Chapter VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

77. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[540] The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report to the General Assembly on the work of its fifty-second sesson. The General Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

78. At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[541] At the same session, the Commission established a working group on the topic.[542] The Working Group in its report[543] briefly considered the scope of the topic, the relations between the new project and the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session,[544] questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[545]

79. From its fifty-fifth (2003) to its fifty seventh (2005) sessions, the Commission had received and considered three reports from the Special Rapporteur,[546] and provisionally adopted draft articles 1 to 16 [15].[547]

[540] *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 729.

[541] *Yearbook … 2002*, vol. II (Part Two), p. 93, paras. 461–463.

[542] *Ibid.*, para. 462.

[543] *Ibid*., pp. 93–96, paras. 465–488.

[544] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[545] *Yearbook … 2002*, vol. II (Part Two), p. 93, para. 464.

[546] Preliminary report: *Yearbook … 2003*, vol. II (Part One), document A/CN.4/532; second report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541; and third report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553.

[547] Draft articles 1 to 3 were adopted at the fifty-fifth session (*Yearbook … 2003*, vol. II (Part Two), p. 18, para. 49), draft articles 4 to 7 at the fifty-sixth session (*Yearbook ... 2004*, vol. II (Part Two), p. 46, para. 69) and draft articles 8 to 16 [15] at the fifty-seventh session (*Yearbook ... 2005*, vol. II (Part Two), para. 203).

B. Consideration of the topic at the present session

80. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/564 and Add.1–2), as well as written comments received so far from international organizations and from governments.[548]

81. The fourth report of the Special Rapporteur, like the previous reports, followed the general pattern of the articles on responsibility of States for internationally wrongful acts.

82. The fourth report contained 13 draft articles. Eight draft articles corresponded to those contained in Chapter V of the articles on responsibility of States for internationally wrongful acts, under the heading "Circumstances precluding wrongfulness". Five draft articles dealt with the responsibility of a State in connection with the wrongful act of an international organization.

83. The Special Rapporteur presented the eight draft articles relating to circumstances precluding wrongfulness, namely, draft articles 17 to 24: article 17 (Consent),[549] article 18 (Self-defence),[550] article 19 (Countermeasures),[551]

[548] Following the recommendations of the Commission (*Yearbook … 2002*, vol. II (Part Two), pp. 93–96, paras. 464–488, and *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 52), the Secretariat, on annual basis, has been circulating the relevant chapter, included in the Commission's report to the General Assembly on the work at its session, to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see *Yearbook ... 2004*, vol. II (Part One), documents A/CN.4/545 and A/CN.4/547, and *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556. See also document A/CN.4/568 and Add.1 (reproduced in *Yearbook … 2006*, vol. II (Part One)).

[549] Draft article 17 reads as follows:

"*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."

[550] Draft article 18 reads as follows:

"*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."

[551] Draft article 19 reads 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]."

article 20 (*Force majeure*),[552] article 21 (Distress),[553] article 22 (Necessity),[554] article 23 (Compliance with peremptory norms),[555] and article 24 (Consequences of invoking a circumstance precluding wrongfulness).[556]

84. Draft articles 17 to 24 are closely modelled on the corresponding articles on responsibility of States for internationally wrongful acts, namely, draft articles 20 to 27.[557] In the view of the Special Rapporteur, the principles contained in the chapter on circumstances precluding wrongfulness were equally applicable to international organizations, although in some cases they needed to be adjusted to fit the particular nature of international organizations. Although the available practice with regard to circumstances precluding wrongfulness was limited, clear parallels could be drawn between States and international organizations in this regard. Thus, there was no reason for departing from the general approach taken in the context of States. However, this did not signify that the provisions would apply the same way in the case of international organizations.

85. The Special Rapporteur also presented draft articles relating to the responsibility of a State in connection with the wrongful act of an international organization, namely, draft articles 25 to 29: article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization),[558] article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization),[559] article 27 (Coercion of an international organization by a State),[560] article 28 (Use by a State that is a member of an international organization of the separate personality of that organization),[561] and article 29 (Responsibility of a State

[552] Draft article 20 reads as follows:

"*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."

[553] Draft article 21 reads as follows:

"*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."

[554] Draft article 22 reads as follows:

"*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."

[555] Draft article 23 reads as follows:

"*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."

[556] Draft article 24 reads as follows:

"*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."

[557] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 72–86.

[558] Draft article 25 reads as follows:

"*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."

[559] Draft article 26 reads as follows:

"*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."

[560] Draft article 27 reads as follows:

"*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."

