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# Responsibility of International Organizations

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# Summary

International organizations play increasingly important parts in international relations, yet a limited legal framework governs their activities. The International Law Commission identified the issue of responsibility of international organizations as early as 1963; however it was not until 2001 that it included the topic in its programme of work. At present, the Commission has provisionally adopted seven articles on the topic.

The starting point for a discussion of the responsibility of an international organization is the question of its conceptual status. Legal personality of an international organization, including certain rights and duties, constitutes a prerequisite for responsibility. One must recognize that there are different views on how, and to what extent, an organization is granted its powers. The widely accepted *implied powers doctrine* determines an organization's capacities based on functionality, which ultimately constitutes the frame for the conduct of the organization and its organs and personnel. Furthermore, some objective elements are required in order for the organization to be able to maintain its personality towards a third party.

The question of attribution of conduct has constituted one of the most controversial aspects of the subject. The crucial issue as regards imputability is the determination of whether an organ or agent acts on behalf of an organization. International organizations generally have very limited resources for the performance of their functions and are often dependant on external assistance. In order to claim that conduct performed by organs placed at the disposal of an organization by a state or organization is attributable to the former organization, one needs to determine whether it has exercised effective control over the conduct in question.

International organizations generally enjoy certain autonomy but can not in reality function without their member states. Thus, the issue of the responsibility of the member states for the actions of the organization is another important issue to consider in this context. Although it does not appear controversial to attribute the same conduct to an organization and one or several of its member states, it is relevant to consider whether dual attribution could lead to joint responsibility. Another issue to consider is whether the member states have a subsidiary responsibility of the organization when the latter is unable to provide for reparation.

The rules of responsibility of international organizations open up to a new field of international law. In the absence of a court with a specific competence with regard to international organization, the question of a *forum conveniens* for future dispute-settlement arises. Although arbitration constitutes an appropriate body for such, it may become necessary to establish a permanent forum for disputes arising between organizations, or between a state and an organization.



# Preface

The subject of this thesis has proven to involve many different aspects of public international law, the law of international institutions and international relations in general. It is the author's belief that the responsibility of international organizations constitutes a new chapter of each of these areas and it has been with great pleasure and interest I have undertaken research for this project.

A special thank you to my supervisor, J.D. Ulf Linderfalk who introduced me to the subject and who has facilitated the process of authoring this thesis abroad, and to my family and Daniel Bowman for their support throughout.

# Abbreviations

EC	European Community
EU	European Union
FRY	Former Republic of Yugoslavia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organization
IUCN	World Conservation Union
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Co-operation in Europe
OPEC	Organization of Petrol Exporting Countries
SFOR	Security Forces
UN	United Nations
UNEF	United Nations Emergency Force
UNFICYP	United Nations Force in Cyprus
UNITAF	Unified Task Force
UNOSOM	United Nations Operation in Somalia
USA	United States of America
WHO	World Health Organization

# 1 Introduction

## 1.1 Introduction

International organizations have over the past century come to play a significant role in international relations. Their powers and capacities are developing as state sovereignty is no longer the rigid concept it once was. Whereas organizations were frequently involved in humanitarian operations during the 20<sup>th</sup> century, no formal rules existed as regards their responsibility. Nevertheless, recent work undertaken on this issue shows that there indeed exists a need for codification of the accountability of international organizations.

Evidently, the question of legal responsibility in general is controversial. The rules on state responsibility preoccupied the International Law Commission for decades and are still matters of examination and interpretation. Whereas state responsibility is based on a consistent practice and deals with the - in comparison - rather uncomplicated concept of the state, any study on international organizations requires additional examination as regards their status in international law and their rather distinct practice.

In the year of 2001 the International Law Commission begun its work on the subject of responsibility of international organizations and at present, seven articles have been provisionally adopted by the Commission.

## 1.2 Purpose and Method

The purpose of this thesis is to constitute a descriptive analysis of some specific aspects of responsibility of international organizations. The discussion targets issues that have arisen during the work by the International Law Commission on this issue up until August 2004, corresponding to topics addressed in articles 1-11 of the 2001 draft articles on state responsibility.

The articles so far adopted by the Commission cover some of the most complex issues with regard to the topic. The author has chosen to approach these articles, taking into account not only the Commission's legal arguments but also doctrinal aspects of the subject in accordance with public international law. The articles are integrated in a disposition chosen on the basis of relevance for the subject as such; thus, they do not necessarily appear in the same order as in the draft. The purpose of this outline is to create a comprehensive summary of different views with regard to the subject of responsibility in general, and in relation to international organizations in particular.

### **1.3 Limitations**

Responsibility is hereinafter to be understood as the consequence of a legally wrongful act or omission, which involves a breach of an international obligation. Thus, issues concerning international liability, i.e. responsibility that does not require illegal acts, have in this study been excluded. Of the same reason, responsibility under municipal law has been left aside.

Furthermore, the scope of this thesis is, with some exceptions, limited to cover issues corresponding to those addressed by the work of the International Law Commission so far. The study does therefore not include all aspects of responsibility.

The International Law Commission (hereinafter, the Commission) has considered the issue of responsibility of international organizations during its 54-56<sup>th</sup> session. The report of the 56<sup>th</sup> session 2004, concerning e.g. the attribution of conduct is at the time of writing yet to be released. Thus, the draft articles may have been subject to revision during the Commission's most recent work.

# 2 Background

## 2.1 The development of international organizations

The concept of the international organization is commonly described to have had its birth in the 19<sup>th</sup> century, even though indicators of a need for co-operation can be traced back even further. Industrialism and new technologies demanded greater communications between states and created issues for which the traditional system of co-existing could not provide solutions.<sup>1</sup>

The creation of the League of Nations in 1919 can be described as a first attempt towards the creation of a modern international organization. As a product of the evolving need for co-operation and of the First World War, it promoted for a new system of dispute-settlement, sanctions, and peace and security efforts. As had been proven over the years prior to its creation, a need for conflict prevention existed in the world in general and in Europe in particular. The League promoted a centralized formation in which states on co-operative grounds could resolve issues of international concern.<sup>2</sup>

The outbreak of the Second World War followed by the collapse of the League of Nations proved however that the concept of the organization was somewhat premature. The member states had shown reluctance towards the transfer of decision-making powers to the organization and the League had failed to become a universal institution.<sup>3</sup>

The creation of the United Nations in 1945 opened up to a security system on a new level. With the faults the League had suffered in recent memory, the UN sought to rectify what had caused the dissolution of its predecessor. Moreover, it provided for a more centralized structure with co-operation on a greater variety of issues, including peacekeeping, human rights and economic, social and ecological interdependence.<sup>4</sup>

The establishment of the United Nations was followed by a rapid increase of organizations of less universal character. Instead, many of them had regional interests as their main purpose, either politically or financially. Furthermore, a number of organizations, such as the WHO and the ILO developed as specialized agencies of the UN, others such as NATO, as independent defence alliances.<sup>5</sup> It became evident that states, in order to

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<sup>1</sup> Friedmann, pp. 91-93.

