

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS*

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Fourth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur

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Multilateral instruments cited in the present report

	Source
Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947)	United Nations, <i>Treaty Series</i> , vol. 21, No. 324, p. 77.
North Atlantic Treaty (Washington, D.C., 4 April 1949)	<i>Ibid.</i> , vol. 34, No. 541, p. 243.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.

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Source

Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	<i>Ibid.</i> , vol. 729, No. 10485, p. 161.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Convention on international liability for damage caused by space objects (London, Moscow, Washington, D.C., 29 March 1972)	<i>Ibid.</i> , vol. 961, No. 13810, p. 187.
United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980)	<i>Ibid.</i> , vol. 1489, No. 25567, p. 58.
Sixth International Tin Agreement (Geneva, 26 June 1981)	<i>Ibid.</i> , vol. 1282, No. 21139, p. 205.
Constitutive Act of the African Union (Lomé, 11 July 2000)	<i>Ibid.</i> , vol. 2158, No. 37733, p. 3.
Treaty establishing the European Community (Rome, 25 March 1957), incorporating the amendments made by the Treaty of Nice of 26 February 2001	Consolidated version of the Treaty on European Union, <i>Official Journal of the European Communities</i> , No. C 325, vol. 45 (24 December 2002), p. 33.
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Introduction

1. At its fifty-fifth, fifty-sixth and fifty-seventh sessions, in 2003, 2004 and 2005, 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” (arts. 1–3), “Attribution of conduct to an international organization” (arts. 4–7), “Breach of an international obligation” (arts. 8–11) and “Responsibility of an international organization in connection with the act of a State or another international organization” (arts. 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.4/556.² More recent comments in writing were received, before the submission of the present report, from Belgium, INTERPOL, the Organization for the Prohibition of Chemical Weapons (OPCW) 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 chapter I of the present report, circumstances precluding wrongfulness are addressed, while in chapter II, responsibility of a State in connection with the act of an international organization is considered.

¹ The text of the draft articles heretofore provisionally adopted is reproduced in *Yearbook ... 2005*, vol. II (Part Two), pp. 40–42, para. 205.

² *Yearbook ... 2005*, vol. II (Part One), p. 27, Comments and observations received from Governments and international organizations.

CHAPTER I

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. Part one, chapter V, of those articles contains eight articles under the heading “Circumstances precluding wrongfulness”.³ Part one, chapter V, of the current draft articles is intended to have the same heading.

6. A few commentators noted that the articles on responsibility of States for internationally wrongful acts in part one, chapter V, group some heterogeneous circumstances and, in particular, do not make a distinction between causes of justification and excuses.⁴ If that distinction were made, 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,⁵ 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.⁶

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 responsibility of States for internationally wrongful acts, 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,⁷ although article 14 (a) of the current draft suggests that

⁶ *Ibid.*, pp. 72–73, para. (2).

⁷ The Russian Federation held that coercion by a State or an international organization could give rise to a circumstance precluding wrongfulness (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 12th meeting, para. 70*). The inclusion of duress as a circumstance precluding wrongfulness in the articles on responsibility of States for internationally wrongful acts had been advocated in the Commission by Mr. John Dugard (*Yearbook ... 1999*, vol. I, 2592nd meeting, p. 178, paras. 22–23). Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, 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

³ *Yearbook ... 2001*, vol. II (Part Two), pp. 27–28, para. 76.

⁴ Lowe, “Precluding wrongfulness or responsibility: a plea for excuses”, p. 405; Gattini, “Smoking/no smoking: some remarks on the current place of fault in the ILC draft articles on State responsibility”, p. 401; Johnstone, “The plea of ‘necessity’ in international legal discourse: humanitarian intervention and counter-terrorism”, pp. 349–356.

⁵ For instance, in the commentary concerning the introduction to chapter V (*Yearbook ... 2001*, vol. II (Part Two), p. 71, para. (2)).

a coerced State or international organization would be excused from international responsibility when it considers that:

The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization.⁸

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.⁹ 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 (art. 20) explains that this “reflects the basic international law principle of consent”.¹⁰ 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.¹¹

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 South-east Asian Nations (Brunei Darussalam, Malaysia, the Philippines, Singapore and Thailand), Norway and Switzerland.¹²

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 responsibility of States for internationally wrongful acts.¹³ 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 Office of Legal Affairs to the Senior Political Adviser to the Secretary-General, which stated that:

[T]he use of force in self-defence is an inherent right of United Nations forces exercised to preserve a collective and individual defence.¹⁴

It would indeed be odd if an international organization could not lawfully respond—not necessarily through the use of force¹⁵—if it were made the object of an armed attack.¹⁶

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

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.”

(*Official Records of the General Assembly* (see above), para. 52)

⁸ *Yearbook ... 2005*, vol. II (Part Two), p. 41, para. 205.

⁹ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

¹⁰ *Ibid.*, p. 72, para. (1).

¹¹ 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 Sapienza, “Considerazioni sulle attività di assistenza e monitoraggio elettorale dell’ONU”.

¹² A reference to the invitation by the Government of Indonesia, which had been made on 12 July 2005, may be found in paragraph (3) of the Council Joint Action 2005/643/CFSP of 9 September 2005 on the European Union Monitoring Mission in Aceh (Indonesia), *Official Journal of the European Union* (10 September 2005), No. L 234, p. 13.

¹³ *Yearbook ... 2001*, vol. II (Part Two), p. 72.

¹⁴ *United Nations Juridical Yearbook*, 1993 (United Nations publication, Sales No. E.97.V.13), p. 372, para. 6 of a memorandum dated 19 July 1993.

¹⁵ This point was made by Salmon, “Les circonstances excluant l’illicéité”, p. 169.

¹⁶ 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 Arsanjani, “Claims against international organizations: *quis custodiet ipsos custodes*”, p. 176; Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, p. 421; Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen*, pp. 264–265; and Zwanenburg, *Accountability of Peace Support Operations*, p. 16.

self-defence and hence did not engage its international responsibility.¹⁷ In relation to the United Nations Protection Force, a memorandum from the Legal Bureau of the Department of Foreign Affairs and International Trade of Canada held that:

“Self-defence” could very well include the defence of the safe areas and of the civilian population in those areas.¹⁸

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.¹⁹

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

A reasonable definition seems to have been established in the case of UNEF [United Nations Emergency Force], 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.²⁰

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

[T]he right to use force in self-defence ... is widely understood to extend to “defence of the mission”.²¹

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.²² No distinction is made according to the source of the armed attack.

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, it may be recalled that, in its judgement in the case concerning *Oil Platforms*, ICJ 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”.²³

19. Article 21 on responsibility of States for internationally wrongful acts 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”.²⁴ 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,²⁵ it may have been understood that member States would act through the organization or even that the organization would respond directly.²⁶

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 important to warrant the inclusion of a specific draft article.²⁷ This could be written following closely the text of article 21 on responsibility of States for internationally wrongful acts.²⁸ The draft article would then read:

²³ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 195, para. 72.

²⁴ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

²⁵ For example, the first paragraph of article 5 of the North Atlantic Treaty 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 and maintain the security of the North Atlantic area.”

Article 3 of the Inter-American Treaty of Reciprocal Assistance was written from a similar perspective.

²⁶ This approach is reflected in the language of texts such as Security Council resolution 770 (1992), para. 2, 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.

²⁷ While noting that “[c]ertain difficulties” would occur “if an attempt were made to apply certain circumstances precluding wrongfulness, such as self-defence, to international organizations” (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 12th meeting, para. 70), the Russian Federation did not rule out that self-defence could be one of those circumstances.

²⁸ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

¹⁷ This view was expressed by Salmon, “Les accords Spaak–U Thant du 20 février 1965”, p. 482.

¹⁸ Kirsch, “Canadian practice in international law: at the Department of Foreign Affairs in 1995–96”, p. 389.

¹⁹ S/5653 (11 April 1964), para. 16.

²⁰ *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 65, document A/3943 (9 October 1958), para. 179.

²¹ A more secure world—our shared responsibility: report of the High-level Panel on Threats, Challenges and Change (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 Cox, “Beyond self-defence: United Nations peacekeeping operations & the use of force”, and by Frulli, “Le operazioni di peacekeeping delle Nazioni Unite e l’uso della forza”, p. 347.

²² This aspect was stressed by Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, pp. 298–299, and by Klein, *op. cit.*, p. 421.

“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 responsibility of States for internationally wrongful acts, countermeasures are considered in article 22 and in part three, chapter II (arts. 49–54).²⁹ 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.³⁰

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.³¹ 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.