[561] Draft article 28 reads as follows:

"*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."

that is a member of an international organization for the internationally wrongful act of that organization).[562]

86. In presenting these articles, the Special Rapporteur stated that Chapter IV of Part One of the articles on responsibility of States for internationally wrongful acts deals with aid or assistance, direction or control and coercion by one State in the commission of the wrongful act by another State. That chapter does not address the question of such relationships between a State and an international organization. Draft articles 25 to 27 cover that gap and they largely correspond to draft articles 16 to 18 of responsibility of States for internationally wrongful acts.[563] Draft articles 28 and 29 are unique to this topic and have no equivalent in the articles on State responsibility.

87. The Commission considered the fourth report of the Special Rapporteur at its 2876th to 2879th and 2891st to 2895th meetings, from 16 to 19 May and from 11 to 14 and 18 July 2006 respectively. At its 2879th meeting, on 19 May 2006, and its 2895th meeting, on 18 July 2006, the Commission referred draft articles 17 to 24 and 25 to 29 to the Drafting Committee.

88. The Commission considered and adopted the report of the Drafting Committee on draft articles 17 to 24 at its 2884th meeting, on 8 June 2006, and draft articles 25 to 30 at its 2902nd meeting on 28 July 2006 (see section C.1 below).

89. At its 2910th meeting on 8 August 2006, the Commission adopted the commentaries to the aforementioned draft articles (see section C.2 below).

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

90. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Part One

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

Chapter I

INTRODUCTION

Article 1.*[564] *Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

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

Article 2.*[565] *Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3.*[566] *General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) is attributable to the international organization under international law; and

(*b*) constitutes a breach of an international obligation of that international organization.

Chapter II[567]

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 4.*[568] *General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.[569]

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[570]

Article 5.*[571] *Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

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[562] Draft article 29 reads as 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."

[563] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 65–70.

[564] For the commentary to this article, see *Yearbook … 2003*, vol. II (Part Two), chapter IV, section C.2, para. 54.

[565] *Ibid.*

[566] *Ibid.*

[567] For the commentary to this chapter, see *Yearbook ... 2004*, vol. II (Part Two), chapter V, section C.2, para. 72.

[568] For the commentary to this article, see *ibid.*

[569] The location of paragraph 2 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[570] The location of paragraph 4 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[571] For the commentary to this article, see *Yearbook ... 2004*, vol. II (Part Two), chapter V, section C.2, para. 72.

Article 6.[572] ***Excess of authority or contravention of instructions***

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 7.[573] ***Conduct acknowledged and adopted by an international organization as its own***

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III[574]

BREACH OF AN INTERNATIONAL OBLIGATION

Article 8.[575] ***Existence of a breach of an international obligation***

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9.[576] ***International obligation in force for an international organization***

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10.[577] ***Extension in time of the breach of an international obligation***

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 11.[578] ***Breach consisting of a composite act***

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

[572] *Ibid.*

[573] *Ibid.*

[574] For the commentary to this chapter, see *Yearbook ... 2005,* vol. II (Part Two), chapter VI, section C.2, para. 206.

[575] For the commentary to this article, see *ibid.*

[576] *Ibid.*

[577] *Ibid.*

[578] *Ibid.*

CHAPTER IV[579]

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 12.[580] ***Aid or assistance in the commission of an internationally wrongful act***

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

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

(*b*) the act would be internationally wrongful if committed by that organization.

Article 13.[581] ***Direction and control exercised over the commission of an internationally wrongful act***

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

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

(*b*) the act would be internationally wrongful if committed by that organization.

Article 14.[582] ***Coercion of a State or another international organization***

An international organization which coerces a State or another 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 the coerced State or international organization; and

(*b*) the coercing international organization does so with knowledge of the circumstances of the act.

Article 15 [16].[583] ***Decisions, recommendations and authorizations addressed to member States and international organizations***

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) it authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) that State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

[579] For the commentary to this chapter, see *ibid*.

[580] For the commentary to this article, see *ibid*.

[581] *Ibid.*

[582] *Ibid.*

[583] *Ibid.* The square bracket refers to the corresponding article in the third report of the Special Rapporteur, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553.

Article 16 [15].[584] Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V[585]

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 17.[586] 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.

Article 18.[587] Self-defence

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

Article 19.[588] Countermeasures

…*[589]

Article 20.[590] **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.

Article 21.[591] 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.

Article 22.[592] Necessity

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

(*a*) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(*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.

Article 23.[593] 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.

Article 24.[594] 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.

CHAPTER (X)[595]

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

Article 25.[596] 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.[597] 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

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[584] For the commentary, see *ibid*.

[585] For the commentary to this chapter, see section C.2 below.

[586] For the commentary to this article, see section C.2 below.

[587] *Ibid.*

[588] *Ibid.*

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

[590] For the commentary to this article, see section C.2 below.

