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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-EIGHTH SESSION

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CHAPTER VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Addendum

Contents

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2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session

1. The text of the draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-eighth session is produced below.

CHAPTER V

Circumstances precluding wrongfulness

Commentary

(1) Under the heading "Circumstances precluding wrongfulness" articles 20 to 27 on responsibility of States for internationally wrongful acts[1] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[2] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

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[1] *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, pp. 169-211.

[2] *Ibid*., p. 169, para. 2.

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.

Commentary

(1) This text corresponds to article 20 on responsibility of States for internationally wrongful acts.[3] As the commentary explains,[4] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[5]

(2) Like States, international organizations perform several functions which would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a commission of inquiry set up by the United Nations Security Council.[6] Another example is consent by a State to the verification of the electoral process by an international

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[3] *Ibid*., p. 173, with the related commentary, at pp. 173-177.

[4] *Ibid*., p. 173, para. 1.

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

[6] For the requirement of consent see para. 6 of the Declaration annexed to General Assembly resolution 46/59 of 9 December 1991.

organization.[7] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[8]

(4) Consent dispensing with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility",[9] such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor. The requirement that consent does not affect compliance with peremptory norms is stated in draft article 23. This is a general provision covering all the circumstances precluding wrongfulness.

(5) Draft article 17 is based on article 20 on Responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an "international organization" with regard to the entity giving consent and the replacement of the term "State" with "international organization" with regard to the entity to which consent is given.

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 principles of international law embodied in the Charter of the United Nations.

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[7] 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.

[8] A reference to the invitation by the Government of Indonesia may be found in the 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.

[9] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 174, para. 4.

Commentary

(1) According to the commentary to the corresponding article (article 21) on Responsibility of States for internationally wrongful acts, that article considers "self-defence as an exception to the prohibition against the use of force".[10] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> "[...] the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter."[11]

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international organizations, although it is likely to be relevant only for a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a wider sense, with regard to situations other than those contemplated in Article 51 of the United Nations Charter. References to "self-defence" have been made also in relation to the "defence of the mission".[12] For instance, in relation to the United Nations

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[10] *Ibid*., p. 177, para. 1.

[11] *Ibid*., p. 180, para. 6.

[12] As was noted by the High-Level Panel on Threats, Challenges and Change, "the right to use force in self-defence [...] is widely understood to extend to the 'defence of the mission'". A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change (A/59/565), para. 213.

Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

> "'self-defence' could well include the defence of the safe areas and the civilian population in those areas."[13]

While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases which go well beyond those in which a State or an international organization responds to an armed attack by a State. At any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also the conditions under which an international organization may resort to force in response to an armed attack by a State pertain to the primary rules and need not be examined in the present context. One of those questions relates to the invocability of collective self-defence on the part of an international organization when one of its member States has become the object of an armed attack and the international organization is given the power to act in collective self-defence.[14]

(5) With regard to article 21 on Responsibility of States for internationally wrongful acts concerning self-defence, what is required in the present context is only to state that measures of self-defence should be regarded as lawful. In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations has been replaced here with that to "principles of international law embodied in the Charter of the

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

[14] A positive answer is implied in article 25 (a) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the member States of the Economic Community of West Africa (ECOWAS), which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof". The text of this provision is reproduced by A. Ayissi (ed.), Cooperation for Peace in West Africa. An Agenda for the 21st Century (UNIDIR, Geneva, 2001), p. 127.

United Nations". This wording already appears, for similar reasons, in article 52 of the Vienna Convention on the Law of Treaties,[15] concerning invalidity of treaties because of coercion, and in the corresponding article of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[16] The only other change with regard to the text of article 21 on Responsibility of States for internationally wrongful acts concerns the replacement of the term "State" with "international organization".

Article 19

Countermeasures

…*

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.

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* Article 19 concerns countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State as circumstances precluding wrongfulness. The text of this article will be drafted at a later stage, when the issues relating to countermeasures by an international organization will be examined in the context of the implementation of the responsibility of an international organization.

[15] United Nations, *Treaty Series*, vol. 1155, p. 331.

[16] Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on Responsibility of States for internationally wrongful acts as "an irresistible force or [...] an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation".[17] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. 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."[18]

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.