<sup>2</sup> Claude, pp. 41-45.

<sup>3</sup> See e.g. White, pp 171-172, Bennett, chapter 2.

<sup>4</sup> Hoffmann, p. 319.

<sup>5</sup> Malanczuk, pp. 94-95.

seek effective solutions to cross-boarder issues, had begun to favour the concept of forming more or less structured entities.

One of the most obvious indicators of the new tendency of centralization was the creation of the European Community (EC) and later, the European Union (EU). The EC, with its supra-national character, witnessed of a willingness of the member states to transfer parts of their state sovereignty to the international level.<sup>6</sup>

## **2.2 The new draft**

The growing importance of international organizations in international relations carried a need for the development of rules governing their activities. The question of legal responsibility of international organizations was identified as early as in 1963; it is however only in recent years that the question has been on the agenda of the United Nations.<sup>7</sup>

In the year of 2000 the International Law Commission first included the question of responsibility of international organization in its long-term work programme. In 2001 the General Assembly requested that the Commission would further address the issue,<sup>8</sup> which resulted in a decision by the Commission in 2002 to establish a working group on the issue, and to appoint a Special Rapporteur, Mr. Giorgio Gaja, for the topic.<sup>9</sup>

As a product of the work by the working group and the Special Rapporteur, the Commission in 2003 provisionally adopted the first three articles on the topic addressing the general principles of the responsibility of international organizations.<sup>10</sup> During its 56<sup>th</sup> session in 2004, the Commission approached the issue of attribution of conduct to international organizations and provisionally adopted four new articles addressing this issue.

## **2.3 The relationship with the draft articles on state responsibility**

In the absence of a separate set of rules concerning the responsibility of international organizations, scholars have in the past made approaches to the question of whether it is possible to analogously apply the rules governing state responsibility on cases concerning organizations, although with varying conclusions.<sup>11</sup>

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<sup>6</sup> Malanczuk, p. 96.

<sup>7</sup> Report of the ILC on the work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, para. 44.

<sup>8</sup> GA Resolution 56/82 of 12 December 2001, para. 8.

<sup>9</sup> Report of the ILC on the work of its Fifty-fourth Session (2002), A/57/10, Chapter III para. 458-463.

<sup>10</sup> See articles 1-3 (supplement A).

<sup>11</sup> See e.g opinion of Shaw, p 920.

The same approach has been adopted in international praxis. For instance, in *Prosecutor v. Dragan Nikolic case*<sup>12</sup> the ICTY held that even though the rules on state responsibility not formally can apply to the conduct of an international organization, general principles laid down in the existing draft can be used as legal guidance concerning organizations.

Naturally, since articles addressing the responsibility of international organizations are presently being drafted, a discussion of whether analogy is an appropriate solution in this context would seem superfluous. Instead, it is relevant to examine to what extent the articles on state responsibility are influential to the new draft.

The codified rules on state responsibility are based on customary law, accepted by states, and thus, express important principles concerning international responsibility in general.<sup>13</sup> It is therefore natural that the articles on state responsibility work as guidance for the responsibility of international organizations.

At the same time, the rules on the responsibility of international organizations have to enjoy certain independence from those concerning states. While states are somewhat consistent in their structures, organizations are subjects of diverse nature and their practice needs to be examined separately from state practice. Legal issues arising with regard to the responsibility of states may not arise with regard to international organizations and vice versa.<sup>14</sup>

The Commission has in its current work on responsibility sought to, as far as possible; avoid the mistake of not identifying particular aspects with regard to international organizations. It has particularly drawn attention to the *Vienna Convention of the law of treaties between states and international organization or between international organizations*, which at the time of its creation had been greatly aligned with the *Vienna convention on the Law of Treaties between States*.<sup>15</sup>

While it may appear logical to simply exchange the word *state* with *international organization* in a provision that contains already established principles of responsibility, doing so may in fact carry problematic consequences. An example of this will be illustrated below.

The draft articles on state responsibility refer to the *internal law of the state*<sup>16</sup> in determining whether an organ is an organ of the state. If a similar

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<sup>12</sup> *Prosecutor v. Dragan Nikolic*, ICTY Trial chamber II, Judgement of 18 December 2003, Case No. IT-94-2-S.

<sup>13</sup> Topical summary of the discussion held in the sixth Committee of the General Assembly during its fifty-eighth session (2003), A/CN.4/537, para. 10.

<sup>14</sup> *Ibid.*, para. 11.

<sup>15</sup> *Ibid.*

<sup>16</sup> See e.g. article 4(2) (Supplement B).

wording would be used with regard to organizations, the provision would refer to *the internal law of the organization*. The internal law of an organization such as the United Nations constitutes in fact also a source of international law. The organization might therefore not possess the capacity to influence its internal law.<sup>17</sup> Taking this controversy into consideration, the Commission has instead chosen to use the term *internal rules of the organization*, referring not only to the constituent documents of the organization but also decisions, resolutions and other acts taken by the organization in accordance with those instruments, as well as established practice of the organization.<sup>18</sup>

Another indicator of the new draft's independence is the fact that some articles that appear in the draft on state responsibility, such as articles 5, 8, 9 and 10, will have no equivalents in the new draft. Naturally, this is because they concern issues that do not correspond to international organizations, such as governmental or territorial control.<sup>19</sup> Simultaneously, some provisions that do not correspond to state responsibility, such as the responsibility of a member state of the conduct of the organization, have been included in the new draft.

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<sup>17</sup> Statement of the Permanent Mission of Japan to the United Nations, On Item 152, "Report of the International Law Commission (Responsibility of International Organizations)" (29 OCT 2003).

<sup>18</sup> See art 4, p4 (Supplement A).

<sup>19</sup> Gaja, Second report on responsibility of International Organizations (2004), A/CN.4/541, para 64-67.

# 3 International organizations as subjects to responsibility

## 3.1 Defining the international organization

In spite of its importance in international relations, there is no universally established definition of the international organization.<sup>20</sup> Thus, any legal approach to the organization requires a determination of its conceptual status. Moreover, in order to examine the responsibility of international organizations one needs to consider which elements determine whether an organization may become subject to responsibility.

The international organization is commonly described as founded on a voluntary basis. It is thereby assumed that it is established through an agreement between the members, normally embodied in a treaty. In addition, it should possess a somewhat permanent structure, autonomy towards its members and co-operative functions.<sup>21</sup>

Codification conventions tend to define the international organization more generally, or in specific accordance with their respective purposes.<sup>22</sup> For instance, whereas a number of conventions simply refer to *intergovernmental organizations*,<sup>23</sup> the *1986 Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations* additionally requires that the organization possesses treaty-making capacities.<sup>24</sup>

The Commission has for the purpose of the draft articles on the responsibility of international organization adopted the following definition:

### "Article 2

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."<sup>25</sup>

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<sup>20</sup> Virally, p. 51.