[591] *Ibid.*

[592] *Ibid.*

[593] *Ibid.*

[594] *Ibid.*

[595] The location of this chapter will be determined at a later stage.

[596] For the commentary to this article, see section C.2 below.

[597] *Ibid.*

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

Article 27.*[598] *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.

Article 28.*[599] *International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

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

Article 29.*[600] *Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) it has accepted responsibility for that act; or

(*b*) it has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 30.*[601] *Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

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

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

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

General commentary

(1) Under the heading "Circumstances precluding wrongfulness", draft articles 20 to 27 on responsibility of States for internationally wrongful acts[602] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[603] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

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

Article 17. Consent

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

Commentary

(1) This text corresponds to draft article 20 on responsibility of States for internationally wrongful acts.[604] As the commentary explains,[605] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[606]

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

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a commission of inquiry set up by the United Nations Security Council.[607]

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[598] *Ibid.*

[599] *Ibid.*

[600] *Ibid.*

[601] *Ibid.*

[602] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 72–86.

[603] *Ibid.*, p. 71, para. (2).

[604] *Ibid.*, p. 72. See also the related commentary, pp. 72–74.

[605] *Ibid.*, p. 72, para. (1).

[606] *Ibid.*, pp. 72–73, para. (2) of the commentary.

[607] For the requirement of consent, see para. 6 of the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security annexed to General Assembly resolution 46/59 of 9 December 1991.

Another example is consent by a State to the verification of the electoral process by an international organization.[608] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[609]

(4) Consent dispensing with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility",[610] such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor. The requirement that consent does not affect compliance with peremptory norms is stated in draft article 23. This is a general provision covering all the circumstances precluding wrongfulness.

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

Article 18. Self-defence

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

Commentary

(1) According to the commentary to the corresponding article (article 21) of the draft articles on responsibility of States for internationally wrongful acts, that article considers "self-defence as an exception to the prohibition against the use of force".[611] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.[612]

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

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a wider sense, with regard to situations other than those contemplated in Article 51 of the Charter of the United Nations. References to "self-defence" have been made also in relation to the "defence of the mission".[613] For instance, in relation to the United Nations Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that " '[s]elf defence' could very well include the defence of the safe areas and the civilian population in those areas."[614] While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases which go well beyond those in which a State or an international organization responds to an armed attack by a State. In any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also, the conditions under which an international organization may resort to force in response to an armed attack by a State pertain to the primary rules and need not be examined in the present context. One of those questions relates to the invocability of collective self-defence on the part of an international organization when one of its member States has become the object of an armed attack and the international organization is given the power to act in collective self-defence.[615]

(5) With regard to article 21 of the draft articles on responsibility of States for internationally wrongful acts concerning self-defence, what is required in the present context is only to state that measures of self-defence should be regarded as lawful. In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations has been replaced here with that to "principles of international law embodied in the Charter of the United Nations". This wording already appears, for similar reasons, in article 52 of the Vienna Convention on the Law of Treaties (hereinafter "1969 Vienna Convention"), concerning invalidity of treaties because of coercion, and in the corresponding article of the Vienna Convention on the

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[608] 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.

[609] A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, No. L 234, 10 September 2005, p. 13.

[610] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 73 (para. (4) of the commentary to article 20 of the draft articles on responsibility of States for internationally wrongful acts).

[611] *Ibid*., p. 74, para. (1).

[612] *Ibid*., p. 75, para. (6) of the commentary to article 21.

[613] As was noted by the High-Level Panel on Threats, Challenges and Change, "the right to use force in self-defence ... is widely understood to extend to the 'defence of the mission'" (report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, document A/59/565 and Corr.1, para. 213).

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

[615] A positive answer is implied in article 25 (*a*) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, adopted on 10 December 1999 by the member States of ECOWAS, which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof".

Law of Treaties between States and International Organizations or between International Organizations (hereinafter "1986 Vienna Convention"). The only other change with regard to the text of article 21 of the draft articles on responsibility of States for internationally wrongful acts concerns the replacement of the term "State" with "international organization".

Article 19. Countermeasures

…[616]

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.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 of the draft articles on responsibility of States for internationally wrongful acts as "an irresistible force or ... an unforeseen event … beyond the control of the State … which makes it materially impossible in the circumstances to perform the obligation".[617] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

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

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

> [i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from 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.[618]

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.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.[619] In Judgement No. 24, *Fernando Hernández de Agüero* v. *Secretary General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force majeure*, which had been made in order to justify termination of an official's contract:

> The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfill the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature.[620]

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

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said: "*Force majeure* is an unforeseeable occurrence, beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent".[621] It is immaterial that in the case at hand *force majeure* had been invoked by the employee against the international organization instead of by the organization.