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, a text could be written, part of which would be placed within brackets. The provision could then be drafted on the lines of article 22 on responsibility of States for internationally wrongful acts.³² 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.³³ 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. Article 79, paragraph (1), of this Convention provides that:

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 responsibility of States for internationally wrongful acts.³⁴ There would be little reason for holding that the same conditions do not apply to international organizations.

28. Some instances of practice, although limited, may be found 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

²⁹ *Ibid.*, p. 30.

³⁰ *Ibid.*, p. 27.

³¹ See Klein, *op. cit.*, pp. 396–409.

³² *Yearbook ... 2001*, vol. II (Part Two), p. 27.

³³ See, for example, Tallon, “Article 79”, pp. 573–575.

³⁴ See footnote 32 above.

Executing Agency Agreement between UNDP and WHO stated that:

In 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 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.³⁵

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 Judgment No. 24, *Fernando Hernández de Agüero v. Secretary General of the Organization of American States*, the OAS Administrative Tribunal 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 fulfill the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature.³⁶

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

30. A similar approach was taken by the ILO Administrative Tribunal 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.³⁷

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. INTERPOL 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 over tax, and cannot therefore generate their own income. International organizations are dependent on the financial contributions of the participating countries. Should it happen that a significant number 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 proved 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.³⁸

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 responsibility of States for internationally wrongful acts³⁹ as a model for a provision concerning the invocability of *force majeure* by an international organization, the following text may be proposed:

"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 responsibility of States for internationally wrongful acts⁴⁰ 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

³⁵ UNDP and WHO Executing Agency Agreement (New York, 17 September 1992 and Geneva, 19 October 1992), United Nations, *Treaty Series*, vol. 1691, No. 1066, p. 325.

³⁶ Para. 3 of the judgement, made on 16 November 1976. The text is available at www.oas.org. In a letter dated 8 January 2003 to the Secretary of the Commission, 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." (*Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, sect. I.5, para. 3)

³⁷ Para. 3 of the judgement, made on 19 June 1985, available at www.ilo.org.

³⁸ Letter dated 9 February 2005 from the INTERPOL General Counsel to the Secretary of the Commission (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.2, p. 49). Footnotes have been omitted in the quotation.

³⁹ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

⁴⁰ *Ibid.*

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.⁴¹ 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 responsibility of States for internationally wrongful acts⁴² is suggested here:

“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.”

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 IMF,⁴³ that in the *Gabčíkovo-Nagymaros Project* case ICJ did not specifically refer to States when it said that:

[T]he 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.⁴⁴

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

[T]he quoted observation could be used to lend support to the proposition that necessity might preclude the wrongfulness of acts of international organizations.⁴⁵

⁴¹ Klein, *op. cit.*, pp. 415–416, gives as a hypothetical example the unauthorized crossing of a border by UNHCR agents in order to save some refugees under the protection of the organization from the effects of the bombing of a refugee camp.

⁴² See footnote 39 above.

⁴³ Letter dated 1 April 2005 from the IMF General Counsel to the Secretary of the Commission (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.3, p. 49).

⁴⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 40, para. 51.

⁴⁵ See footnote 43 above.

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.⁴⁶ 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”.⁴⁷ In his report on financing of the United Nations peacekeeping operations, the 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 necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates.⁴⁸

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 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.⁴⁹

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

[I]n 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 organisations 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.⁵⁰

⁴⁶ Klein, *op. cit.*, 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 (*Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 22nd meeting, para. 77).

⁴⁷ For the distinction between the two concepts, see Shrager, “UN peacekeeping operations: applicability of international humanitarian law and responsibility for operations-related damage”, pp. 410–411. The wide scope given to “military necessity” has raised some criticism. See Sands and Klein, *Bowett's Law of International Institutions*, p. 520, footnote 64.

⁴⁸ A/51/389, para. 13.

⁴⁹ *United Nations Juridical Yearbook, 1994* (United Nations publication, Sales No. E.00.V.8), p. 405.

⁵⁰ Para. 19 of the judgement, made on 3 February 2003. The Registry's translation from the original French is available at www.ilo.org.

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.⁵¹

39. Even if practice is scarce, as was noted by INTERPOL:

[N]ecessity does not pertain to those areas of international law that, by their nature, are patently inapplicable to international organizations.⁵²

The invocability of necessity by international organizations was also advocated by the European Commission,⁵³ IMF,⁵⁴ WIPO⁵⁵ and the World Bank.⁵⁶ Although comments made in the Sixth Committee in reply to a question raised by the International Law Commission were divided, the majority of the views expressed by States were in favour of including necessity among the circumstances precluding wrongfulness.⁵⁷ 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 responsibility of States for internationally wrongful acts requires that the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril".⁵⁸ In its judgment in the *Gabčíkovo-Nagymaros Project* case, ICJ 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".⁵⁹ In its commentary on article 25, 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.⁶⁰

41. As IMF observed:

It is unclear whether international organizations could claim "essential interests" similar to those of States, in order to invoke the defence of necessity.⁶¹

While a State may be considered as entitled to protect an essential interest that is either its own or that 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 a 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.⁶²

Similarly, IMF held that:

[T]he application of necessity to an international organization would also need to be related to the organization's purposes and functions.⁶³

As was pointed out by the European Commission:

[A]n 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.⁶⁴

43. The foregoing remarks lead to the consideration that international organizations may invoke necessity only if the grave peril⁶⁵ affects an interest that the organization

⁵¹ In a letter of 31 January 2006 to the Secretary of the Commission, INTERPOL "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 responsibility of States for internationally wrongful acts was not met" (A/CN.4/568 and Add.1, sect. J.3, para. 6, reproduced in the present volume).

⁵² Letter dated 9 February 2005 from the INTERPOL General Counsel to the Secretary of the Commission (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.2, p. 49).

⁵³ Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.1, p. 48).

⁵⁴ Letter dated 1 April 2005 from IMF to the Legal Counsel of the United Nations (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.3, p. 49).

⁵⁵ Letter dated 19 January 2005 from the WIPO Legal Counsel to the Legal Counsel of the United Nations (see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.5, p. 50).

⁵⁶ Letter dated 31 January 2006 from the Senior Vice President and General Counsel of the World Bank to the Secretary of the Commission (see A/CN.4/568 and Add.1, sect. K.11, para. 6, reproduced in the present volume).

⁵⁷ Statements clearly in favour were made by France (*Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 22nd meeting, para. 12), Austria (*ibid.*, para. 23), Denmark, on behalf of the Nordic countries, Finland, Iceland, Norway and Sweden (*ibid.*, para. 65), Belgium (*ibid.*, para. 76), the Russian Federation (*ibid.*, 23rd meeting, para. 23) and Cuba (*ibid.*, para. 25). A tentatively favourable position was taken also by Spain (*ibid.*, 22nd meeting, para. 49). The contrary view was expressed in statements by Germany (*ibid.*, 21st meeting, para. 22), China (*ibid.*, para. 42), Poland (*ibid.*, 22nd meeting, para. 2), Belarus (*ibid.*, para. 45) and Greece (*ibid.*, 23rd meeting, para. 43). Tentatively negative positions were taken by Singapore (*ibid.*, 22nd meeting, para. 57) and New Zealand (*ibid.*, 23rd meeting, para. 10).

⁵⁸ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

⁵⁹ *I.C.J. Reports 1997* (see footnote 44 above), p. 40, para. 52. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004*, p. 195, para. 140, the Court referred again to the requirement of an "essential interest" by quoting article 25, paragraph 1 (a), of the articles on State responsibility.

⁶⁰ *Yearbook ... 2001*, vol. II (Part Two), p. 83, para. (15).

⁶¹ See footnote 54 above.

⁶² See footnote 56 above.

⁶³ See footnote 54 above.

⁶⁴ See footnote 53 above.

⁶⁵ The delegate of Singapore "wondered whether there was a common understanding of what constituted such a peril to an international organization" (*Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 22nd meeting, para. 57). It could be observed that the peril in question would have to affect the essential interest, but not necessarily the organization.

has the function to protect. Reference only to the constituent instrument may be too restrictive. As ICJ pointed out in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

The powers conferred on international organizations are normally the 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 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.⁶⁶

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 also seem to apply 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 2,⁶⁷ are States or at least include States. As, according to article 25 on responsibility of States for internationally wrongful acts,⁶⁸ 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 responsibility of States for internationally wrongful acts, 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”.⁶⁹ 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 responsibility of States for internationally wrongful acts.⁷⁰ 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:

“(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. Part one, chapter V, of the articles on responsibility of States for internationally wrongful acts contains a “without prejudice”⁷¹ 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”.⁷² 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,⁷³ 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 of the United Nations. 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.⁷⁴

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 responsibility of States for internationally

⁷¹ *Ibid.*, art. 27.