<sup>21</sup> Ibid., pp. 51-52.

<sup>22</sup> Gaja, First report on responsibility of international organizations (2003), A/CN.4/532, para 22.

<sup>23</sup> See e.g. article 2(1)(i) of the *Vienna convention on the law of treaties* of 23 May 1969.

<sup>24</sup> See article 2 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* of 21 March 1986.

<sup>25</sup> Report of the International Law Commission on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 38.

When one compares the definition in article 2 to prior definitions of international organizations, it is evident that the Commission has taken a new approach.

The term *intergovernmental*, as often used in codification conventions addressing international organizations, indicates that an organization is founded by governments and excludes the possibility of other representatives as founders of an organization. By suggesting other entities than states as members of the organization, which may well be other organizations without a governmental authority, the Commission has rejected the term *intergovernmental* for the purpose of its new draft.<sup>26</sup>

The Commission has further avoided using the criterion *treaty-based*. Although most international organizations are in fact established through a treaty; it is necessary to recall the existence of organizations with alternative foundations.<sup>27</sup> For instance, the OSCE<sup>28</sup> and the OPEC<sup>29</sup> are both examples of major organizations established through documents adopted during international conferences. Nevertheless, in such cases one could still assume the existence of an implicit legal agreement between the founders.<sup>30</sup> Consequently, article 2 refers to organizations established by a treaty or other instrument governed by international law. By other instruments, the Commission suggests resolutions adopted by the General Assembly of the UN or by states during international conferences.<sup>31</sup>

One may still argue that it is controversial to lay down this criterion in article 2 while suggesting that international organizations may include as members *other entities* than states.

In order to adopt an international instrument, a subject needs to possess some treaty-making powers. Although it is somewhat unclear to what *other entities* article 2 refers, one could assume that they do not necessarily possess enough powers to adopt the constituent documents of an international organization. The Commission has however not intended to exclude entities without such powers from being regarded members of the organization and emphasises that membership of an organization does not in fact require adoption of the constituent documents.<sup>32</sup>

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<sup>26</sup> See e.g. Gaja, First report on responsibility of international organizations (2003), A/CN.4/532, para. 13-14.

<sup>27</sup> Virally, p. 53.

<sup>28</sup> Organization for Security and Co-operation in Europe, originally founded at the Helsinki meeting 1975, [www.osce.org](http://www.osce.org), last visited 24-08-2004 (10.35).

<sup>29</sup> Organization of Petrol Exporting Countries, founded at the Baghdad conference 1960, [www.opec.org](http://www.opec.org), last visited 24-08-2004 (10.40).

<sup>30</sup> Gaja, First report on responsibility of international organizations (2003), A/CN.4/532, para. 25.

<sup>31</sup> Report of the International Law Commission on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 40.

<sup>32</sup> Ibid.

It is noteworthy that the term *governed by international law* in article 2 excludes organizations established through treaties governed by municipal law, regardless of whether they have multiple state members. Thus, organizations such as the World Conservation Union (IUCN)<sup>33</sup> comprising over 70 member states but established under French law can not be subject to the draft. However, where a treaty has subsequently been concluded, as was the case regarding the Nordic Council, the draft remains applicable.<sup>34</sup>

## 3.2 Legal Personality

### 3.2.1 The concept of legal personality

The most relevant element in the determination of whether an organization may become subject to responsibility is the question of whether it possesses legal personality. Given its importance, it is necessary to pay specific attention to this issue.

Legal personality can be described as the capacity to operate on the world arena. It may include the ability to enter into legal agreements, to enjoy privileges and immunities from national jurisdiction and to bring and defend claims against other subjects in relation to violations of international law.<sup>35</sup> It is only logical that without legal personality, an organization can not become subject to international rights or duties and thereby, nor responsibility.

Although no general requisites for the establishment of legal personality exist, the International Court of Justice (ICJ) has in contemporary praxis taken a rather liberal view on the subject status of international organizations. In its advisory opinion on the *Interpretation of the Agreement of 25 March between the WHO and Egypt* the Court held that International Organizations are subjects of international law and therefore are bound by obligations arising under such law.<sup>36</sup>

The ICJ addressed the question of international organizations as legal subjects again in the *Legality of the use by a State of Nuclear Weapons in armed conflict* where it held that: “The Court need hardly point out that international organizations are subjects of international law...”<sup>37</sup>

In spite of this rather liberal view taken in practise on the subject status of international organizations, it is necessary to recall that their sheer existence

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<sup>33</sup> [www.iucn.org](http://www.iucn.org), last visited 27-08-2004 (14.10).

<sup>34</sup> Report of the International Law Commission on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, pp. 40-41.

<sup>35</sup> Malanczuk, p 91.

<sup>36</sup> *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt*, ICJ advisory opinion of 20 December 1980.

<sup>37</sup> *Legality of the use by a state of nuclear weapons in armed conflict*, ICJ advisory opinion of 8 July 1996.

does not give that they possess enough legal personality to become subject to international rights and obligations. According to some scholars, nor does the existence of legal personality *per se* necessarily entail what rights and obligations the organizations may be subject to.

The starting point for any discussion regarding the personality of an international organization must be the acknowledgement of that it is not born with a certain capacity. Hence, it is relevant to examine how legal personality may be acquired and ultimately, which powers and capacities it entails.

Two approaches to the issue of legal personality will be examined below.

## **3.2.2 The subjective approach**

### **3.2.2.1 Legal personality according to the constituent documents**

According to one view, legal personality of an international organization is dependent upon provisions in its constituent documents.

There are examples of statutes that explicitly establish the organization's personality.<sup>38</sup> However, as regards the United Nations, no such provision exists in the UN charter. Article 104 of the same, although it speaks of legal capacity, only grants the organization domestic personality.

It may be controversial to argue that an organization is limited to powers explicitly established in its constituent documents. The member states would under such circumstances maintain the utter control over the organization, which ultimately limits its autonomy. Naturally, it may also be the case that the statute is inadequate due to that the creators simply could not foresee certain situations. To strictly follow the constituent documents under such conditions may hinder the organization's development.<sup>39</sup>

In the absence of an explicit constitutional provision with regard to legal personality it is necessary to examine alternative legal grounds for the establishment of such.

### **3.2.2.2 The doctrine of implied powers**

The doctrine of implied powers provides that the constituent documents should be interpreted in such a way as to assure the fulfilment of their objectives and purposes. Powers not explicitly established in a statute can

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<sup>38</sup> See e.g. EC Treaty of Rome art 210: "The Community shall have legal personality".