(6) The text of draft article 20 differs from that of article 23 of the draft articles on responsibility of States for

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[616] See footnote 589 above.

[617] *Yearbook ... 2001* , vol. II (Part Two) and corrigendum, p. 76. See also the related commentary, at pp. 76–78.

[618] Signed at New York on 17 September 1992 and at Geneva on 19 October 1992, United Nations, *Treaty Series*, vol. 1691, No. 1066, p. 325, at p. 331.

[619] These cases related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary to draft article 8 (*Yearbook ... 2005*, vol. II (Part Two), pp. 42–43, para. 206).

[620] *Fernando Hernández de Agüero* v. *Secretary General of the Organization of American States, Judgment No. 24 of 16 November 1976*, para. 3 (OAS, *Sentencias del Tribunal Administrativo, Nos. 1–56 (1971–1980)*, p. 282). The text is also available at http://www.oas.org (decisions of the Administrative Tribunal). In a letter to the United Nations Legal Counsel dated 8 January 2003, the 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 (comments and observations received from international organizations on responsibility of international organizations, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, under the heading "Practice regarding claims filed against an international organization for violations of international law. Organization of American States").

[621] *Barthl* case, judgement of 19 June 1985, para. 3. The Registry's translation from the original French is available at www.ilo.org /public /english/tribunal (decisions of the Administrative Tribunal).

internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

Article 21. Distress

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

2. Paragraph 1 does not apply if:

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

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

Commentary

(1) Article 24 of the draft articles on responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care".[622] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters for seeking shelter during a heavy storm,[623] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[624]

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

(3) As with regard to States, the line between cases of distress and those which may be considered as pertaining to necessity[625] is not always obvious. The commentary to article 24 of the draft articles on responsibility of States for internationally wrongful acts notes that "general cases of emergencies ... are more a matter of necessity than distress".[626]

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

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

Article 22. Necessity

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

(*a*) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

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

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

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

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

Commentary

(1) Conditions for the invocability of necessity by States have been listed in article 25 of the draft articles on responsibility of States for internationally wrongful acts.[627] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgement No. 2183 of the ILO Administrative Tribunal in the *T. D.-N.* v. *CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care.[628]

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[622] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 78.

[623] *Ibid*., p. 79, para. (3).

[624] *Ibid*., para. (4).

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

[626] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 80, para. (7).

[627] *Ibid*. See also the related commentary, pp. 80–84.

[628] *T. D.-N.* v. *CERN*, Judgement of 3 February 2003, para. 19. The Registry's translation from the original French is available at www.ilo.org (decisions of the Administrative Tribunal).

(3) Even if practice is scarce, as was noted by INTERPOL: "necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations".[629] The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[630] the International Monetary Fund,[631] the World Intellectual Property Organization[632] and the World Bank.[633]

(4) While the conditions set by article 25 of the draft articles on responsibility of States for internationally wrongful acts are applicable also with regard to international organizations, the scarcity of specific practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This could be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity which appeared in the debates in the Sixth Committee[634] and also in the Commission: the view of those who favour placing international organizations on the same level as States, and the opinion of those who would totally rule out the invocability of necessity by international organizations. According to some members of the Commission, although subparagraph (1) (*a*) only refers to the interests of the international community as a whole, an organization should nevertheless be entitled to invoke necessity for protecting an essential interest of its member States.

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

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

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

Article 23. Compliance with peremptory norms

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

Commentary

(1) Chapter V of Part One of the draft articles on responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision—article 26—is to state that an act, which would otherwise not be considered wrongful, would be so held if it was "not in conformity with an obligation arising under a peremptory norm of general international law".[635]

(2) The commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, provides that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[636] In its judgment in the *Armed Activities on the Territory of the Congo* case, the ICJ found that the prohibition of genocide "assuredly" was a peremptory norm.[637]

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

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[629] Letter dated 9 February 2005 from the General Counsel of INTERPOL to the Secretary of the International Law Commission (see the comments and observations received from international organizations on responsibility of international organizations, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/556 (under the heading "Necessity as a circumstance to preclude wrongfulness")).

[630] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (*ibid.*).

[631] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (*ibid.*).

[632] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (*ibid.*).

[633] Letter dated 31 January 2006 from the Senior Vice President and General Counsel of the World Bank to the Secretary of the International Law Commission (see the comments and observations received from international organizations on responsibility of international organizations, *Yearbook … 2006*, vol. II (Part One), document A/CN.4/568 and Add.1 (under the heading "Circumstances precluding wrongfulness—necessity. World Bank")).

