author of the act conflicting with one of its international obligations".[58] In its commentary on article 25 on State responsibility, the Commission notes that:

> "The extent to which a given interest is 'essential' depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole".[59]

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[52] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see A/CN.4/556, p.40).

[53] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (see A/CN.4/556, p. 42).

[54] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (see A/CN.4/556, pp. 42-43).

[55] Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (not yet published, paras. 1-2).

[56] Statements clearly in favour were made by France (A/C.6/59/SR.22, para. 12), Austria (A/C.6/59/SR.22, para. 23), Denmark, speaking also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/59/SR.22, para. 65), Belgium (A/C.6/59/SR.22, para. 76), the Russian Federation (A/C.6/59/SR.23, para. 23) and Cuba (A/C.6/59/SR.23, para. 25). A tentatively favourable position was taken also by Spain (A/C.6/59/SR.23, para. 49). The contrary view was expressed in statements by Germany (A/C.6/59/SR.21, para. 22), China (A/C.6/59/SR.21, para. 42), Poland (A/C.6/59/SR.22, para. 2), Belarus (A/C.6/59/SR.22, para. 45) and Greece (A/C.6/59/SR.23, para. 43). Tentatively negative positions were taken by Singapore (A/C.6/59/SR.22, para. 57) and New Zealand (A/C.6/59/SR.23, para. 10).

[57] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

[58] *I.C.J. Reports 1997*, p. 41, para. 52. In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court referred again to the requirement of an "essential interest" by quoting article 25, paragraph 1 (a) of the articles on State responsibility. *I.C.J. Reports 2004*, p. 195, para. 140.

[59] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, p. 202, para. 15.

41. As the International Monetary Fund observed:

> "It is unclear whether international organizations could claim 'essential interests' similar to those of States, in order to invoke the defence of necessity".[60]

While a State may be considered as entitled to protect an essential interest that is either its own or of the international community, the scope of interests for which an international organization may invoke necessity cannot be as wide. One cannot assimilate, for instance, the State's interest in surviving with that of an international organization in not being extinguished. Nor are international organizations in the same position as States with regard to the protection of essential interests of the international community.

42. For international organizations, the essential interest in question has to be related to the functions that are entrusted to the organization concerned. According to the World Bank:

> "As international organizations have separate legal personality from that of their member States, and are therefore separate legal subjects, it cannot be denied, a priori, that they too have essential interests to safeguard in accordance with their constituent instruments".[61]

Similarly, the International Monetary Fund held that:

> "[...] the application of necessity to an international organization would also need to be related to the organization's purposes or functions".[62]

As was pointed out by the Commission of the European Union:

> "[...] an environmental international organization may possibly invoke 'environmental necessity' in a comparable situation where States would be allowed to do so, provided that [...] it needs to protect an essential interest enshrined in its Constitution as a core function and reason of its very existence [...]"[63]

43. The foregoing remarks lead one to consider that international organizations may invoke necessity only if the grave peril[64] affects an interest that the organization has the function to protect. Reference only to the constituent instrument may be too restrictive. As the International Court of Justice pointed out in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons*:

> "The powers conferred on international organizations are normally subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not

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[60] Letter dated 1 April 2005 from the General Counsel of the International Monetary Fund to the Secretary of the International Law Commission (see A/CN.4/556, p. 42).

[61] Letter dated 31 January 2006, supra note 55 (not yet published, para. 2).

[62] Letter dated 1 April 2005, supra note 53 (see A/CN.4/556, pp. 41-42).

[63] Letter dated 18 March 2005, supra note 52 (see A/CN.4/556, p. 40).

[64] The delegate of Singapore "wondered whether there was a common understanding of what constituted such a peril to an international organization" (A/C.6/59/SR.22, para. 57). One could observe that the peril in question would have to affect the essential interest, but not necessarily the organization.

expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers."[65]

44. Should an international organization be established with the objective of protecting an interest of the international community, the organization could invoke necessity in case of grave peril to that interest. This would seem to apply also in the case of non-universal organizations, since they would do so because they have been established for that purpose by their members, which, according to the definition in draft article 2,[66] are States or at least include States. Since, according to article 25 on State responsibility,[67] States could invoke necessity for protecting an essential interest of the international community individually, the same should apply to the organization of which they are members.