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[17] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 183, with the related commentary, at pp. 183-188.

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

(4) *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."[19]

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

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment 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."[20]

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.

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[19] Paragraph 3 of the judgement, made on 16 November 1976. The text is available at http://www.oas.org/tribadm/decisiones_decisions/judgments. 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.)

[20] 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.

(6) The text of draft article 20 differs from that of article 23 on Responsibility of States for internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

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:

(*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.

Commentary

(1) Article 24 on Responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "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".[21] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters for seeking shelter during a heavy storm,[22] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[23]

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[21] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 189, with the related commentary, pp. 189-194.

[22] *Ibid*., p. 190, para. 3.

[23] *Ibid*., p. 191, para. 4.

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity[24] is not always obvious. The commentary to article 24 notes that "general cases of emergencies [...] are more a matter of necessity than distress".[25]

(4) Article 24 on responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress and the act in question is not likely to create a comparable greater peril. These conditions appear to be equally applicable to international organizations.

(5) Draft article 21 is textually identical to the corresponding article on State responsibility, with the only changes due to the replacement of the term "State" once with the term "international organization" and twice with the term "organization".

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 of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

[24] Necessity is considered in the following draft article.

[25] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 193, para. 7.

(*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:

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

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

Commentary

(1) Conditions for the invocability of necessity by States have been listed in article 25 on responsibility of States for internationally wrongful acts.[26] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgement No. 2183 of the ILO Administrative Tribunal 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

[26] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 194, with the related commentary, pp. 194-206.

> 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."[27]

(3) 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 very nature, are patently inapplicable to international organizations."[28]

The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[29] the International Monetary Fund,[30] the World Intellectual Property Organization[31] and the World Bank.[32]

(4) While the conditions set by article 25 on Responsibility of States for internationally wrongful acts are applicable also with regard to international organizations, the scarcity of specific practice and the considerable risk that invocability of necessity entails for compliance

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

[28] 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).

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

[30] 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).

[31] 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).

[32] 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 (see A/CN.4/568, pp. 8-9).

with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This could be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity which appeared in the debates in the Sixth Committee[33] and also in the Commission: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations. According to some members of the Commission, although subparagraph (1) (a) only refers to the interests of the international community as a whole, an organization should nevertheless be entitled to invoke necessity for protecting an essential interest of its member States.

(5) There is no contradiction between the reference in subparagraph (1) (a) to the protection of an essential interest of the international community and the condition in subparagraph (1) (b) that the conduct in question should not impair an essential interest of the international community. The interests in question are not necessarily the same.

(6) In view of the solution adopted for subparagraph (1) (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of the international community, the essential interests of international organizations have not been added in subparagraph (1) (b) to those that should not be seriously impaired.

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[33] Statements clearly in favour of the invocability of necessity by international organizations 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).

(7) Apart from the change in subparagraph (1) (a) the text reproduces article 25 on Responsibility of States for internationally wrongful acts, with the replacement of the term "State" with the terms "international organization" or "organization" in the chapeau of both paragraphs.

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.

Commentary

(1) Chapter V of part one of the articles on Responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision - article 26 - 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".[34]

(2) The commentary to article 26 on Responsibility of States for internationally wrongful acts, provides that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[35] In its judgement in the *Case concerning armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the International Court of Justice found that the prohibition of genocide "assuredly" was a peremptory norm.[36]

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[34] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 206, with the related commentary, pp. 206-209.

[35] *Ibid*., p. 208, para. 5.

[36] Para. 64 of the judgement, available at http://www.icj-cij.org.

(3) Since peremptory norms also bind international organizations, it is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a "without prejudice" provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on Responsibility of States for internationally wrongful acts with the only replacement of the term "State" with "international organization".

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.

Commentary

(1) Article 27 on Responsibility of States for internationally wrongful acts makes two points.[37] The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,[38] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

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[37] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), p. 209, with the related commentary, pp. 209-211.

[38] This temporal element may have been emphasized because the International Court of Justice had said in the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* case 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.

(2) The second point is that the question of compensation is left unprejudiced. 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.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on Responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, draft article 24 is identical to the corresponding article on Responsibility of States for internationally wrongful acts.