<sup>39</sup> See Klabbers, p. 66.

instead be acquired through an implicit interpretation of the same document, or of the organization's functions in general.<sup>40</sup>

There are several examples of support for the doctrine of implied powers in practice.

In *Reparation for Injuries case*<sup>41</sup> the ICJ was asked for an advisory opinion on whether the UN had the legal capacity to bring claims for reparation against a state. Hence, the Court primarily had to consider whether the organization had a legal personality in that aspect and made a number of statements relevant to the issue. It pointed out that the functions of the United Nations were so important that some degree of legal personality was essential. If the organizations suffered injuries caused by a violation of an international obligation, its legal personality included the capacity to bring claims against the responsible state. The Court further held that the rights and duties of the organization depended upon its functions and purposes as specified or implied in the charter and practice.

Thus, the crucial question is whether one only can imply powers based on specific constitutional provisions or if powers only related to the functions and purposes of the organization may be implied.<sup>42</sup> In *Reparation for Injuries case*, the ICJ based the personality on functional necessity, i.e. powers necessary to carry out the organizations objectives could be implied from its general functions.

The opinion of the Court in *Reparation for Injuries case* was not unanimous. In a dissenting opinion Judge Hackworth expressed concern of the wide interpretation of the implied powers doctrine. Hackworth claimed that a correct application of the doctrine would be to imply powers based on already established rights and duties of the organization. Examples of such were the privileges the UN enjoys through the convention on the privileges and immunities of the United Nations, its treaty-making powers and its capacity to institute legal proceedings.<sup>43</sup>

An even more liberal view was taken by the ICJ in *Certain Expenses case*,<sup>44</sup> where it established that the UN had the capacity to set up a peacekeeping force. It is noteworthy that the Court did not approach the issue of whether the establishment of the UNEF was necessary, instead it was considered sufficient that the powers to do so were related to the general purposes of the United Nations.<sup>45</sup>

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<sup>40</sup> Ibid., pp. 67-73.

<sup>41</sup> *Reparation for injuries suffered in the service of the United Nations*, ICJ advisory opinion of April 11 1949.

<sup>42</sup> See Bowett, p. 303.

<sup>43</sup> *Reparation for injuries suffered in the service of the United Nations*, ICJ advisory opinion of April 11 1949, Dissenting opinion by Judge Hackworth, para. 196.

<sup>44</sup> *Certain Expenses of the United Nations*, ICJ advisory opinion of 20 July 1962.

<sup>45</sup> See Bowett, p. 303.

Even though practice indicates that one rather liberally can imply powers of international organizations, it is essential to recall that their personality remains limited. In *Reparation for Injuries case* the ICJ concluded that the personality of the organization did not entail that it had same rights and duties as states. Instead, it was evidential to its subject status under international law and to that it had the capacity to possess certain rights and duties. Such rights included the capacity to bring an international claim.<sup>46</sup>

The subjective theory suffers some weaknesses. Only the fact that one may establish legal personality through interpretation of the statute does not give that the personality may be maintained towards a third party. Moreover, any treaty-based provisions, whether implied or explicit, are simply expressions of a subjective intention of the member states and one may therefore claim that they only can be enforced against parties to the treaty.

### **3.2.3 The objective approach**

In *Reparation for Injuries case* the Court further held that the legal personality of the United Nations was objective, established through the intention of the member states but not dependant on their subjective wills. Thus, it did not require recognition by states and could be maintained against non-members of the organization as well as against the member states.<sup>47</sup>

The objective theory has been further developed and analysed in doctrine. It relies on the assumption that the legal personality of an organization exists in accordance with international customary law and ultimately, separately from its members.<sup>48</sup>

In order for an organization to possess an objective personality, scholars have suggested some general requisites. These involve e.g. the existence of legal powers on the international plane as well as certain distinction between the members and the organization in terms of powers and functions.<sup>49</sup>

The objective approach naturally becomes the most appealing choice in the establishment of legal personality with regard to international organizations. Given its rather liberal nature and its assumption of a pre-existing autonomy enjoyed by international organizations in general, it does not require a far-reaching analysis of neither the constituent documents of an organization, nor the intentions of its creators.

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<sup>46</sup> Ibid., p. 302.

<sup>47</sup> See e.g. Report of the International Law Commission on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 42.

<sup>48</sup> Reinisch, p. 57.

<sup>49</sup> See White, p. 28.

Nevertheless, it does give rise to some problematic issues. The member states of an organization may well agree upon the exclusion of customary law in its constituent document. Thus, one may conclusively argue that the ultimate power remains with the states, leading to that any objectiveness becomes difficult to maintain.

Another problematic aspect of the objective approach is that the objectiveness only becomes relevant when interpreted by a third party. Needless to say, any injured state that bilaterally requests for an international organization to assume responsibility may or may not recognize its capacity to do so.<sup>50</sup> Hence, one may again argue that legal personality remains subjective.

### **3.2.4 Own international legal personality**

The Commission had several reasons for adopting the wording *own international legal personality* in article 2.

The term is meant to require that the organization is a subject of international law, capable of bringing or defending an international claim. It is also meant to reflect that the legal personality of an organization is determined both by its constituent document and by its practice. Furthermore, it excludes questions concerning non-governmental organizations from the draft.<sup>51</sup>

By using the term *own* in addition to international personality, it is the Commissions intention to require that the organization enjoys certain independence from its members. Without an actual autonomy, an organization does not possess enough objective personality to become subject to responsibility.<sup>52</sup>

## **3.3 Concluding remarks**

It is evident that the Commission with regard to accountability attempts to use a broader definition than before. The subject of responsibility requires inclusion of a wide range of organizations without moving away from some minimum criterion regarding their capacities. Moreover, its nature does not require any other limitations than perhaps that the organizations possess the capacity to assume or claim responsibility. Hence, even though a majority of international organizations possess legal personality it would have been controversial to leave out the personality as a criterion in article 2.

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<sup>50</sup> See e.g. Topical summary of the discussion held in the sixth Committee of the General Assembly during its fifty-eighth session (2003), A/CN.4/537, para. 34.

<sup>51</sup> Ibid. para. 32-33.

<sup>52</sup> Ibid. para. 35-36.

With the great variety of international organizations today, one can not assume that international organizations generally possess legal personality. Moreover, organizations that only exist according to a document do not possess enough legal personality to be considered legal subjects, regardless of their intended functions and purposes. The organizations must also in reality possess certain autonomy towards their member states.

The criterion of *own international legal personality* in article 2 may however seem somewhat superfluous. It is natural that only organizations that are in fact subjects of international law and which have actual functions will in practice be able to injure a state and thereby become subjects to the draft. Moreover, through article 2 the Commission is requiring not only legal personality but also a particular objective legal personality. While this may seem necessary in the context of the draft, it must be recalled that objective legal personality is not an established concept.

