International Organizations Law Review **3**: 177–183, 2006

EDITORIAL: HOW NECESSARY IS NECESSITY FOR INTERNATIONAL ORGANIZATIONS?

AUGUST REINISCH*

The current work of the ILC on Responsibility of International Organizations is progressing swiftly. Recently, its drafting committee has provisionally adopted articles on circumstances precluding wrongfulness[1] that, by and large, resemble the corresponding provisions in the ILC Articles on State Responsibility.[2] There is only one major divergence to the latter, which can be found in Draft Article 22 on Necessity. At variance with the State Responsibility Article on Necessity, which allows a State to exceptionally take action contrary to its international obligations in order to protect its vital interests, Draft Article 22 of the provisions on Responsibility of International Organizations does not provide for a necessity justification aimed at safeguarding the interests of an international organization. Instead, it provides for a variation of the other interest acknowledged already in the State responsibility article on necessity, *i.e.* that of the international community as a whole.

Necessity was one of the more controversial circumstances precluding wrongfulness during the lengthy debates of the ILC on State Responsibility.[3] Some members thought that necessity might have such a potential of abuse that any international obligation could be rendered worthless where such a defence were available. After an exhaustive study by the then Special Rapporteur Roberto Ago in 1980, who concluded that necessity belonged to the justifications accepted by customary international law,[4] it was decided to include necessity though

---

* Professor of International and European Law at the University of Vienna and Professorial Lecturer at the Bologna Center of SAIS/Johns Hopkins University.

1 ILC, 58th Sess., Responsibility of International Organizations, Titles and texts of the draft articles adopted by the Drafting Committee on 31 May 2006, A/CN.4/L.687, 31 May 2006, p. 3.

2 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

3 See ILC, 58th Sess., Forth Report on Responsibility of International Organizations by Mr. Giorgio Gaja, U.N. Doc. A/CN.4/564, 28 February 2006, p. 13.

4 "[T]he concept of 'state of necessity' is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms." Addendum to

under very restrictive conditions. The final version of the text as adopted by the ILC in 2001 is as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; 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 a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State has contributed to the situation of necessity.[5]

Recently, the state-of-necessity defence has been subject to a revived interest in international practice. A number of international and national courts and tribunals have, with explicit reference to the ILC Article, concluded that necessity may, in principle, justify non-compliance with an international obligation. First, the ICJ held in the *Gabcíkovo-Nagymaros* Case that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."[6] And as recent as 2004 in its Advisory Opinion on the so-called Israeli Security Wall or Fence, the Court spoke of "a state of necessity as recognized in customary international law."[7]

Eighth Report on State Responsibility by Mr. Roberto Ago, U.N. Doc. A/CN.4/318/ADD.5-7, in: [1980] YBILC Vol. II, Part One, p. 51.

[5] Article 25 of the Draft Articles on State Responsibility, *supra* note 2.

[6] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 40, para. 51.

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, 43 *International Legal Materials* 1009 (2004), para. 140.

In 2005, an ICSID arbitral tribunal found in an investment arbitration that a state of necessity may even cover situations of economic necessity, though, in the particular case, it concluded that the financial crisis in Argentina did not reach that level.[8] A similar issue is still pending before the German Constitutional Court, which is confronted with a necessity defence raised by Argentina against claims brought by its bondholder creditors.[9]

Apparently, necessity is alive and well as an accepted ground for precluding wrongfulness. Thus, it is all the more interesting that the provisionally accepted draft Article 22 on the Responsibility of International Organizations significantly modifies the existing model of the State responsibility defence. In its current version of spring 2006, it provides as follows:

> 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."[10]

---

[8] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 *International Legal Materials* 1205 (2005).

[9] Reference to the Bundesverfassungsgericht by the Oberlandesgericht Frankfurt a.M., 24 June 2003, *Neue Juristische Wochenschrift* (2003), p. 2688.

[10] Article 22 of the Draft Articles on Responsibility of International Organizations, *supra* note 1.

Thus, while all the other restrictive conditions under which necessity can be invoked are retained, international organizations, as opposed to States, are apparently not intended to protect their own essential interests, but rather only "an essential interest of the international community as a whole" and only under the additional condition that "the organization has, in accordance with international law, the function to protect that interest."

There was a remarkable additional restriction to the Rapporteur's suggested text made by the ILC's drafting committee. While Professor Gaja's draft Article on necessity foresaw a potential lawfulness if 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;"[11] the provisionally adopted version reproduced above does not consider any "essential interest" that an organization "has the function to protect" but requires an "essential interest of the international community as a whole". Obviously, a number of regional international organizations will have difficulties to live with that additional restriction to find an "essential interest of the international community as a whole" in order to justify emergency measures. How do we assess whether an "essential interest of the international community as a whole" is threatened? Does it depend on the type of organization or the type of value protected? For example, would health and safety measures against SARS or avian flu taken by the WHO (assuming that it had such powers) always qualify because human health is an "essential interest of the international community as a whole"? Would it also be the case if human health was only threatened in some distinct geographic areas? Would it also be a justification of a regional health organization like PAHO?