45. According to article 25 on State responsibility,[68] the act for which necessity is invoked should not "impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". In a draft article concerning the invocability of necessity by an international organization, it would not be necessary to add a reference to the impairment of an essential interest of another international organization. No more than in the case of the invocation by States, the essential interest of another organization could be protected only to the extent that it coincides with those of one or more States or of the international community.

46. Under aspects that have not been discussed above, there is no reason for departing from the model provided by article 25 on State responsibility.[69] The following text is therefore suggested:

Article 22
Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest that the organization has the function to protect; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

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[65] *I.C.J. Reports 1996*, p. 79, para. 25.
[66] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.
[67] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.
[68] Ibid.
[69] Ibid.

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The organization has contributed to the situation of necessity.

H. Compliance with peremptory norms

47. Chapter V of part one of the articles on the responsibility of States for internationally wrongful acts[70] contains a "without prejudice" provision which refers to all the circumstances precluding wrongfulness. The purpose of this provision is to state that an act, which would otherwise not be considered wrongful, would be so held if it was "not in conformity with an obligation arising under a peremptory norm of general international law". In principle, peremptory norms bind international organizations in the same way as States. However, the application of certain peremptory norms with regard to international organizations may raise some problems.

48. The main problems relate to the prohibition of the use of force, which is widely recognized as a prohibition deriving from a peremptory norm. While a State may validly consent to a specific intervention by another State,[71] a general consent given to another State that would allow the latter State to intervene militarily on its own initiative would have to be taken as inconsistent with the peremptory norm. It is clear that no breach of that norm occurs because of the fact that the United Nations has been given the power to use force under Chapter VII of the Charter. On the contrary, the attribution to a regional organization of certain powers of military intervention could be viewed as contravening the peremptory norm. However, a different view could be held with regard to regional organizations which are given the power to use force if that power represents an element of political integration among the member States.[72]

49. While the application of a "without prejudice" provision concerning peremptory norms may present some special features, the general statement that is contained in article 26 on State responsibility[73] could be reproduced here by simply inserting the term "international organization" instead of "State":

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[70] Ibid.

[71] The view that "consensual intervention can preclude the operation of article 26" on State responsibility was expressed by A. Abass, "Consent Precluding Responsibility: A Critical Analysis", *International and Comparative Law Quarterly*, vol. 53 (2004), p. 211 at p. 224.

[72] One may consider under this perspective article 4 (h) of the Constitutive Act of the African Union, which provides for "[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity" (United Nations, *Treaty Series*, vol. 2158, p. 3 at p. 37). An additional, or possibly alternative, explanation could be that the power of an organization to intervene in those circumstances would not be considered as prohibited by a peremptory norm.

[73] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

Article 23
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

I. Consequences of invoking a circumstance precluding wrongfulness

50. The substance of what is stated in article 27 (a) on State responsibility[74] could hardly be contested and certainly applies also to international organizations. The text runs as follows:

> "The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
>
> (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists".

Although this text emphasizes the element of time,[75] what is said about compliance also concerns all the other dimensions of the circumstance. It is clear that a circumstance may preclude wrongfulness only insofar as it goes. In fact, the provision does not leave any question unprejudiced. It simply conveys the meaning that, beyond the reach of the relevant circumstance, wrongfulness of the act is not affected.

51. The question of compensation, which is referred to under article 27 (b), is left unprejudiced in the articles on State responsibility because it is not covered. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance. In any event, no responsibility for an internationally wrongful act would arise. The distinction between justifications and excuses would not provide decisive elements for resolving the question whether compensation is due.[76] For instance, consent to a certain act may or may not imply a waiver to any claim relating to losses.

52. Since the position of international organizations is identical to that of States with regard to the matters covered by article 27 on State responsibility,[77] the preferable course is to reproduce the text in the current draft articles, although the wording of subparagraph (a) could be improved by referring more generally to all the elements of the circumstance and not only to the temporal element. The following text is proposed:

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[74] Ibid.

[75] This temporal element may have been emphasized because the International Court of Justice in its Judgment in the *Gabcíkovo-Nagymaros Project* case had said that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives" (*I.C.J. Reports 1997*, p. 63, para. 101).

[76] The need to distinguish between justification and excuses for this purpose was upheld by V. Lowe, supra note 3, p. 410; I. Johnstone, supra note 3, p. 354.

[77] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1.

Article 24
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material loss caused by the act in question.