⁷² *Ibid.*, art. 26.

⁷³ The view that “consensual intervention can preclude the operation of Article 26” on responsibility of States for internationally wrongful acts was expressed by Abass, “Consent precluding State responsibility: a critical analysis”, p. 224.

⁷⁴ 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”. 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.

⁶⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 79, para. 25.

⁶⁷ *Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 205.

⁶⁸ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

wrongful acts⁷⁵ could be reproduced here by simply inserting the term “international organization” instead of “State”:

“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 responsibility of States for internationally wrongful acts could hardly be contested and certainly also applies 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.⁷⁶

Although this text emphasizes the element of time,⁷⁷ 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.

⁷⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

⁷⁶ *Ibid.*

⁷⁷ This temporal element may have been emphasized because ICJ in its judgment in the *Gabčíkovo-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* (see footnote 43 above), p. 63, para. 101).

51. The question of compensation, which is referred to under article 27 (b), is left unprejudiced in the articles on responsibility of States for internationally wrongful acts 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.⁷⁸ 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 responsibility of States for internationally wrongful acts,⁷⁹ 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:

“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.”

⁷⁸ The need to distinguish between justification and excuses for this purpose was upheld by Lowe, *loc. cit.*, p. 410; and Johnstone, *loc. cit.*, p. 354.

⁷⁹ See footnote 75 above.

CHAPTER II

Responsibility of a State in connection with the act of an international organization

A. General remarks

53. According to article 1, paragraph 2, of the current draft articles:

The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.⁸⁰

As the related commentary explains,⁸¹ the inclusion of this subject within the scope of the current draft articles is intended to fill a gap that was deliberately left in the articles on responsibility of States for internationally wrongful acts. Article 57 of the latter articles stated that they were “without prejudice to any question of the responsibility under international law of an international

organization, or of any State for the conduct of an international organization”.⁸²

54. Not all the questions that may affect the responsibility of a State in connection with the conduct of an international organization should be examined in the present context. For instance, questions relating to attribution of conduct to a State have already been covered in the articles on responsibility of States for internationally wrongful acts. It would clearly be preferable not to consider them here again. Thus, if an issue arises as to whether a certain conduct is to be attributed to a State or to an international organization or to both, the current articles will provide criteria only for settling the question as to whether that conduct is to be attributed to an international organization, while the articles on State responsibility

⁸⁰ *Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 205.

⁸¹ *Yearbook ... 2003*, vol. II (Part Two), p. 19, para. (7).

⁸² *Yearbook ... 2001*, vol. II (Part Two), p. 30.

will say whether that same conduct is to be attributed or not to a State.

55. The pattern set by the articles on responsibility of States for internationally wrongful acts does not provide a chapter in which one could appropriately include questions concerning State responsibility in connection with the act of an international organization. In the current draft a new chapter has to be envisaged for this purpose. The placing of this chapter in part one of the draft would have the advantage of addressing those questions in the same part that already deals with similar issues, relating to the reverse case of the responsibility of an international organization in connection with the act of a State.⁸³ If the option here suggested is taken, the heading of part one, which currently reads, “The internationally wrongful act of an international organization” may have to be modified as a consequence of including some provisions concerning the responsibility of States in that part.

56. Most of the questions to be considered in the new chapter relate to cases in which the responsibility of a State may arise in connection with a wrongful act of an international organization. However, in certain cases the act of the organization is not necessarily wrongful. This also occurs with regard to matters considered in chapter IV of the current draft articles, which also covers the case of a State or an international organization coercing another entity into committing what would be, but for the coercion, an internationally wrongful act.

57. With regard to questions of the responsibility, if any, of States as members of an international organization for the wrongful act of the latter, the conclusions to be reached in relation to States would probably apply also to entities other than States that may also be members of the same organization. Should the draft articles to be adopted in this regard cover the latter members as well, the new chapter would extend beyond questions of responsibility of a State in connection with the act of an international organization. This could be done by referring to “members” instead of “States” in the relevant provisions; however, the current draft cannot also deal with the question of responsibility of entities other than States or international organizations. Insofar as members of an international organization other than States are themselves international organizations, another option could be to refer only to States in all the provisions of the new chapter and to write some specific, albeit parallel, provisions with regard to international organizations as members of other international organizations. The latter provisions could then be included in chapter IV. The current title of that chapter, which reads, “Responsibility of an international organization in connection with the act of a State or another international organization”,⁸⁴ is wide enough to cover the said provisions as well.

B. Aid or assistance, direction and control, and coercion by a State in the commission of an internationally wrongful act of an international organization

58. Part one, chapter IV, of the articles on responsibility of States for internationally wrongful acts⁸⁵ only covers

cases of States that aid or assist another State in the commission of an internationally wrongful act, or direct and control another State in the commission of such an act, or else coerce another State to commit an act that would, but for the coercion, be an internationally wrongful act. It would be difficult to find reasons for ruling out that States may act similarly with regard to international organizations. It would likewise be difficult to assume that different rules should apply when, for instance, on the one hand, a State assists another State in the commission of an internationally wrongful act, such as the unlawful use of force, and, on the other hand, a State assists an international organization in doing the same.⁸⁶

59. One could apply by analogy to the case of assistance given by a State to an international organization in the commission of an internationally wrongful act a rule which is in substance identical to the one that was expressed in chapter IV on responsibility of States for internationally wrongful acts with regard to the relations between States. The same goes for all the other cases mentioned in that chapter. However, it seems preferable to include in the current draft certain rules that are specifically designed to cover the case in which a State assists an organization in the commission of an internationally wrongful act and the other cases envisaged in chapter IV on State responsibility. This solution, although largely repetitive, would contribute to clarity. Moreover, if the draft includes a chapter on responsibility of a State in connection with the act of an international organization, it would be odd if no mention were made of the case of aid or assistance, or of direction and control by a State in the commission of an internationally wrongful act by an international organization. Nor would the reason for omitting the case of coercion by a State on an organization be easily understood.

60. In its report to the General Assembly in 2005,⁸⁷ the Commission raised the question of whether provisions on aid or assistance, direction and control, and coercion by a State should be included in the current draft. The great majority of the comments expressed by States in the Sixth Committee gave an affirmative reply to this question.⁸⁸

⁸⁶ Several authors held, sometimes implicitly, that similar rules should apply to the relations between a State and another State and to those between a State and an international organization. Amrallah, “The international responsibility of the United Nations for activities carried out by U.N. peace-keeping forces”, p. 69, held that “the host state may bear international responsibility—in addition to the U.N. responsibility—for unlawful acts of the U.N. force if it commits an act of complicity in the aforesaid unlawful act, i.e., to instigate or facilitate its committal”. Klein, *op. cit.*, pp. 468–469, referred to the case of a State putting its own territory at the disposal of an international organization in order to allow that organization to commit a breach of an international obligation. Sands and Klein, *op. cit.*, p. 524, and Sarooshi, *op. cit.*, pp. 63 and 104, considered the case of aid or assistance by a State in the commission of an internationally wrongful act by an international organization. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, p. 171, referred to cases in which “a single member state has in fact complete, or almost complete, control over the activities of the organization”.

⁸⁷ *Yearbook ... 2005*, vol. II (Part Two), p. 13, para. 26.

⁸⁸ Statements by China (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting, para. 52), Austria (*ibid.*, para. 64), the Republic of Korea (*ibid.*, para. 86), Italy (*ibid.*, 12th meeting, para. 4), Belarus (*ibid.*, paras. 49–50), the Russian Federation (*ibid.*, para. 71), Romania (*ibid.*, para. 77), Hungary (*ibid.*, 13th meeting, para. 8), Denmark, on behalf of the Nordic countries, Finland, Iceland, Norway and Sweden (*ibid.*, para. 20), the Libyan Arab Jamahiriya (*ibid.*, 19th meeting, para. 11) and Algeria (*ibid.*, 20th meeting, para. 60).

⁸³ *Yearbook ... 2005*, vol. II (Part Two), p. 40–42, para. 205.

⁸⁴ *Ibid.*

⁸⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

The few States that were not favourable to the inclusion of provisions on these issues, accepted the idea of a “reference clause” to the corresponding provisions on responsibility of States for internationally wrongful acts⁸⁹ or suggested a savings clause, with a reference in the commentary.⁹⁰ While INTERPOL held that the current draft would not be “the right place” to deal with the case of a State “aiding and assisting or directing and controlling an international organization in the commission of an internationally wrongful act”,⁹¹ and the European Commission considered that the “existing rules on State responsibility may well be applied by analogy when a State does not aid or assist another State but an international organization to commit an international wrongful act”.⁹² OPCW and WHO expressed a view favourable to including provisions that are parallel to those contained in the articles on State responsibility.⁹³

61. Some criticism of a general nature has been voiced with regard to articles 16–18 on responsibility of States for internationally wrongful acts and to the parallel provisions of the current draft which consider aid or assistance, direction and control, and coercion on the part of an international organization.⁹⁴ Without going into the merits of that criticism, the need for coherence both with the articles on State responsibility and with those already included in the current draft suggests that, at the present stage, the wording of the model articles be modified only to the extent that is necessary to identify the cases that the proposed draft articles are intended to cover.

