



# IRELAND

Statement by

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## The International Law Commission's Draft Articles on the Responsibility of International Organisations

Mr. Chairman,

On behalf of Ireland, I wish to thank the Commission for undertaking the important and difficult task of formulating a regime of responsibility of international organisations. I would also like to congratulate the Special Rapporteur on his fourth report and commend him on his work so far.

Having considered draft articles 17 to 30, together with the Commission's comprehensive commentary and the reports of the Special Rapporteur, we would like to offer comments on two draft provisions, namely draft article 22 on necessity and draft article 28 on international responsibility in the case of provision of competence to an international organisation.

### **Draft article 22 - Necessity**

Mr. Chairman, Ireland welcomes draft articles 17 to 24 on circumstances precluding wrongfulness. We also support the inclusion of a draft article on necessity<sup>1</sup>, while remaining conscious of the need to limit the scope of this exception within defined boundaries.

### ***Protection of member states' interests***

It is our concern that draft article 22, in its current form, fails to adequately protect member states' essential interests.

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<sup>1</sup> Draft article 22:

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.

A state may choose to entrust certain functions to an international organisation. However, simply because a state has transferred functions does not mean that it no longer retains essential interests in relation to those functions. These essential interests of the state may be imperilled by an act or omission of the organisation, even if the organisation's conduct is consistent with, and indeed required by, its own legal obligations.

However, according to the wording of the most recent draft of article 22 adopted by the Commission, unless a member state's essential interest coincides with an essential interest of the international community as a whole, the international organisation is unable to invoke necessity.

Obviously, states may be reluctant to transfer powers to an international organisation if their essential interests are not afforded sufficient protection. We therefore support the view held by some members of the Commission that an international organisation should be entitled to invoke an essential interest of its member states when claiming necessity.

***Nexus between the imperilled essential interest and an organisation's functions***

Mr. Chairman, a second point which we would like to raise in relation to draft article 22 is our concern that it may not reflect the present reality of movement towards international integration. Under the present formulation, in order to have recourse to the claim of necessity, an organisation must have as one of its functions the protection of the essential interest under threat. In other words, draft article 22 makes an organisation's ability to invoke necessity dependant on its functions.

While, in the modern era, international integration has led to states granting international organisations more and more functions, most of these organisations deal individually with discrete issues and are entrusted with a narrow range of functions. Draft article 22, in its present form, may fail to adequately accommodate this state of affairs. After all, it is quite plausible that the actions of an international organisation might imperil an essential interest of a member state, or indeed of the international community as a whole, without that organisation having as one of its functions the

protection of that interest. In such circumstances, the current wording of draft article 22 would leave the organisation without recourse to the claim of necessity in order to safeguard the imperilled essential interest.

***Reference to the constituent instrument in determining the essential interests***

Thirdly, Mr. Chairman, in relation to draft article 22 we welcome the observation of the Special Rapporteur that in determining the essential interests which an international organisation has the function to protect, reference only to the constituent instrument may be too restrictive. Conversely, not *all* the functions which an organisation is conferred with in its constituent instrument are to be regarded as essential interests.

For these reasons we urge the Commission to review the formulation of this article.

**Draft article 28 - International responsibility in case of provision of competence to an international organisation**

We now turn our attention to draft article 28, concerning international responsibility in case of provision of competence to an international organisation. Recalling our comments in relation to draft article 15 at the 60<sup>th</sup> Session of the General Assembly, we would like to express our support for the efforts of the Special Rapporteur to make provision for member states to incur responsibility for acts of international organisations in certain circumstances. We express reservations, however, as to the wording of draft article 28.<sup>2</sup>

The scope of the draft article in its present form is inadequately defined. The draft article's insistence on the provision of competence in relation to the circumvented obligation may unduly narrow the scope of the article where a restrictive understanding of this requirement is employed. In such circumstances, the member state may not have provided the organisation with competence in relation to the

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<sup>2</sup> Draft article 28:

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.

specific obligation being circumvented but may nevertheless, in the knowledge that the organisation had a general competence that could impinge upon the obligation, have intended that it be breached by the organisation.

Conversely, a broad understanding of the provision of competence requirement could result in state responsibility where an international organisation acts upon a general competence which may affect the obligation in question but without any intent on the part of the member state that the obligation be breached. In this regard, we welcome the Commission's commentary on draft article 28, which provides that the use of the term "circumvention" is intended to exclude that international responsibility arises when the act of the organisation, 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 organisation with competence.

On a practical level, we believe that the determination of whether or not a state has provided an organisation with competence in relation to an obligation could prove problematic. Our primary concern, however, is in the absence of any requirement of intent in draft article 28 which would limit the potential scope of the draft article.

### **Conclusion**

In closing, Mr. Chairman, Ireland reiterates its appreciation for the important work of the Commission on this challenging topic and looks forward to its next report.