But there is a more general problem stemming from the apparent inability of international organizations to invoke a state of necessity threatening their own interests and it is one that somehow touches the very basis of the legal personality of international organizations and thus their ability to become responsible under international law.

One may only speculate about the reasons for the deviation in the present draft Articles from the State responsibility Articles: Could it be that international organizations do not have a vested interest in their own existence comparable to the one enjoyed by States? It is clear that international organizations will always remain somewhere in the magical oscillation between "actor" and "forum", a phenomenon that resembles Heisenberg's insight as to the true nature of atomic particles. It may depend on the observer whether they are perceived as

---

[11] Forth Report on Responsibility of International Organizations, *supra* note 3, p. 17.

"particles" or as "waves". Nevertheless, it appears that the non-acknowledgement of the interest of international organizations in safeguarding their own essential interest, which would include their interest in securing their existence, indicates that the draft Articles do not take the separate international legal personality of international organizations fully for granted.

The question really is whether this seemingly innocuous change in wording goes to the heart of the question what an international organization is. Does it support those who have always maintained that international organizations are only a short-hand for the collective of their member States, forums for negotiations instead of actors in their own right?

The Special Rapporteur's report does not fully clarify this issue. While he mentions the opinions of a number of international organizations that had advocated the invocability of necessity by international organizations,[12] he elaborates on the observation of the IMF, stating that it was unclear whether international organizations could claim "essential interests" similar to those of States in order to invoke the defence of necessity.[13] According to the Special Rapporteur: "While a State may be considered as entitled to protect an essential interest that is either its own or of the international community, the scope of interests for which an international organization may invoke necessity cannot be as wide. One cannot assimilate, for instance, the State's interest in surviving with that of an international organization in not being extinguished."[14]

Admittedly, it is hard to maintain that international organizations should have a vested right to prolong their existence should their members no longer consider them useful. An organization's member States remain the "Masters of the Treaty" – to borrow a term from the EU/EC debate – and they remain free to create and also abolish an international organization. Though international organizations, like all institutions, tend to justify and thereby prolong their own existence – even if that may require a considerable re-interpretation of their original design. NATO nicely has demonstrated this by adhering to the principle "better out of area than out of business" and thus surviving the end of the Cold War. But does this (collective) supreme power of member States over the fate of an international organization's existence really imply that an international organization has no separate (individual) right to defend its existence, or maybe less existential "essential interests", if threatened by individual States, maybe

---

[12] ILC, 58th Sess., Forth Report on Responsibility of International Organizations by Mr. Giorgio Gaja, U.N. Doc. A/CN.4/564, 28 February 2006, p. 15.

[13] *Ibid*., p. 16.

[14] *Ibid*.

even by non-member States? The answer to this question is apparently in the negative, if we follow the draft Articles on Responsibility of International Organizations, which provide for self-defence as a valid justification for acts of international organizations.[15]

But why then should it be permissible for an international organization to resort to forcible measures to defend itself, while it would not be permissible to resort to other non-forcible measures in order to protect itself under the necessity defence? One possible answer to solve this apparent inconsistency would be to regard the self-defence Article of the draft Articles on Responsibility of International Organizations as codifying not real self-defence of the organization, but rather self-defence of individuals acting on its behalf. Indeed, if one looks at the examples provided for by the Special Rapporteur in his report, most of the practice analyzed there and taken in support of a right of self-defence of international organizations relates to peace-keeping and other military operations of the United Nations and could be understood as affirming an individual right of self-defence of members of UN troops.[16] However, while most of the documents cited by the Special Rapporteur relate to the right of self-defence of UN forces, the report itself as well as the proposed draft Article 18 clearly affirm a right of self-defence of international organizations. Thus, it remains unclear why international organizations should have the right of self-defence if they were made the object of an armed attack, while they would not be able to rely on necessity in order to justify non-forcible measures not in conformity with their obligations in order to secure other essential interests.

In addition to such intra-textual considerations there are also other ones that make one wonder why the draft Articles on Responsibility of International Organizations do not provide for a full-fledged necessity defence to international organizations. The interests of international organizations are more and more acknowledged in international law. For instance, the 1999 United Nations Convention for the Suppression of the Financing of Terrorism[17] expressly includes the protection of the interests of international organizations in parallel

---

[15] Draft Article 18 provides: "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."

[16] See Forth Report on Responsibility of International Organizations, *supra* note 12, p. 5 *et seq*.

[17] Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999. Available under http://untreaty.un.org/English/Terrorism/Conv12.pdf.

to those of States.[18] If the interest of international organizations may give rise to an obligation of States to criminalize certain behavior directed against them, one may wonder why international organizations should not be able to invoke necessity in order to take their own measures aimed at protection their interests. Quite obviously, questions concerning the necessity of a necessity defence for international organizations have not yet been necessarily exhausted, and it will be interesting to see how the ILC finally will solve the matter.

[18] Article 2(1)(b) of the Convention provides: "Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."