62. The State that aids or assists, or directs and controls, or coerces an international organization may or may not be a member State. Should it be a member State, the relevant conduct could not simply consist in participating in the decision-making process of the organization according to the pertinent rules of the organization. The influence which may amount to aid or assistance, direction and control, or coercion, has to be used by the State as a legal entity that is separate from the organization. This is not to say that, when acting within an organ of an international organization, a State may not commit an internationally wrongful act, or that, because of its conduct as a member, a State could not incur responsibility for an internationally wrongful act of the organization. The latter question will be considered later in the present report.⁹⁵

⁸⁹ Spain stated that: “It might be sufficient to include a reference clause that would ensure the application, *mutatis mutandis*, of the rules already established under the articles on Responsibility of States for Internationally Wrongful Acts.” (*Ibid.* 13th meeting, para. 53)

⁹⁰ According to the statement made by France, “[a] saving clause accompanied by a commentary should be sufficient” (*ibid.*, 11th meeting, para. 80). Israel held that “it might be appropriate to make some reference ... in the commentary” (*ibid.*, 16th meeting, para. 57).

⁹¹ See footnote 52 above.

⁹² A.CN.4/568 and Add.1, sect. L.1 (reproduced in the present volume at p. 125), letter of 3 February 2006 from the Director General of the Legal Service of the European Commission to the Legal Counsel of the United Nations.

⁹³ *Ibid.*, pp. 127–128, letters of 30 January 2006 from the OPCW Legal Adviser, and 21 February 2006 from the WHO Legal Counsel to the Legal Counsel of the United Nations.

⁹⁴ Statement by Israel (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 16th meeting, paras. 55–56). The criticism concerned the appropriateness “to limit a State’s responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State”.

⁹⁵ Sect. D below, p. 119.

63. Given the fact that, with regard to aid or assistance, direction and control, and coercion, there is no reason for distinguishing between the relations between a State and an international organization, on the one hand, and the relations between States, on the other, the articles to be drafted should closely follow the text of articles 16–18 on responsibility of States for internationally wrongful acts. The headings need to be slightly modified in order to distinguish them from those which have been used in articles 12–14 of the current draft.⁹⁶ Article 19 on State responsibility contains a savings clause⁹⁷ which is not necessary to replicate in the present context. The following texts are suggested:

“Article 25. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

“A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

“(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) the act would be internationally wrongful if committed by that State.

“Article 26. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

“A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

“(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) the act would be internationally wrongful if committed by that State.

“Article 27. Coercion of an international organization by a State

“A State which coerces an international organization to commit an act is internationally responsible for that act if:

“(a) the act would, but for the coercion, be an internationally wrongful act of that international organization; and

“(b) that State does so with knowledge of the circumstances of the act.”

⁹⁶ *Yearbook ... 2005*, vol. II (Part Two), p. 41, para. 205.

⁹⁷ Article 19 on the responsibility of States for internationally wrongful acts reads as follows: “This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State”. (*Yearbook ... 2001*, vol. II (Part Two), p. 27)

C. Use by a State that is a member of an international organization of the separate personality of that organization

64. Article 15 of the current draft concerns the case in which an international organization takes a decision binding its members or makes a recommendation or gives an authorization to members for the commission of an act that implies a circumvention, on the part of that organization, of one of its international obligations.⁹⁸ In this type of case the organization refrains from acting directly. It apparently does not infringe any of its obligations, but achieves the same result, taking advantage of the separate legal personality of its members for avoiding compliance. While article 15 elicited a variety of comments in the Sixth Committee,⁹⁹ most, if not all, of these comments did not query the basic assumption that an international organization may incur international responsibility because of what it requires member States to do.

65. In the Sixth Committee the delegation of Ireland noted that article 15 “did not cover the situation where the act of the member State would not have incurred international responsibility if committed by the international organization”.¹⁰⁰ The delegation of Switzerland added that “States should not be able to hide behind the conduct of the international organization”.¹⁰¹ While chapter IV of the draft was not the appropriate place for considering the problem from the angle of the responsibility of member States, it is indeed reasonable to also envisage in the draft the reverse situation in which a State may incur international responsibility because, in order to avoid compliance with one of its international obligations, it requires an international organization to act in its stead. In the latter case the entity that makes use of the separate legal personality of another entity is a State.

66. The case examined in article 15 and the reverse case now under consideration acquire practical importance when the entity which is required to act could do so without committing a breach of one of its international obligations and its conduct would therefore be lawful. One example could be that of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty.

67. The role that a member State may have within the organs of an international organization would not justify attribution of responsibility to the State for the conduct of the organization: this would be tantamount to denying the separate legal personality of the organization. Should the obligation also cover conduct that the State may take as the member of an international organization, responsibility, if any, of the State in this context would be for breach of an international obligation through its own conduct, not for what the organization did. Example can be taken of the obligation of not acquiring nuclear weapons that non-nuclear States have under the Treaty on the Non-Proliferation of Nuclear Weapons. This type of obligation would then appear to include the prohibition for a State party to the Treaty to contribute to the acquisition of nuclear weapons by an international organization of which the State was a member. Should, on the contrary, the obligation under a treaty be regarded as not covering conduct that States parties take as members of an organization, the conduct of a State within the organization would not as such cause responsibility of the State to arise. The responsibility of a State party to the treaty could be asserted only if it was held responsible for achieving, through the organization, a result that the treaty precludes.

68. While the case envisaged in article 15 and the reverse case under discussion here bear some similarities, it would be difficult to give weight to the same factors that article 15 considers relevant when examining the question of the international responsibility of a State for the conduct of an international organization. For instance, it is not inconceivable, but it is unlikely, that a State be entitled to take a decision binding an organization or even to influence the conduct of the organization through a recommendation. The most likely case that may be relevant under the present perspective is that of a State acquiring certain international obligations with regard to some of its functions and then transferring those functions to an international organization. To return to the example of the non-proliferation of nuclear weapons, States that are bound by the Treaty on the Non-Proliferation of Nuclear Weapons could be held responsible if they established an international organization that acquired or developed nuclear weapons.

69. The European Court of Human Rights considered in some judgements the question as to whether States that are members of an international organization incurred responsibility for a breach of an obligation under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) when those States had transferred certain sovereign functions to that organization. In *Waite and Kennedy v. Germany* the Court examined the question as to whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency in relation to claims concerning employment. The Court said that:

[W]here States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby

⁹⁸ *Yearbook ... 2005*, vol. II (Part Two), pp. 41–42, para. 205.

⁹⁹ Statements by Ireland (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting, paras. 33–37), China (*ibid.*, para. 51), Austria (*ibid.*, paras. 61–62), France (*ibid.*, para. 79), Japan (*ibid.*, 12th meeting, para. 7), the Netherlands (*ibid.*, paras. 15–18), the United States (*ibid.*, paras. 26–28), Portugal (*ibid.*, para. 35), Belarus (*ibid.*, para. 50), the Russian Federation (*ibid.*, paras. 68–69), Guatemala (*ibid.*, para. 105), Hungary (*ibid.*, 13th meeting, para. 7), Denmark, on behalf of the Nordic countries, Finland, Iceland, Norway and Sweden (*ibid.*, para. 19), Greece (*ibid.*, paras. 26–28), Germany (*ibid.*, para. 34), Switzerland (*ibid.*, para. 45), Spain (*ibid.*, para. 52), Poland (*ibid.*, para. 59) and India (*ibid.*, 18th meeting, para. 60). Comments on this question were also expressed by the observer for the European Commission (*ibid.*, 12th meeting, paras. 13–14).

¹⁰⁰ *Ibid.*, 11th meeting, para. 33.

¹⁰¹ *Ibid.*, 13th meeting, para. 45.

absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.¹⁰²

The Court nevertheless concluded that, although access to German courts was precluded by the immunity given to the relevant organization, “the essence” of the applicants’ “right to a court” under the Convention was not impaired, in view of the “alternative means of legal process available” to them.¹⁰³

70. In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*, the European Court of Human Rights took a similar approach, but made the criterion of equivalence more general. The application related to a State measure which had been taken for implementing an obligation stemming from a regulation of the European Community. The Court reiterated its view that a State could not free itself from its obligations under the European Convention on Human Rights by transferring functions to an international organization, because:

absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards ... The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.¹⁰⁴

The Court held that what was required from States parties to the Convention was that the relevant organization protected “fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”.¹⁰⁵ If, as in the case in hand, an equivalent protection was granted, the State did not incur responsibility.