[634] Statements clearly in favour of the invocability of necessity by international organizations were made by France, *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee, Summary record of the 22nd meeting (*A/C.6/59/SR.22), para. 12; Austria, *ibid.*, para. 23; Denmark, speaking also on behalf of Finland, Iceland, Norway and Sweden, *ibid.*, para. 65; Belgium, *ibid.*, para. 76; the Russian Federation, *ibid., 23rd meeting* (A/C.6/59/SR.23), para. 23; and Cuba, *ibid.*, para. 25. A tentatively favourable position was taken also by Spain, *ibid., 22nd meeting* (A/C.6/59/SR.22), para. 49. The contrary view was expressed in statements by Germany, *ibid., 21st meeting* (A/C.6/59/SR.21), para. 22; China, *ibid.*, para. 42; Poland, *ibid., 22nd meeting* (A/C.6/59/SR.22), para. 2; Belarus, *ibid.*, para. 45; and Greece, *ibid., 23rd meeting* (A/C.6/59/SR.23), para. 43. Tentatively negative positions were taken by Singapore, *ibid., 22nd meeting* (A/C.6/59/SR.22), para. 57; and New Zealand, *ibid., 23rd meeting* (A/C.6/59/SR.23), para. 10.

[635] *Yearbook … 2001* , vol. II (Part Two) and corrigendum, p. 85. See also the related commentary, pp. 84–85.

[636] *Ibid.*, p. 85, para. (5).

[637] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 32, para. 64. The text of the judgment is also available at www.icj-cij.org.

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

Article 24. Consequences of invoking a circumstance precluding wrongfulness

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

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

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

Commentary

(1) Article 27 of the draft articles on responsibility of States for internationally wrongful acts makes two points.[638] The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,[639] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

(2) The second point is that the question of compensation is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

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

Chapter (x)[640]

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

General commentary

(1) In accordance with draft article 1, paragraph 2[641] of these draft articles (above), the present chapter is intended to fill a gap that was deliberately left in the articles on responsibility of States for internationally wrongful acts. As stated in article 57 of the draft articles on responsibility of States for internationally wrongful acts, these articles are "without prejudice to any question of the responsibility of … any State for the conduct of an international organization".[642]

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the draft articles on responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organization or to both, the present draft articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the draft articles on State responsibility for internationally wrongful acts will regulate attribution of conduct to the State.

(3) The present chapter assumes that there exists conduct attributable to an international organization. In most cases, it also assumes that that conduct is internationally wrongful. However, exceptions are provided for the cases envisaged in draft articles 27 and 28, which deal respectively with coercion of an international organization by a State and with international responsibility in case of provision of competence to an international organization.

(4) According to draft articles 28 and 29, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in draft articles 25, 26 and 27, the responsible State may or may not be a member.

(5) The present chapter does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part One of the present draft already considers the responsibility that an international organization may incur when it aids or assists or directs and controls in the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Following draft articles 28 and 29, which consider further cases of responsibility of States as members of an international organization, additional provisions would have to be introduced in Chapter IV in order to deal with parallel situations concerning international organizations as members of other international organizations. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall beyond the scope of the present draft.

(6) The position of the present chapter within the structure of the draft still needs to be determined. For this reason the chapter is provisionally called "Chapter (x)". Should the current position be retained, it could constitute a separate part or the final chapter of Part One. In the latter case, Part One would have to be given a more appropriate heading.

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[638] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85. See also the related commentary, pp. 85–86.

[639] This temporal element may have been emphasized because the ICJ had said in the *Gabčíkovo–Nagymaros Project* case (see footnote 363 above) that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives" (p. 63, para. 101).

[640] The location of the chapter will be determined at a later stage.

[641] See the commentary to this article adopted by the Commission at its fifty-fifth session in *Yearbook … 2003*, vol. II (Part Two), pp. 18–19.

[642] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 141.

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.

Commentary

(1) Draft article 25 addresses a situation parallel to the one covered in draft article 12 (above), which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization.[643] Both draft articles closely follow the text of draft article 16 on responsibility of States for internationally wrongful acts.[644]

(2) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, it cannot be totally ruled out that aid or assistance could result from conduct taken by the State within the framework of the organization. This could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

(3) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear State party to the Treaty on the Non-Proliferation of Nuclear Weapons would have to refrain from assisting a non-nuclear State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear States are members. In that case, international responsibility that may arise for the State would have to be determined in accordance with the draft articles on responsibility of States for internationally wrongful acts.

(4) Draft article 25 sets under (*a*) and (*b*) the conditions for international responsibility to arise for the aiding or assisting State. The draft article uses the same wording as article 16 of the draft articles on responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(5) The heading of draft article 16 on responsibility of States for internationally wrongful acts has been slightly adapted, by introducing the words "by a State", in order to distinguish the heading of the present draft article from that of draft article 12.