The requirement of *own legal personality* may also carry consequences with regard to the responsibility of an organization's member states. In arguing that subsidiary responsibility of the members for the acts of the organization may arise, one is left with a theoretical imbalance between an assumed autonomy of the organization on one hand, and the members' influence on the other.

# 4 Attribution of conduct

## 4.1 Imputability as a prerequisite for responsibility

The Commission has laid down the following provision in its draft article 3 (p2):

“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.”<sup>53</sup>

Responsibility generally requires that a wrongful action or omission is attributable to the subject in question. Neither an organization, nor a state, has an autonomous body that can commit illegal acts. Attribution of conduct depends therefore on a link between the perpetrator and the state or organization.<sup>54</sup>

The link normally depends on several factors and although it may need to be established with specific regard to each case, guidance on this issue may be sought in chapter II of part I of the draft articles on state responsibility. The key aspect as regards attribution is the determination of which organs or persons possess the capacity to act on behalf of the state, and these are often representatives of the governmental body, including local and central authorities.<sup>55</sup>

An organization has a structure very different from that of a state and lacks a governmental body. Whereas it with regard to states are first and foremost the actions of state officials that may impose responsibility upon the state, the matter is more complex as regards organizations. More often than states, organizations depend on external resources in carrying out their activities. Two categories of actors may therefore be distinguished in a discussion regarding imputability of conduct to an organization, organs of the organization and organs placed at the disposal of the organization.

## 4.2 Organs and agents of the organization

Whereas states include nationals whose conduct is not attributable to the state if in breach of international law, an organization has a significantly

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<sup>53</sup> Report of the International Law Commission on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 45.

<sup>54</sup> Shaw, p. 548.

<sup>55</sup> Malanczuk, p. 257.

different structure. What constitutes private conduct of state nationals has no equivalent as regards organizations. It seems reasonable to assume that persons figuring within an international organization do so for the purpose of carrying out a function of the organization. Thus, a rather liberal approach has in practice been taken to the determination of whether organs or persons act on behalf of the organization.

In *Reparation for Injuries case* the International Court of Justice used the term *agent* in addition to *organ* and *official* to describe any person through whom the organization acted, and the *agents* were indeed considered actors of the organization.<sup>56</sup> It was thereby indicated that it is a person's functional role instead of administrative position that determines whether actions are carried out on behalf of the organization.

Similarly, conventions such as the *Convention on the privileges and immunities of the United Nations* grant *member representatives* and *experts of missions* immunities next to the *officials* of the organization.<sup>57</sup>

Organs and agents of an organization are, by their very nature, performers of the organizations functions, wherefore the link between the organization's own organs and agents and the organization may simply be determined on the basis of functionality.

Thus, the Commission has chosen the following formulation of its draft article 4:

#### **“Article 4**

##### **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.
3. Rules of the organization shall apply to the determination of the functions of its organs and agents ...”<sup>58</sup>

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<sup>56</sup>Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 14-15.

<sup>57</sup> See articles IV-VI of the *Convention on the privileges and immunities of the United Nations*.

<sup>58</sup> Articles 4-7 available at [www.un.org/law/ilc/sessions/56/56sess.htm](http://www.un.org/law/ilc/sessions/56/56sess.htm), last visited 15-08-2004 (15.00).

## 4.3 Organs and agents at the disposal of the organization

### 4.3.1 The criterion of effective control

International organizations generally possess very limited resources for pursuing their objectives and are therefore often dependent on state organs for assistance.<sup>59</sup>

The occurrence of that organs or agents are placed at the disposal of a state is naturally less common than as regards organizations. Nevertheless, the draft articles on state responsibility provide that a conduct performed by a lent organ may be attributable to the receiving state if the organ performs actions of governmental authority of the state at whose disposal it is placed.<sup>60</sup>

In the absence of a governmental authority with regard to international organizations the Commission has had to formulate some alternative criterion for this matter. The following formulation of article 5 has been adopted:

#### **“Article 5**

#### **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.”<sup>61</sup>

It is noteworthy that the exercise of *effective control* appears as the only criterion in the wording of article 5. The Special Rapporteur originally suggested a different formulation of the article. In addition to the criterion of effective control it required that the organ was “...*placed at the disposal of the organization for the exercise of one of the organization’s functions...*”<sup>62</sup>

Although it is not obvious why the Commission chose to exclude this element, it seems reasonable to assume that a functional criterion is in fact included in the term *at the disposal of the organization*.

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<sup>59</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 29.

<sup>60</sup> See article 6 (Supplement B).

<sup>61</sup> See footnote 58.

<sup>62</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 50.

Although article 5 does not specifically target any particular organs or conduct, one may envisage particular actions onto which it could apply. The United Nations naturally becomes an interesting subject to examine in this context.

### 4.3.2 Seconded personnel

A common occurrence with regard to international organizations is that a state lends, or *seconds*, personnel to the organization of which it is a member.<sup>63</sup>

The question of attribution of conduct as regards seconded personnel was left out in the draft articles on state responsibility.<sup>64</sup> Nevertheless, in its commentary to article 57 the International Law Commission makes the following remark:

“...when a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributed to the organization, not the sending State, and will fall outside the scope of the articles”.<sup>65</sup>

This approach to the question of attribution of conduct of seconded officials rules out responsibility of the state of origin. It does not appear unreasonable to argue that it is an indicator of that seconded officials in fact should be considered agents of the organization and thereby fall within the scope of article 4. However, the nature of seconded personnel gives that they are in fact placed at the disposal of an organization by a state, in accordance with article 5.

It is noteworthy that the statement rejects the possibility of dual attribution to the state and the organization, which according to the Special Rapporteur is in fact possible with regard to seconded personnel.<sup>66</sup>

When a seconded official answers directly to an organization, one could assume that effective control over that official is carried out by the organization to the extent that the official's actions are attributable to the organization in accordance with article 5. However, if a seconded official is instructed to act on behalf of the sending state one would have to pay

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<sup>63</sup> See e.g. *ibid.*, para. 29-30.

<sup>64</sup> See article 57 (Supplement B).

<sup>65</sup> See commentary on article 57, in: *ILC Commentaries to the draft articles on the responsibility of states for internationally wrongful acts*, adopted at its fifty-third session 2001, A/56/10.

<sup>66</sup> See opinion of Gaja, A/CN.4/541, para. 31 and 6-7.

specific attention to whether the organization carried out effective control over the illegal actions in question.<sup>67</sup>

### 4.3.3 Peacekeeping operations

The concept of peacekeeping, invented by the United Nations during the Cold War, has come to play a significant role in the field of collective security. While its original scope did not include the use of force, contemporary practice indicates that the use of such is in fact possible under some circumstances.<sup>68</sup> The question of who should be held responsible for the conduct of peacekeepers has thereby become increasingly relevant in contemporary practice.