71. It is noteworthy that the Commission of the European Communities had taken the same view before the European Court of Human Rights when it said in its written observations in *Senator Lines GmbH v. Fifteen member States of the European Union* that:

While it may be true as a matter of principle that signatories to the Convention may not evade their obligations by transferring powers to independent international organizations, it does not follow that they can be held liable for the actions of those organizations in individual cases. In order to comply with their obligations under the Convention it is sufficient that they ensure the institution of an equivalent level of protection of fundamental rights within the organization in question.¹⁰⁶

¹⁰² European Court of Human Rights, *Reports of Judgments and Decisions* (1999–I), *Waite and Kennedy v. Germany*, judgment of 18 February 1999 (Strasbourg, Council of Europe), p. 410, para. 67. A similar passage is contained in the judgment of the same day in *Beer and Regan v. Germany*, *European Human Rights Reports*, vol. 33 (London, Sweet & Maxwell, 2001), p. 78, para. 57. A more succinct version is in the judgment, again of the same day, in *Matthews v. the United Kingdom*, *Reports of Judgments ...* (see above), p. 265, para. 32. The passage quoted in the text reflects the view that the European Commission of Human Rights had expressed in its decision of 9 February 1990 in *M. & Co. v. the Federal Republic of Germany*, *Decisions and Reports*, vol. 64, p. 145.

¹⁰³ *Reports of Judgments ...* (see footnote 102 above), p. 412, para. 73.

¹⁰⁴ European Court of Human Rights, judgment of 30 June 2005, *Reports of Judgments and Decisions* (2005–VI) (Strasbourg, Council of Europe), pp. 157–158, para. 154.

¹⁰⁵ *Ibid.*, p. 158, para. 155.

¹⁰⁶ Observations dated 1 March 2001 (JURM (2000) 4030), para. 25. The Court did not address the question in its judgement in the case.

72. There is a significant body of literature which advocates the responsibility of member States when they “abuse the separate personality in order to commit illegal acts, or in order to evade their legal obligations”.¹⁰⁷ As one author put it: “States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually.”¹⁰⁸ The emphasis is on the case of States establishing an international organization and entrusting it with functions in respect of which they are bound by obligations under international law while the organization is not so bound.¹⁰⁹ As the case of avoidance of compliance with international obligations by transferring functions to an international organization is the same as the one that was envisaged in the instances of practice referred to in the previous paragraphs, it seems preferable to write a draft article that addresses that case. This option would not rule out other cases being treated in a similar way, by resorting to analogy.

73. In draft article 15 the verb “to circumvent” is used in order to describe the case in which an international organization incurs responsibility for avoiding compliance with one of its international obligations by adopting “a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization”.¹¹⁰ The term “circumvention” received some criticism in the Sixth Committee,¹¹¹ mainly because it appeared to be unclear, although the commentary attempted to explain that term, indicating in particular that no “specific intention of circumventing” was required.¹¹² In view of this criticism, it would be preferable to use different wording in the present context. A change of terminology does not raise

¹⁰⁷ Hirsch, *op. cit.*, p. 195.

¹⁰⁸ Zemanek, “The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties: réponses et observations des membres de la Commission”, p. 329.

¹⁰⁹ Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der völkerrechtsgemeinschaft*, p. 269, linked the responsibility of member States of an international organization to circumvention of their obligations through the use of the separate legal personality of that organization. Seidl-Hohenveldern, *Corporations in and under International Law*, p. 121, maintained that: “Just as a State cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner States of a common inter-State enterprise are jointly and severally responsible in international law for the acts of the enterprise”. Similar views were expressed with regard to the relations between member States and international organizations by Di Blase, “Sulla responsabilità internazionale per attività dell’ONU”, pp. 271–276; Sands and Klein, *op. cit.*, p. 524; and Sarooshi, *op. cit.*, p. 64. After examining the dictum of the European Court of Human Rights in *Waite and Kennedy v. Germany* mentioned above (para. 69), Brownlie, “The responsibility of States for the acts of international organizations”, p. 361, noted that: “Whilst the context is that of human rights, the principle invoked would seem to be general in its application.”

¹¹⁰ *Yearbook ... 2005*, vol. II (Part Two), pp. 41–42, para. 205. The text refers to paragraph 1; the same verb was used in paragraph 2, which considers the case in which an international organization authorizes a member, or recommends to a member, “to commit an act that would be internationally wrongful if committed” by that organization.

¹¹¹ See statements by the observer for the European Commission (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 12th meeting, paras. 13–14), the Netherlands (*ibid.*, paras. 15–18), the United States (*ibid.*, paras. 26–28), Guatemala (*ibid.*, para. 105), Hungary (*ibid.*, 13th meeting, para. 7) and Greece (*ibid.*, paras. 26–28).

¹¹² *Yearbook ... 2005*, vol. II (Part Two), p. 47, para. 206, para. (4) of the commentary to article 15.

questions of coherency in relation to article 15 because, as has been noted above, the cases in which an international organization would incur responsibility according to that article are different from those that are relevant for the draft article under discussion here.

74. While responsibility of members of an international organization may concern entities other than States, for the reasons expressed in paragraph 57 above, the draft that is here proposed only refers to States. Practice and literature point to the requirement that the act that implies avoidance of the international obligation should actually occur. Although, as has been noted above, the practical relevance of this case depends on the fact that the international organization is not bound by the obligation, this is certainly not a requirement and it may be preferable to say as much, as has been done in draft article 15, paragraph 3. The suggested heading attempts to follow the style of those of the previous draft articles in the chapter. The following text is therefore suggested:

“Article 28. Use by a State that is a member of an international organization of the separate personality of that organization

“1. A State that is a member of an international organization incurs international responsibility if:

“(a) it avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and

“(b) the organization commits an act that, if taken by that State, would have implied non-compliance with that obligation.

“2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.”

D. Question of the responsibility of members of an international organization when that organization is responsible

75. Two affairs have highlighted the question of whether States that are members of an international organization incur responsibility because they are members of an organization which commits an internationally wrongful act. Both affairs led to a number of judgements by municipal courts, one of them also to some arbitral awards. Although in neither instance was the focus on whether member States were responsible under international law, several remarks were made on this question; moreover, certain considerations of a general nature that were made in those decisions also appear to be relevant to issues of international responsibility.

76. The first case had its origin in a request for arbitration which was made by Westland Helicopters Ltd. against the Arab Organization for Industrialization (AOI) and the four States members of that organization (Egypt, Qatar, Saudi Arabia and the United Arab Emirates). The request was based on an arbitration clause in a contract that had been concluded between the company and AOI. The arbitration tribunal examined in an interim award the

question of its own competence and that of the liability of the four member States for the acts of the organization. This award deserves relatively long quotations as it tried to make a case for the responsibility of member States. The tribunal’s main points in this regard were the following:

A widespread theory, deriving moreover from Roman law (“*Si quid universitati debetur, singulis non debetur; nec quod debet universitas singuli debent*”) Dig. 3, 4, 7, 1), excludes cumulative liability of a legal person and of the individuals which constitute it, these latter being party to none of the legal relations of the legal person. This notion, which could be deemed “strict”, cannot however be applied in the present case ... [T]he designation of an organization as “legal person” and the attribution of an independent existence do not provide any basis for a conclusion as to whether or not those who compose it are bound by obligations undertaken by it.¹¹³

In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability. This rule flows from general principles of law and from good faith.¹¹⁴

[T]he four States, in forming the AOI, did not intend wholly to disappear behind it, but rather to participate in the AOI as “members with liability”.¹¹⁵

[O]ne must admit that in reality, in the circumstances of this case, the AOI is one with the States. At the same time as establishing the AOI, the Treaty set up the Higher Committee (“joint Ministerial Higher Committee”) composed of the competent Ministers of the four States, charged with the responsibility not only to approve the Basic Statute, and to set up a provisional Directorate, but furthermore to direct the general policy of the AOI, and Article 23 of the Basic Statute describes this Committee as the “dominating authority”. There could be no clearer demonstration of this identification of the States with the AOI, especially since Article 56 of the Statute specifies that in case of disagreement within the Committee, reference should be made to the Kings, Princes and Presidents of the States.¹¹⁶

After referring to the circumstances in which the agreement between AOI and the company had been concluded and noting that the member States “could not help but be aware of the implications of their actions”,¹¹⁷ the arbitral tribunal concluded:

If it is true that the four States are bound by the obligations entered into by the AOI, these four States are equally bound by the arbitration clause concluded by the AOI, since the obligations under substantive law cannot be dissociated from those which exist on the procedural level.¹¹⁸

The tribunal made a brief reference to international law when it put forward some “considerations of equity”:

Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment (International Court of Justice, 5 February 1970, *Barcelona Traction*).¹¹⁹

77. The arbitral award was set aside by the Court of Justice of Geneva at the request of Egypt and in relation to

¹¹³ *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, interim award of 5 March 1984, quoted from the English translation published in *International Law Reports*, vol. 80 (1989), p. 612.