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.

Commentary

(1) While draft article 13 (above) relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization,[645] draft article 26 considers the case in which direction and control are exercised by a State. Both draft articles closely follow the text of article 17 of the draft articles on responsibility of States for internationally wrongful acts.[646]

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in draft article 25 and the related commentary, a distinction has to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present draft article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous draft article.

(3) Draft article 26 sets under (*a*) and (*b*) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 of the draft articles on responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

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[643] See the commentary on this article adopted by the Commission at its fifty-seventh session in *Yearbook ... 2005*, vol. II (Part Two), p. 45, para. 206.

[644] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 65.

[645] See the commentary on this article adopted by the Commission at its fifty-seventh session in *Yearbook ... 2005*, vol. II (Part Two), p. 46, para. 206.

[646] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 67–68.

(4) With regard to article 17 of the draft articles on responsibility of States for internationally wrongful acts, the heading of the present draft article has been slightly adapted, by adding the words "by a State", in order to distinguish it from the heading of draft article 13.

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.

Commentary

(1) Draft article 14 (above) deals with coercion by an international organization in the commission of what would be, but for the coercion, a wrongful act of another international organization.[647] The present draft article concerns coercion by a State in a similar situation. Both draft articles closely follow article 18 of the draft articles on responsibility of States for internationally wrongful acts.[648]

(2) The State coercing an international organization may or may not be a member of that organization. Should the State be a member, a distinction that is similar to the one that was made with regard to the previous two draft articles has to be made between participation in the decision-making process of the organization according to its pertinent rules, on the one hand, and coercion, on the other hand.

(3) The conditions that draft article 27 sets for international responsibility to arise are identical to those that are listed in article 18 of the draft articles on responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

(4) The heading of the present draft article slightly adapts that of article 18 of the draft articles on responsibility of States for internationally wrongful acts by introducing the words "by a State", this in order to distinguish it from the heading of draft article 14.

Article 28. International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

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

Commentary

(1) Draft article 28 concerns a situation which is to a certain extent analogous to those considered in draft article 15 (above).[649] According to that draft article, an international organization incurs international responsibility when it circumvents 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. Draft article 15 also considers circumvention through authorizations or recommendations given to member States or international organizations. The present draft article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

(2) As the commentary to draft article 15 explains, the existence of a specific intention of circumvention is not required and responsibility cannot be avoided by showing the absence of an intention to circumvent the international obligation.[650] The use of the term "circumvention" is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if taken by the State, has to be regarded as an unwitting result of providing the international organization with competence. On the other hand, the term "circumvention" does not refer only to cases in which the member State may be said to be abusing its rights.[651]

(3) The jurisprudence of the European Court of Human Rights provides a few examples of States being held responsible when they have provided competence to an international organization and have failed to ensure compliance with their obligations under the European Convention on Human Rights. 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, of which it was a member, in relation to claims concerning employment. The Court said that:

> where 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

[647] See the commentary on this article adopted by the Commission at its fifty-seventh session in *Yearbook ... 2005*, vol. II (Part Two), pp. 46–47, para. 206.

[648] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 69.

[649] See the commentary on this article adopted by the Commission at its fifty-seventh session in *Yearbook ... 2005*, vol. II (Part Two), para. 206.

[650] *Ibid*. (para. (4) of the commentary).

[651] In article 5 (*b*) of a resolution adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", the Institute of International Law stated: "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as … the abuse of rights" (*Yearbook of the Institute of International Law*, vol. 66–II (1996), p. 449).

them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[652]

(4) In *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, the Court took a similar approach with regard to a State measure implementing a regulation of the European Community. The Court said 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:

> [a]bsolving Contracting States completely from their [European Convention on Human Rights] 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.[653]

(5) According to the present draft article, two elements are required for international responsibility to arise. The first one is that the State provides the international organization with competence in relation to the international obligation that is circumvented. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for the purposes of international responsibility to arise according to the present draft article, is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(6) The second condition for international responsibility to arise is that the international organization commits an act that, if committed by the State, would have constituted a breach of that obligation. The fact that the organization is not bound by the obligation is not sufficient for international responsibility to arise. An act that would constitute a breach of the obligation has to be committed. On the other hand, there is no requirement that the State cause the international organization to commit the act in question.