For reasons of efficiency, the United Nations has often accepted the ultimate responsibility of actions performed by peacekeepers.<sup>69</sup> Nevertheless, as regards the question of to whom the conduct of peacekeepers is actually attributable, it is necessary to determine whether they constitute organs of the organization, organs at the disposal of the organization, or organs of the state of origin.

The charter of the United Nations does not provide an explicit legal support for peacekeeping operations. While it may be argued that an authorization by the Security Council under chapter VII of the charter constitutes a possible legal ground, it must be pointed out that authorizations not always take place.<sup>70</sup>

Nevertheless, peacekeeping missions may still find support through an implicit interpretation of the objectives and purposes of the United Nations.<sup>71</sup> One may refer to *Certain Expenses case* as a support for this argument and the issue of legality may therefore be considered resolved, or at least belonging to a legal analysis different from the present.

It appears reasonable to argue the very basis for the legality of peacekeeping simultaneously establishes that it does in fact fall within the functional scope of the United Nations. If one were to maintain this argument, peacekeeping forces would in fact constitute organs of the United Nations in accordance with article 4, and no further analysis of the link between the organization and the forces would be necessary. The reference to the internal rules of the organization in article 4, namely practice, supports this argument.

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<sup>67</sup> Statement by Colleen Swords, legal department of foreign affairs and international trade of Canada to the sixth committee of the 58th General Assembly, on Item 152, (28 OCT 2003).

<sup>68</sup> Ghali, pp. 89-91.

<sup>69</sup> See Shaw, p. 920.

<sup>70</sup> See e.g. opinion of Shaw, p 846.

<sup>71</sup> See Art 1 of the *Charter of the United Nations*.

However, although peacekeeping forces generally are regarded subsidiary organs of the United Nations, it is in fact the member states that provide for the forces.<sup>72</sup> The characteristic of peacekeeping is therefore more in accordance with article 5, namely that the forces are placed at the disposal of the organization by one or several states.

If peacekeeping forces are to be considered organs placed at the disposal of the organization, in order for their conduct to be attributable to the organization, one would have to consider the criterion of effective control in article 5.

Again, the United Nations often claim exclusive command and control of peacekeeping operations. While it thereby easily can be assumed that it does in fact carry out effective control over the actions of peacekeepers it is necessary to point out that this not an obvious fact. Agreements between the United Nations and the contributing state often give that it is ultimately the sending state that has the exclusive criminal jurisdiction and control over disciplinary matters. It is noteworthy that whereas this does not entail that the organization is unable to carry out effective control, it serves as a reminder of that peacekeeping forces are in fact connected to the state of origin.<sup>73</sup> It also indicates that the organization's control never can be exclusive.

It seems therefore reasonable to assume that the degree to which an organization carries out effective control needs to be determined with specific regard to each case. It is likely that the crucial question in the determination of effective control will be whether the actions of the peacekeepers fall under the United Nations' chain of command.<sup>74</sup>

There is support for this argument in practice. When a British helicopter suffered an accident during the UN peacekeeping operation in Cyprus (UNFICYP) the United Nation accepted responsibility due to that the particular action in which the helicopter was involved was under the ultimate authority of the UNFICYP force commander.<sup>75</sup>

With regard to a car accident that occurred during the United Nations operation in Somalia (UNOSOM), the organization denied responsibility on the same ground. The persons involved in the accident were part of the Unified task force (UNITAF), namely Operation Restore Hope, which was not immediately under UN command.<sup>76</sup>

The notion that it is the relevant chain of command that determines to whom a certain conduct is attributable appears reasonable. A peacekeeping

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<sup>72</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 35.

<sup>73</sup> *Ibid.*, para. 38.

<sup>74</sup> *Ibid.*, para. 40-41.

<sup>75</sup> *Ibid.*, para 35.

<sup>76</sup> *Ibid.*, para 33.

operation requires inclusion of not only military personnel, but also staff holding varying functions within its structure. It is only logical that conduct should be attributable to the authority under which a conductor operates.

Nevertheless, bearing in mind that the peacekeepers may well act under the command of several authorities, one should not exclude the possibility of joint responsibility between the organization and the contributing state.<sup>77</sup>

#### **4.3.4 Military measures *authorized or recommended* by the Security Council**

Whereas peacekeeping forces may be considered organs placed at the disposal of the United Nations, the question is whether the same can be argued with regard to mandated military operations in general. The UN charter provides little support for military actions and they constitute neither a purpose, nor an objective of the organization.<sup>78</sup>

If one still were to argue that mandated operations, as collective security measures, under some circumstances aim to carry out the functions of the United Nations the question of whether the United Nations exercises effective control over such actions remains.

Again, it should be the chain of command that indicates who carries out the ultimate control. The United Nations has in practice persistently argued that when an operation falls outside the command of the organization, conduct is attributable to the respective state.<sup>79</sup>

It is noteworthy that the Commission has not intended that the scope of article 5 should cover military operations undertaken by states under recommendation or authorization by the Security Council. According to the Special Rapporteur, an authorization or recommendation does not equal effective control and thus, the respective state or states should assume the responsibility under such circumstances.<sup>80</sup>

As a support for this argument the Rapporteur refers to the situation in which the United States accidentally bombed the territory of China during the Korean War. Despite the existence of a mandate authorizing the use of force, the United States took responsibility for the actions as a state.<sup>81</sup>

Nevertheless, like any provision article 5 may become subject to interpretation. One may envisage some possible controversies in relation to its wording.

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<sup>77</sup> See e.g Ibid., para. 42.

<sup>78</sup> See articles 1-2 of the *Charter of the United Nations*.

<sup>79</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 33.

<sup>80</sup> Ibid., para 29-34.

<sup>81</sup> Ibid. (para 32).

The *Charter of the United Nations* clearly indicates that the legality of any military action by the Security Council requires a certain control. Evidential to this are the prerequisites laid down in articles 46-47, providing that the Security Council in collaboration with the Military Staff Committee shall set up plans for the actions.<sup>82</sup>

With regard to peacekeeping operations, it has been pointed out that their legality, namely their accordance with the functions of the United Nations, also may confirm that they belong to the organization to the extent that they in fact might constitute organs of the organization. It seems reasonable to assume that similarly, although to a less extent, the requirements of control and planning for the legality of collective security measures are indicators of that they have a functional connection to the organization. By requiring an effective control, one has limited the possibility of holding an organization responsible for the acts of an organ that was in fact at the disposal of the organization.

In the corresponding provision in the draft articles on state responsibility, the criterion of effective control is embodied in the requirement that the organ exercises elements of *governmental authority*.<sup>83</sup> Needless to say, *governmental authority* is a broader requirement than *effective control* and does to a less extent lead to subjective determinations of the relationship between a lent organ and the receiving state.