¹¹⁴ *Ibid.*, p. 613.

¹¹⁵ *Ibid.*, p. 614.

¹¹⁶ *Ibid.*, pp. 614–615.

¹¹⁷ *Ibid.*, p. 615.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, p. 616.

that State only.¹²⁰ In finding that the arbitral tribunal was incompetent, the Court dissented from

the conclusion of the Arbitral Tribunal that the AOI is in some way a general partnership (*société en nom collectif*) which the four States did not intend to hide behind but agreed to take part in as “members with liability” (*membres responsables*). It is not clear what legal grounds the Arbitral Tribunal has for accepting that the AOI is a legal entity under international law and then assimilating it to a corporation under private law, recognized by national legislations and subject to the rules of these legislations.¹²¹

Westland Helicopters unsuccessfully appealed against this judgement to the Federal Supreme Court of Switzerland. The Court confirmed that the arbitration clause did not bind Egypt and said:

The predominant role played by [the member] States and the fact that the supreme authority of the AOI is a Higher Committee composed of ministers cannot undermine the independence and personality of the Organization, nor lead to the conclusion that when organs of the AOI deal with third parties they *ipso facto* bind the founding States.

... The fact that the AOI's status derives from public international law does not cause any attenuation of its independence *vis-à-vis* its founding States.¹²²

78. A new arbitration panel considered the issue of the liability of AOI and the three member States which had not challenged the interim award. The tribunal found that:

The States' responsibility in each individual case can be assessed only on the basis of the acts constituting the joint organization when construed also in accordance with the behaviour of the founder States.¹²³

The tribunal concluded that member States had not intended to exclude their liability and that the special circumstances of the case “invited the trust of third parties contracting with the Organization as to its ability to cope with its commitments because of the constant support of the member states”.¹²⁴ However, it appears that the final award was given only against AOI.¹²⁵

79. The second affair which caused an in-depth discussion of the responsibility of member States originated in the failure of the International Tin Council (ITC) to fulfil its obligations under several contracts. In one of the cases before the English High Court, the plaintiffs sued the United Kingdom Department of Trade and Industry, 22 foreign States and the European Economic Community (EEC).¹²⁶ After referring to the interim arbitral

award examined above and to an EEC regulation, Justice Staughton said:

There is thus material on which one could conclude that, both in the domestic law of some countries and in public international law, the fact that an association is a legal person is not inconsistent with its members being liable to creditors for its obligations.¹²⁷

However, he added:

As it is, I reach no conclusion as to whether legal personality of an association is or is not, in international law, inconsistent with the members being liable for its obligations to third parties.¹²⁸

He concluded instead that, according to English law, members were not liable. One of the arguments ran as follows:

It seems to me that the view of Parliament ... was that in international law legal personality necessarily meant that the members of an organization were not liable for its obligations.¹²⁹

In a parallel case in the High Court, Justice Millett took the same approach and held that, if the member States were “to be criticised, it is not for their failure to pay the creditors directly, but for their failure to put the ITC in funds to discharge the obligations they allowed it to incur”.¹³⁰

80. The two judgements given in the High Court were the subject of appeals, which were decided jointly. In the Court of Appeal one of the majority opinions was Lord Kerr's. He noted that the legal problems arising in the case would require an “analysis on the plane of public international law and of the relationship between international law and the domestic law” of England.¹³¹ On the first aspect he said that:

The preponderant view of the relatively few international jurists to whose writings we were referred, since we were told that there are no others, appears to be in favour of international organisations being treated in international law as “mixed” entities, rather than bodies corporate. But their views, however learned, are based on their personal opinions; and in many cases they are expressed with a degree of understandable uncertainty. As yet there is clearly no settled jurisprudence about these aspects of international organisations.

... There is no other source from which the position in international law can be deduced with any confidence.¹³²

Lord Kerr held that:

[I]t may well be that if an international association were to default upon an obligation to a state or association of states or to another international organisation, then the regime of secondary liability on the part of its members would apply as a matter of international law. But it does not by any means follow that any similar acceptance of obligations by the members can be assumed within the framework of municipal systems of law.¹³³

¹²⁰ *Ibid.*, judgment of 23 October 1987, p. 622.

¹²¹ *Ibid.*, p. 643.

¹²² *Ibid.*, judgment of 19 July 1988, p. 658. The original French texts of the judgements of the Court of Justice of Geneva and of the Swiss Federal Court can be found in *Revue de l'arbitrage*, No. 3 (July–September 1989), pp. 515 and 525, respectively.

¹²³ Para. 56 of the award of 21 July 1991, as quoted by Higgins, “The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties: provisional report”, p. 393.

¹²⁴ *Ibid.*, pp. 393–394.

¹²⁵ The text of the final award, which was given on 28 June 1993, was not published. The award was referred to in the judgement of the High Court, England, of 3 August 1994, *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, *International Law Reports*, vol. 108 (1998), p. 567.

¹²⁶ *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others* (24 June 1987), *International Law Reports*, vol. 77 (1988), p. 55.

¹²⁷ *Ibid.*, p. 76.

¹²⁸ *Ibid.*, p. 77. Similar passages appear on pages 79–80.

¹²⁹ *Ibid.*, p. 88.

¹³⁰ *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*, judgement of 29 July 1987, *International Law Reports*, vol. 80 (1989), p. 47.

¹³¹ *Ibid.* and *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, and Related Appeals*, judgement of 27 April 1988, *ibid.*, p. 57.

¹³² *Ibid.*, p. 108.

¹³³ *Ibid.*, p. 109.

However, Lord Kerr's conclusion did not entirely rest on municipal law. He also stated the opinion that:

In sum, I cannot find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member states of the I.T.C., whereby they can be held liable—let alone jointly and severally—in any national court to the creditors of the I.T.C. for the debts of the I.T.C. resulting from contracts concluded by the I.T.C. in its own name.¹³⁴

81. Lord Ralph Gibson concurred. He observed that:

Where the contract has been made by the organisation as a separate legal personality, then, in my view, international law would not impose such liability upon the members, simply by reason of their membership, unless upon a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability has been assumed by the members.¹³⁵

He also noted that:

Nothing is shown of any practice of states as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause.¹³⁶

Also the dissenting judge, Lord Nourse, gave decisive importance to the attitude taken by the member States, although he adopted the opposite presumption. He said that:

[I]t is inherent in the views of the jurists and the Westland tribunal that the founding states of an international organisation can, by the terms of its constitution, provide for the exclusion or limitation, alternatively no doubt for the inclusion, of their liability for its obligations; and, moreover, that such provision will be determinative of that question for the purposes of international law. Thus the intention of the founding states is paramount ... And we must heed the importance which Shihata, like the Westland tribunal, would attach to the extent to which the states' intention was made known to third parties dealing with the I.T.C.¹³⁷

Lord Nourse found that "the intention of the states who were parties to I.T.A.6 [the Sixth International Tin Agreement] was that the members of I.T.C. should be liable for its obligations"¹³⁸ and said that:

[T]he ITC has separate personality in international law, but that its members are nevertheless jointly and severally, directly and without limitation liable for debts on its tin and loan contracts in England, if and to the extent that they are not discharged by the I.T.C. itself.¹³⁹

82. The conclusion that the majority opinions had reached in the Court of Appeal was unanimously upheld by the House of Lords. Lord Templeman rejected the idea that liability of member States would "flow from a general principle of law", noting that: "No authority was cited which supported the alleged general principle."¹⁴⁰ With regard to the alleged rule of international law imposing on "states members of an international organisation, joint and several liability for the default of the organisation in the payment of its debts unless the treaty which establishes the international organisation clearly disclaims any liability on the part of the members", Lord Templeman

found that: "No plausible evidence was produced of the existence of such a rule of international law before or at the time of I.T.A.6 in 1982 or thereafter."¹⁴¹ As an additional argument the same judge held that:

[I]f there existed a rule of international law which implied in a treaty or imposed on sovereign states which enter into a treaty an obligation (in default of a clear disclaimer in the treaty) to discharge the debts of an international organisation established by that treaty, the rule of international law could only be enforced under international law.¹⁴²

Neither was Lord Oliver of Aylmerton persuaded of the existence in international law of a rule providing for liability, whether "primary or secondary", of members of an international organization. He said:

A rule of international law becomes a rule—whether accepted into domestic law or not—only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.¹⁴³

83. The question of liability of member States was incidentally touched upon by the Government of Canada in relation to a claim for injuries caused by a crash of a Canadian helicopter in 1989, while it was operating in the Sinai for an organization established by Egypt and Israel, the Multilateral Force and Observers (MFO). An exchange of letters dated 4 and 9 November 1999 between Canada and MFO contained the following passage:

The Government of Canada agrees that the payment of U.S. \$3,650,000 shall constitute full and final satisfaction of, and the Government of Canada shall thereupon be deemed to unconditionally release and discharge the MFO and through it the State of Israel and the Arab Republic of Egypt from, any and all liability or obligation that the MFO may have in respect of the claims.¹⁴⁴

One could find in this passage some support for the view that a claim could have been preferred against the two member States.