(7) Paragraph 2 explains that draft article 28 does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the sheer existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(8) Should the act of the international organization be wrongful and the act be caused by the member State, there could be an overlap between the cases covered in draft article 28 and those considered in the three previous articles. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

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

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) it has accepted responsibility for that act; or

(*b*) it has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Commentary

(1) The saving clause with reference to draft articles 25 to 28 at the beginning of paragraph 1 of the present draft article intends to make it clear that a State member of an international organization may be held responsible also in accordance with the previous draft articles. Therefore, draft article 29 envisages two additional cases in which member States incur responsibility. Member States may furthermore be responsible according to the articles on responsibility of States for internationally wrongful acts,[654] but this need not be the object of a saving clause since it is beyond the scope of the present draft.

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[652] *Waite and Kennedy* v. *Germany, Application no. 26083/94, Judgement of 18 February 1999*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 1999-I*, p. 393, at p. 410, para. 67. The Court concluded that "the essence of [the applicants'] 'right to a court'" under the Convention had not been impaired (p. 412, para. 73). After examining the dictum in *Waite and Kennedy* v. *Germany* reproduced above, Ian Brownlie noted that, "[w]hilst the context is that of human rights, the principle invoked would seem to be general in its application" (I. Brownlie, "The responsibility of States for the acts of international organizations", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden/Boston, Martinus Nijhoff, 2005, p. 361). Views similar to those of the European Court of Human Rights were expressed by Antonietta Di Blasé in "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di diritto internazionale*, vol. 57 (1974), p. 250, at pp. 275–276; Moshe Hirsch in *The Responsibility of International Organizations toward Third Parties*, Dordrecht/Boston/London, Martinus Nijhoff, 1995, p. 179; Karl Zemanek, in *Yearbook of the Institute of International Law*, vol. 66-I (1995), p. 329; Philippe Sands in *Bowett's Law of International Institutions*, P. Sands and P. Klein (eds.), London, Sweet and Maxwell, 2001, p. 524; and Dan Sarooshi in *International Organizations and their Exercise of Sovereign Powers*, Oxford University Press, 2005, p. 64.

[653] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland, Application no. 45036/98, Decision of 30 June 2005*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2005-VI*, para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were protected within the European Community "in a manner which can be considered at least equivalent to that for which the Convention provides" (para. 155).

[654] This would apply to the case envisaged by the Institute of International Law in article 5 (*c*) (ii) of its resolution on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties": the case that "the international organization has acted as the agent of the State, in law or in fact" (*Yearbook of the Institute of International Law*, vol. 66–II (1996), p. 449).

(2) Consistently with the approach generally taken by the present draft as well as by the articles on responsibility of States for internationally wrongful acts, the present draft article positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. Although some members did not agree, the Commission found that it would be inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which, according to the draft, responsibility does not arise for a State in connection with the act of an international organization. It is clear, however, that such a conclusion is implied and that membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The Government of Germany recalled in a written comment 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 the International Court of Justice (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations.[655]

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman. Lord Kerr said that he could not:

> 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.[656]

In the House of Lords, with regard to an alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

> [n]o plausible evidence was produced of the existence of such a rule of international law before or at the time of I.T.A.6 [the Sixth International Tin Agreement] in 1982 or thereafter.[657]

(5) Although doctrine is divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that:

> [s]ave 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.[658]

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous draft articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (*a*). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his opinion in the judgment of the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[659] One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.[660] It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.[661]

(8) Paragraph 1 envisages a second case of responsibility of member States: when the conduct of member States has given the third party reason to rely on the responsibility of member States, for instance, that they would stand in

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[655] Comments and observations received from international organizations on responsibility of international organizations, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/556 (under the heading "Practice relating to responsibility of international organizations. Germany") .

[656] *Maclaine Watson & Co. Ltd.* v. *Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd.*v. *Department of Trade and Industry and Others, Judgment of 27 April 1988*, ILR, vol. 80, p. 109.

[657] *Australia & New Zealand Banking Group Ltd., et al.* v. *Australia and 23 Others*; *Amalgamated Metal Trading Ltd. and Others* v. *Department of Trade and Industry and Others*; *Maclaine Watson & Co. Ltd.* v. *Department of Trade and Industry*; *Maclaine Watson & Co. Ltd.* v. *International Tin Council, Judgment of 26 October 1989*, ILM, vol. 29 (1990), p. 675.

[658] Article 6 (*a*). 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 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" (*Yearbook of the Institute of International Law*, vol. 66–II (1996), p. 449).

[659] *Maclaine Watson & Co. Ltd.* v. *Department of Trade and Industry*; *J.H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry and Others* (see footnote 656 above), p. 172.

[660] The conditions set by article 36 of the 1969 Vienna Convention would then apply.