One may therefore argue that article 5 requires a more functional criterion than *effective control*. For example, a reference to article 4 would have broadened the scope of article 5.

One may also envisage a situation where the required planning is delegated to the states whose forces intend to perform the operation, and the mandate which constitutes the link between the organization and the organ, namely through establishing a certain control, relies on a doubtful legal ground. The delegation will thereby have changed the legal characteristic of the organ so that it in fact no longer is at the disposal of the organization.

There are several examples of when a mandate in this way has changed from being an authorization of the use of force to merely a recommendation by the Security Council, one being the removal of Iraq from Kuwait during the Gulf war. The Coalition forces, although authorized by the Security Council, did not in reality act neither under the supervision of the Council, nor the UN flag.<sup>84</sup>

The same situation referred to by the Special Rapporteur in dismissal of that an authorization by the Security Council could lead to positive attribution of

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<sup>82</sup> White, pp. 192-193.

<sup>83</sup> See article 6 (Supplement B)

<sup>84</sup> See White pp. 196-197.

conduct to the United Nations, is in fact another example of a similar delegation. The Secretary General had expressed a wish that the actions towards Korea in 1950 would be carried out under control by the UN, but the enforcement of the mission was ultimately dominated by the United States.<sup>85</sup>

Thus, the question is whether the Security Council can bypass its responsibility by simply delegating the very criterion for its own control, or acting beyond its capacity. While this requires further consideration in relation to ultra vires acts, it seems that the criterion of *effective control* does not offer any apparent solutions to this controversy.

In conclusion it seems that there is little reason for establishing categorically that military forces under a mandate by the UN never can constitute organs at the disposal of the organization. As with regard to peacekeeping, each case may need to be examined in the light of the actual relationship between the organ and the organization.

One may also in this context mention voluntary operations, in which states undertake military measures merely based on an informal approval by the Security Council.<sup>86</sup> Such operations remain contrary to international law *per se* and are very unlikely to impose responsibility to the United Nations.

#### **4.4 Attribution of conduct ultra vires**

As regards state responsibility, an illegal action is attributable to a state even if it was carried out beyond the capacity of the conductor.<sup>87</sup>

With regard to international organizations, which in comparison to states possess more limited powers, one could assume two categories of ultra vires acts, acts carried out by the organization beyond its functions and acts carried out by organs of an organization beyond their functions.

Actions carried out beyond the functions of the organization itself may be difficult to distinguish. The doctrine of implied powers, more or less, grants organizations powers based on functionality. On the same ground, International organizations tend to take a rather liberal approach to its own area of competence.

Nothing in praxis indicates that conduct carried out by an organization beyond the functions given to it by its member states never can be imputed to the organization.<sup>88</sup> One may therefore assume that an organization has a

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<sup>85</sup> Ibid., pp. 195-196.

<sup>86</sup> Ibid., pp. 195-197.

<sup>87</sup> See article 7 (Supplement B).

<sup>88</sup> See e.g. A/CN.4/541, para. 51 with reference to *Legality of use by a state of nuclear weapons in armed conflict*, ICJ advisory opinion of 8 July 1996.

fundamental responsibility to act within such functions and if it they are exceeded, the actions may still be attributable to the organization.

As for organs exceeding their functions, reference may be made to *Certain Expenses* case, where the ICJ established that if an action falls within the scope of the functions of the United Nations but has been carried out by the wrong organ, it may still be attributable to the organization. The Court indicated that the situation in which an organ exceeds its powers only constitutes an irregularity of the internal structure of an organization and should not effect the protection of third parties.<sup>89</sup>

However, not only organs act within the functional scope of an organization. As has previously been pointed out, the actions of any persons acting within the functions of an organization are attributable to the organization. There is therefore no reason to exclude the possibility of attributing ultra vires acts performed by agents of an organization in this context.<sup>90</sup> The ICJ expressed support for this argument in its advisory opinion on *Difference relating to immunity from legal process of a Special Rapporteur of the Commission of Human Rights*, where it held that agents of the United Nations must care not to exceed their functions to avoid claims against the organization.<sup>91</sup>

Nevertheless, it is noteworthy that only acts undertaken by on-duty personnel can be attributable to the organization.<sup>92</sup> This requirement is evidential to the functional criterion as laid down in for instance *Certain Expenses case*.

The following wording of article 6 has been adopted:

**“Article 6**

**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.”<sup>93</sup>

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<sup>89</sup> Ibid., para. 52-53.

<sup>90</sup> Ibid., para. 54.

<sup>91</sup> *Difference relating to immunity from legal process of a Special Rapporteur of the commission of human rights*, ICJ advisory opinion of 29 April 1999, para. 66.

<sup>92</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para.55.

<sup>93</sup> See footnote 58.

## 4.5 Attribution of conduct adopted by the organization as its own

The link between a conductor and the organization is normally established based on the status of the organ or agent at the time the action was carried out. Nevertheless, conduct may be attributable to an organization even if it may not have been so at the time of event, if the organization subsequently adopts the conduct as its own.

As regards state practice, there are several examples of where a state has been declared responsible for an action due to its acknowledgement or adoption of a certain conduct, even if it otherwise would not have been attributable to the state.<sup>94</sup>

In *Teheran Hostage case*,<sup>95</sup> the ICJ declared that while the Iranian government was not immediately responsible for the actions of the hostage-takers, namely the seizure of the American Embassy in Teheran, its approval and maintenance of the situation has translated the actions into acts of the state of Iran.

It is noteworthy that mere approval or support for an action does not entail that the action is attributable to the state that expresses the support. The state has to actually identify the action as its own in order for positive imputability to arise. The adoption of the conduct may be either express or interpreted from certain behaviour of the state in question.<sup>96</sup>

As regards practice of international organizations the question of adoption of conduct by an organization as its own was addressed by the Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia, in *Prosecutor v. Dragan Nikolic case*.<sup>97</sup> The Court had to consider whether the SFOR had adopted certain individuals' behaviour in relation to Nikolic's arrest as its own, and if it thereby was attributable to the force. The Court, through an analogous interpretation of article 11 of the draft articles on state responsibility, concluded that SFOR had in fact not acted in a way as to identify and adopt the conduct in question.

Nevertheless, acknowledgement and adoption of conduct by an organization may well lead to imputability in the same way as with regard to state responsibility.<sup>98</sup>

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<sup>94</sup> See commentary on article 11, A/56/10.

<sup>95</sup> *United States diplomatic and consular staff in Teheran, US v. Iran*, ICJ judgement of May 24, 1980.

<sup>96</sup> Commentary on article 11, A/56/10.

<sup>97</sup> See footnote 12.

<sup>98</sup> See Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 60-63.

In addressing this issue, the Commission has suggested a wording somewhat identical to article 11 of the draft articles on state responsibility.