84. Some opinions on the question of the responsibility of member States were expressed by States in connection with the current study of the Commission. In this context, Germany recalled in its written comments that it had

advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and ICJ (*Legality of Use of Force*) and has rejected responsibility by reason of membership for measures taken by the European Community, NATO and the United Nations.¹⁴⁵

¹⁴¹ *Ibid.*, p. 675.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, p. 706. A few months later, the view that member States could not be held responsible because of their part in the "internal decision-making process" of the organization was maintained by Mr. Advocate General Darmon in his opinion in the case *Maclaine Watson & Company Ltd v. Council and Commission of the European Communities*, case C-241/87, before the Court of Justice of the European Communities, *Reports of Cases before the Court of Justice and the Court of First Instance* (1990-5), p. I-1822, para. 144. A settlement was reached before the Court could give its judgement on this case.

¹⁴⁴ Similar wording had been used in an exchange of letters dated 3 May 1990 between the MFO Director-General and the Ambassador of the United States to Italy, relating to a claim arising from the crash of an aircraft. For further information, see *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, sect. I.3, pp. 34-36 and annex thereto, p. 41.

¹⁴⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. O.3, p. 61.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, p. 172.

¹³⁶ *Ibid.*, p. 174.

¹³⁷ *Ibid.*, p. 141.

¹³⁸ *Ibid.*, p. 145.

¹³⁹ *Ibid.*, p. 147.

¹⁴⁰ *Australia & New Zealand Banking Group Ltd. et al. v. Australia et al.*, judgement of 26 October 1989, ILM, vol. XXIX, No. 3 (May 1990), p. 674.

85. In its report concerning its fifty-seventh session, the Commission had requested comments with regard to the question whether “a State could be held responsible for the internationally wrongful act of an international organization of which it is a member”.¹⁴⁶ Only a few comments were expressed in the Sixth Committee on this point. While two statements suggested that the current draft articles should not deal with this question,¹⁴⁷ other statements expressed a different opinion¹⁴⁸ and proposed a variety of solutions. The delegation of China observed that, since the decisions and actions of an international organization were, as a rule, under the control, or reliant on the support, of member States, those member States that voted in favour of the decision in question or implemented the relevant decision, recommendation or authorization should incur a corresponding international responsibility.¹⁴⁹ Other delegations took the view that in principle member States were not responsible, but held that they could incur responsibility in “certain exceptional cases”,¹⁵⁰ in case of “negligent supervision of organizations”,¹⁵¹ or “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”.¹⁵² Another delegation pointed out the possible relevance of “various factors”.¹⁵³

86. According to INTERPOL, one of “the *lex specialis* cases where the rules of an international organization specifically provide for the responsibility of a State for internationally wrongful acts of an international organization of which it is a member” would occur when “either the constituent instrument or another rule of the organization prescribes the derivative or secondary liability of the members of the organization for the acts or debts of the organization”.¹⁵⁴ However, responsibility of States members under the rules of the organization does not imply that those States incur responsibility towards a third State unless their responsibility was made relevant with regard to that State under international law. Thus, contrary to the opinion expressed by INTERPOL it cannot be assumed, on the basis of the constituent instrument, that States members of the European Community would incur responsibility when the Community breaches a treaty obligation. Article 300, paragraph 7, of the Treaty establishing the European Community does not intend to create obligations for member States towards non-member States.¹⁵⁵ As was noted in a written comment by Germany, “the article only forms a basis for obligations

under community law *vis-à-vis* the European Community and does not permit third parties to assert direct claims against the States members of the European Community”.¹⁵⁶ For similar reasons, provisions that may be contained in status-of-forces agreements concerning distribution of liability between a State providing forces to an international organization and that organization cannot be regarded under international law as *per se* relevant in the relations with third States.¹⁵⁷

87. When a treaty provides for the responsibility of member States,¹⁵⁸ or limits that responsibility or rules it out,¹⁵⁹ a special rule of international law may be established, on the assumption that the treaty provision becomes relevant in relation to a potentially claimant State.¹⁶⁰ Given the variety of this type of clause, it would be difficult to build an argument on the basis of this treaty practice and suggest a conclusion, one way or the other, for resolving the question of responsibility of member States.

88. Legal literature is divided on the question of whether States incur responsibility when an organization of which they are members commits an internationally wrongful act. Some authors hold member States to be responsible because they do not accept that the organization has its own legal personality or they consider that the legal personality of the organization can have legal effects only with regard to non-member States that recognize it.¹⁶¹ These views conflict with the assumption, made in article 2 of the current draft, that the organization has “its own international legal personality”.¹⁶² Other authors maintain, on different premises, that member States are responsible if the organization fails to comply with its obligation to

case C-327/91, judgment of 9 August 1994, *Reports of Cases before the Court of Justice* (1994-8), p. I-3674, para. 25.

¹⁵⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. O.1 (a) (iii), pp. 53-54.

¹⁵⁷ For an analysis of the agreements concerning the status of forces of NATO and the European Union, see Schmalenbach, *op. cit.*, pp. 556-564 and 573-575. See also *Yearbook ... 2005* (footnote 156 above), sect. O.2 (c) (ii), pp. 59-60. The model status-of-forces agreement between the United Nations and host countries (A/45/594, annex) does not contain provisions on liability.

¹⁵⁸ For instance, according to article XXII, para. 3 (b) of the Convention on the international liability for damage caused by space objects: “Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.” The fact that liability of members of an organization was only provided for the benefit of States parties to the Convention was criticized by Galicki, “Liability of international organizations for space activities”, p. 207.

¹⁵⁹ As an example, article 24 of the International Cocoa Agreement, 2001 may be quoted: “A Member’s liability to the Council and to other Members is limited to the extent of its obligations regarding contributions specifically provided for in this Agreement. Third parties dealing with the Council shall be deemed to have notice of the provisions of this Agreement regarding the powers of the Council and the obligations of the Members ...”

¹⁶⁰ This would require the acceptance or at least acquiescence of third States.

¹⁶¹ For this view, see Münch, *op. cit.*, pp. 267-268; Seidl-Hohenveldern, “Die völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten”, pp. 502-505; and Stein, “Kosovo and the international community—the attribution of possible internationally wrongful acts: responsibility of NATO or of its member States”, p. 192.

¹⁶² *Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 205.

¹⁴⁶ *Ibid.*, vol. II (Part Two), p. 13, para. 26 (b).

¹⁴⁷ Statements of Morocco (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting, para. 43) and Argentina (12th meeting, para. 80).

¹⁴⁸ The statement of Sierra Leone (*ibid.*, 17th meeting, para. 11) stressed the “exceptional importance” of the issue.

¹⁴⁹ *Ibid.*, 11th meeting, para. 53.

¹⁵⁰ Statement of Italy, *ibid.*, 12th meeting, para. 3.

¹⁵¹ Statement of Austria, *ibid.*, 11th meeting, para. 65.

¹⁵² Statement of Belarus, *ibid.*, 12th meeting, para. 52.

¹⁵³ Statement of Spain, *ibid.*, 13th meeting, para. 53.

¹⁵⁴ Letter of 31 January 2006 (see footnote 51 above).