[661] For instance, article 300, paragraph 7, of the Treaty establishing the European Community 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 may as a consequence incur responsibility towards them under international law. See *French Republic* v. *Commission of the European Communities, Case C-327/91, Judgment of 9 August 1994, Reports of Cases before the Court of Justice and the Court of First Instance, 1994-8*, p. I–3641, at p. I–3674, para. 25.

if the responsible organization did not have the necessary funds for making reparation.[662]

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning Westland Helicopters. The panel found 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".[663]

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,[664] although this factor, together with all the pertinent factors, would have to be considered globally. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraph (*b*) uses the term "injured party". In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the draft articles on responsibility of States for internationally wrongful acts considers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 of these draft articles a saving clause concerning the rights that may arise for "any person or entity other than a State".[665] Similarly, subparagraph (*b*) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

(12) According to subparagraphs (*a*) and (*b*), international responsibility arises only for those member States who accepted that responsibility or whose conduct induced reliance. Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

(13) Paragraph 2 considers the nature of the responsibility that is entailed in accordance with paragraph 1. Acceptance of responsibility by a State could relate either to subsidiary or to joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, one could only state a rebuttable presumption. Also, in view of the limited nature of the cases in which responsibility arises according to the present draft article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.[666]

Article 30. Effect of this chapter

This chapter is without prejudice to international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

Commentary

(1) The present draft article finds a parallel in draft article 16 [15] (above), according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is "without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization".

(2) Draft article 30 is a saving clause relating to the whole chapter. It corresponds to article 19 of the draft articles on responsibility of States for internationally wrongful acts.[667] The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary on article 19 of the draft articles on responsibility of States explains, the article is also intended to make it clear "that the provisions of [the chapter] are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful" and to preserve the responsibility of any other State "to whom the internationally wrongful conduct might also be attributable under other provisions of the articles".[668]

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[662] Amerasinghe held, on the basis of "policy reasons", that "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" (C. F. Amerasinghe, "Liability to third parties of member States of international organizations: practice, principle and juridical precedent", AJIL, vol. 85 (1991), p. 280. Pierre Klein also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization (see P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruxelles, Bruylant/Editions de l'Université, 1998, pp. 509–510).

[663] *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, Award of 21 July 1991*, para. 56, cited by Rosalyn Higgins in "The legal consequences for member states of non-fulfilment by international organizations of their obligations toward third parties: provisional report", *Yearbook of the Institute of International Law*, vol. 66–I (1995), pp. 393–394.

[664] See in this respect the comment made by Belarus, *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, Summary record of the 12th meeting (*A/C.6/60/SR.12) and corrigendum, para. 52.

[665] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 94.

[666] In the opinion referred to above, in the judgment of 27 April 1988, *Maclaine Watson & Co. Ltd.* v. *Department of Trade and Industry*; *J.H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry and Others* (see footnote 656 above), Lord Ralph Gibson held that, in case of acceptance of responsibility, "direct secondary liability has been assumed by the members" (p. 172).

[667] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 70.

[668] *Ibid*., pp. 70–71, paras. (2)–(3).

(3) There appears to be less need for an analogous "without prejudice" provision in a chapter concerning responsibility of States which is included in a draft on responsibility of international organizations. It is hardly necessary to save responsibility that may arise for States according to articles on responsibility of States for internationally wrongful acts and not according to the present draft. On the contrary, a "without prejudice" provision analogous to that of article 19 of the draft articles on responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in the chapter of a provision analogous to draft article 19 could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in saying that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

(4) In the present draft article the references to the term "State" in article 19 of the draft articles on responsibility of States for internationally wrongful acts have been replaced by references to the term "international organization".

Chapter VIII

RESERVATIONS TO TREATIES

A. Introduction

92. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

93. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[669]

94. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.[670]

95. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969 Vienna Convention, the Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention") and the 1986 Vienna Convention.[671] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

96. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[672] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.[673] The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[674]

97. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur's second report on the topic.[675] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[676]

98. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[677]

99. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

100. From its fiftieth session (1998) to its fifty-seventh session (2005) the Commission considered eight more reports[678] by the Special Rapporteur and provisionally adopted 71 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

101. At the current session, the Commission had before it the second part of the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1–2) on validity of reservations and the concept of the object and purpose of the

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[669] See *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

[670] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

[671] *Ibid.*, vol. II (Part Two), p. 108, para. 487.

[672] See *Yearbook ... 1993*, vol. II (Part Two), p. 83, para. 286.

[673] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, Annexes II and III.

[674] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

[675] *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

[676] *Ibid.*, vol. II (Part Two), p. 83, para. 136 and footnote 238.

[677] See footnote 6 above.

[678] Third report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report: *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1; fifth report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; and tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. See a detailed historical presentation of the third to fifth reports in *Yearbook ... 2004*, vol. II (Part Two), pp. 97–98, paras. 257–269.