¹⁵⁵ Article 300, paragraph 7, reads as follows: “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.” The European Court of Justice pointed out that this provision does not imply that member States are bound towards non-member States and thus may incur responsibility under international law. See *France v. Commission*,

make reparation for an internationally wrongful act.¹⁶³ Their opinion has been opposed by several other authors who hold that, given the separate legal personality of the organization, member States do not incur any subsidiary responsibility.¹⁶⁴ However, among these authors, some accept that responsibility can nevertheless occur for member States in exceptional cases.¹⁶⁵

89. The latter opinion also found an expression in the resolution that the Institute of International Law adopted in 1995 in Lisbon on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties. According to article 6 (a) of that resolution:

Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members.¹⁶⁶

¹⁶³ See Adam, *Les organismes internationaux spécialisés: contribution à la théorie générale des établissements publics internationaux*, p. 130; Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten*, pp. 177–179 and 184; Hoffmann, “Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden”, p. 586; Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, pp. 92–96; Sadurska and Chinkin, “The collapse of the International Tin Council: a case of State responsibility?”, pp. 887–890; Schermers, “Liability of international organizations”, p. 9; and Wenckstern, “Die Haftung der Mitgliedstaaten für internationale Organisationen”, pp. 108–109. Brownlie, in *Principles of Public International Law*, p. 655, held that “in the case of more specialized organizations with a small number of members, it may be necessary to fall back on the collective responsibility of the member states”.

¹⁶⁴ See Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen*, pp. 290–296; Klein, *op. cit.*, pp. 509–510; Pellet, “L’imputabilité d’éventuels actes illicites: responsabilité de l’OTAN ou des États membres”, pp. 198 and 201; Pernice, “Die Haftung internationaler Organisationen und ihrer Mitglieder”, pp. 419–420; and Ritter, “La protection diplomatique à l’égard d’une organisation internationale”, pp. 444–445. Also the authors referred to in footnote 160 above consider that member States are not responsible when the legal personality of the organization may be opposed to non-member States.

¹⁶⁵ Several authors held the view that an exception should be admitted when member States accept that they could be held responsible for an internationally wrongful act of the organization. In a seminal paper, “Role of law in economic development: the legal problems of international public ventures”, p. 125, Shihata held, with regard to international companies, that “[a]ll relevant provisions and circumstances must be studied to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties dealing with the enterprise”. With regard to members of an international organization, Seidl-Hohenveldern, “Liability of member States for acts or omissions of an international organization”, p. 739, agreed that one should likewise take “all relevant provisions and circumstances into account”. Klein, *op. cit.*, pp. 509–510, considered that the conduct of member States might imply that they provide a guarantee for the obligations arising for the organization. According to Herdegen, “The insolvency of international organizations and the legal position of creditors: some observations in the light of the International Tin Council crisis”, p. 141: “Membership alone cannot serve as an appropriate basis for an extension of claims and liabilities, unless the member States clearly intended to share the organization’s rights and obligations.” Amerasinghe, “Liability to third parties of member States of international organizations: practice, principle and judicial precedent”, p. 280, held that, on the basis of “policy reasons”, “the presumption of nonliability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability even without an express or implied intention to that effect in the constituent instrument”. According to Hartwig, *op. cit.*, pp. 299–300, and Hirsch, *op. cit.*, p. 165, an injured party would have the right to claim that members fulfil their obligations to provide funds to the organization concerned.

¹⁶⁶ Institute of International Law, *Yearbook*, vol. 66, part II (Session of Lisbon, 1996), p. 449.

Article 5 reads as follows:

(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.

(b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights.

(c) In addition, a member State may incur liability to a third party

(i) through undertakings by the State, or

(ii) if the international organization has acted as the agent of the State, in law or in fact.¹⁶⁷

90. The general approach that was taken in the resolution of the Institute of International Law seems in line with the elements that are offered by the above analysis of practice. Apart from the interim arbitral award in the case concerning *Westland Helicopters* (see paragraph 76 above) and the minority opinion by Lord Nourse in the Court of Appeal in the International Tin Council case (see paragraph 81 above), the decisions considered above followed the view that there exists no presumption to the effect that member States incur responsibility (see paragraphs 77–82 above). The same view was shared by the great majority of States: all those (over 25) that were sued in the two affairs considered in paragraphs 76–82 above and most of those that commented on this question in connection with the present study (see paragraphs 84–85 above).

91. One case in which States are often held to be exceptionally responsible for an internationally wrongful act committed by an organization of which they are members is when States accept to be responsible. Acceptance generally implies only a subsidiary responsibility in the event that the organization fails to comply with its obligations towards a non-member State. For instance, in his opinion in the International Tin Council case, Lord Ralph Gibson referred to acceptance of responsibility in the “constituent document”.¹⁶⁸ Acceptance can also be expressed in an instrument other than the constituent act. However, as was pointed out when considering article 300, paragraph 7, of the Treaty establishing the European Community (see paragraph 86 above), member States would incur responsibility in international law only if their acceptance of responsibility produced legal effects in their relations with the injured non-member State. This would be most likely to occur on the basis of a treaty provision that conferred rights on third States.¹⁶⁹ The injured State could not sustain its claim simply on the basis of the constituent instrument, which does not bind member States in their relations with non-member States.

92. While the case of acceptance of responsibility seems straightforward, there is another case that calls for a similar solution. This is when member States, by their conduct, cause a non-member State to rely, in its

¹⁶⁷ *Ibid.*

¹⁶⁸ See paragraph 81 above. In the same paragraph there is a quotation from Lord Nourse’s opinion, which also refers to the “constitution” of the international organization concerned.

¹⁶⁹ The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply.

dealings with the organization, on the subsidiary responsibility of the member States of that organization. Certain instances that have been envisaged in practice¹⁷⁰ could be covered by an exception that referred to reliance on the subsidiary responsibility of member States. One statement directly to the point was made in the arbitral award on the merits in the *Westland Helicopters* case. The tribunal referred to the “trust of third parties contracting with the Organization as to its ability to cope with its commitments because of the constant support of the member states”.¹⁷¹ Various factors could be relevant when it comes to establishing whether a non-member State had reason to rely on the member States’ responsibility. Among those factors one could include, as was suggested in the comment made by Belarus, “small membership”.¹⁷² However, it cannot be assumed that the presence of one or more of those factors *per se* implies that member States incur responsibility.

93. The two exceptions mentioned in the preceding paragraphs do not necessarily concern all the States that are members of an international organization. For instance, should acceptance of subsidiary responsibility have been made only by certain member States, responsibility could be held to exist only for those States. On the other hand, should responsibility arise for the organization as a consequence of a decision taken by one of its organs, the fact that the decision in question was taken with the votes of some member States only does not imply that only those States would incur responsibility.¹⁷³ A distinction between States which vote in favour and the other States would not always be warranted. This would reflect also a policy reason, because giving weight to that distinction could negatively affect the decision-making process in many organizations, because the risk of incurring responsibility would hamper the reaching of consensus.

¹⁷⁰ See paragraphs 76, 83 and 85 above. Some of the exceptions referred to in the resolution of the Institute of International Law, quoted in paragraph 82 above, concern the same type of circumstance, while the case where “the international organization has acted as the agent of the State, in law or in fact” (art. 5 (c) (ii)) appears to raise a question of attribution of conduct.

¹⁷¹ This passage was quoted in paragraph 78 above.

¹⁷² *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 12th meeting, para. 52.

¹⁷³ The importance of the circumstance of a vote in favour of the relevant decision was emphasized in the statements by China (*ibid.*, 11th meeting, para. 53) and Belarus (*ibid.*, 12th meeting, para. 51).

94. The solution suggested here finds some support in further policy reasons. First of all, should member States be regarded as generally responsible, albeit subsidiarily, the relations of international organizations with non-member States would be negatively affected, because they would find difficulties in acting autonomously. Moreover, as has been noted, “if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations”.¹⁷⁴ The two suggested exceptions also rest on policy reasons, because they link responsibility of member States to their conduct. Once member States have accepted responsibility or led a non-member State to rely on their responsibility, it seems fair that member States should face the consequences of their own conduct.

95. For the reasons explained in paragraph 57 above, the suggested draft article will only consider States as members of an international organization. However, as was observed by IAEA:

Prima facie, any potential responsibility of a State member of an international organization and of an international organization that is a member of another international organization should be treated similarly.¹⁷⁵

96. The foregoing remarks lead to the conclusion that only in exceptional cases could a State that is a member of an international organization incur responsibility for the internationally wrongful act of that organization. This could be expressed in a text like the one which follows:

“Article 29. Responsibility of a State that is a member of an international organization for the internationally wrongful act of that organization

“Except as provided in the preceding articles of this chapter, a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless:

“(a) it has accepted with regard to the injured third party that it could be held responsible; or

“(b) it has led the injured third party to rely on its responsibility.”

¹⁷⁴ Higgins, *loc. cit.*, p. 419.

¹⁷⁵ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, sect. B.1 (b), p. 23.