**“Article 7**

**Conduct acknowledged and adopted by an international organization as its own**

Conduct which is not attributable to an international organization under proceeding 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.”<sup>99</sup>

## **4.6 Concluding remarks**

Attribution of conduct has proven to be the most complex issue of the work on the responsibility of international organizations so far. Given its sensitive nature, several states have called upon the Commission to investigate the question of attribution, specifically with regard to peacekeeping.

Peacekeeping constitutes a very distinctive collective security measure and should therefore not be confused with mandated operations in general. Whereas it seems reasonable to argue that the legal personality of the United Nations entails the capacity to establish a peacekeeping force and the actions of the force thereby should fall within the legal framework of the organization, one must bear in mind that imputability depends on additional elements. Regardless of to what extent the purpose of peacekeeping corresponds to the purposes of the United Nations, its enforcement remains dependent on the member states.

The theoretical aspects of attribution of conduct with regard to peacekeeping missions are likely to become subjects to further examination and interpretation once the draft articles are officially adopted. For reasons of efficiency it may be the case that the United Nations in practice continues to take responsibility for the conduct of peacekeepers. The purpose of referring to draft article 5 with regard to peacekeeping must be considered an attempt by the Commission to establish some factual criterions, regardless of their practical relevance.

The controversial aspect of imputability with regard to international organizations is the absence of a governmental sphere. The Commission has attempted to find alternative ways of linking an organ or agent to the organization, namely by using criterions such as functionality or the exercise of effective control. The risk one takes by establishing such requirements is that they may become subject to interpretations with varying outcomes. It is for instance not always obvious when, or if, an organization carries out effective control over an action.

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<sup>99</sup> See footnote 58.

Given this fact, the topic of attribution constitutes a prominent example of the fact that it under some circumstances may be controversial to codify rules concerning organizations based on existing rules concerning states. The organization remains fundamentally different from the state in terms of structure and is moreover a developing concept. The rules need therefore be flexible on one hand, and specific on the other.

# 5 Responsibility of the member states

## 5.1 The relationship between an international organization and its members

The question of the responsibility of the member states for the actions of the organization is naturally related to the question of attribution but, due to its complex nature, needs separate attention.

The relationship between the organization and its members is controversial. When an organization is said to possess legal personality it is liable for its own actions. However, in spite of its autonomy, the organization can not function without its members.

In the preliminary draft articles the issue of the member states' responsibility is so far only mentioned in article 1 (2), which states:

“... 2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.”<sup>100</sup>

The question of whether a member state can be held responsible for the conduct of the international organization of which it is a member was left out in the draft articles on state responsibility. By including the issue of the member states' responsibility in the present draft, the Commission attempts to conclusively fill out this gap.<sup>101</sup>

Nevertheless, it remains unclear under which circumstances and to what extent, the members can be held responsible for the actions of the organization. One may assume that the former could become subject to two types of responsibility, which will be analysed below.

## 5.2 Joint responsibility

Whereas it appears logical that positive attribution of conduct to one subject excludes attribution of conduct to another, conduct is not necessarily attributable to only one subject.<sup>102</sup> In situations where an action is imputable

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<sup>100</sup> Report of the ILC on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 33.

<sup>101</sup> Ibid., p. 36 (para. 7).

<sup>102</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 6.

to both a state and the organization of which it is a member, the question of joint responsibility between the two arises.

Chapter IV of part I of the draft articles on state responsibility governs the responsibility of a state when it aids, assists, directs, controls or coerces another state in conducting an internationally wrongful act. In such cases responsibility can be imposed upon that state if the act would have been wrongful if committed by that state.<sup>103</sup> While it must be noted that the draft articles on state responsibility only deals with the relationship between states, one should bear in mind that situations arising between states may similarly arise between states and international organizations, or between organizations.

Thus, joint responsibility could arise when a state co-operates with the organization in committing the unlawful act, or as has been pointed out above, when organs or personnel are placed at the disposal of an organization by a state or another organization. Naturally, a state would under such circumstances become subject to state responsibility.<sup>104</sup>

One may also argue that in order for joint responsibility to arise, dual attribution of conduct is in fact not a necessary prerequisite. If an organization and its members enter into a so-called mixed agreement, where their respective competence and obligations are not distinguished, they will have a joint responsibility towards third parties. It is noteworthy that such would arise even if the conduct otherwise would have been attributable to one or several of the states involved. Examples of this type of joint responsibility can be sought in European Community practice.<sup>105</sup>

Although joint responsibility appears logical, it has little support in practice. After the NATO interventions in the former Yugoslavia (FRY), several of the organization's member states were brought before the International Court of Justice by Serbia and Montenegro for the illegality of use of force.<sup>106</sup> It has by several of the respondents been argued that the actions are attributable to NATO instead of to the states and they have thereby objected to the possibility of dual attribution.<sup>107</sup>

Another argument put forward by the defendants has concerned the absence of support for joint responsibility in international law. For instance, the government of Canada has argued that in order for joint responsibility to arise, there has to be a support for such in a relevant treaty. The NATO treaty does not include any such provisions, and the codified rules on state

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<sup>103</sup> See articles 16-18 (Supplement B).

<sup>104</sup> Report of the ILC on the Work of its Fifty-Fifth Session (2003), A/58/10, Chapter IV, p. 37.

<sup>105</sup> Gaja, Second report on responsibility of international organizations (2004), A/CN.4/541, para. 8.

<sup>106</sup> *Legality of use of force, Serbia and Montenegro v. eight states*, ICJ 1999- (pending).

<sup>107</sup> See A7CN.4/541, para. 7.

responsibility provide no more support for the concept of joint responsibility.<sup>108</sup>

Thus, whereas the above mentioned case in theory constitutes an example of where an organization and its members may jointly be responsible for illegal acts due to dual attribution of conduct, one must recognize that international law in fact provides a weak ground for such.

Nevertheless, the Commission intends to address the issue of joint responsibility during its session in 2005 and has requested states and organizations to comment on whether such can arise under two circumstances. These include the event of that a state acts on the request of an international organization and that action is in breach of an international obligation, and if a state instead acts under the authorization of an international organization.<sup>109</sup> It seems reasonable to assume that the Commission thereby acknowledges joint responsibility as a customary provision.

## 5.3 Subsidiary responsibility

### 5.3.1 Subsidiary responsibility in practice

The question of subsidiary responsibility of the member states arises in situations where the organization is unable to provide for reparation. Practice on this issue has so far mainly concerned commercial contracts concluded between the organization and external parties and thereby, liability. Nevertheless, it provides general guidance on the issue of responsibility of member states or at the very least, on the relations between the organization and its members.<sup>110</sup>

A relevant example to examine in this context is what followed the collapse of the International Tin Council. The organization, comprising 23 states and the EC, was established in 1956 with the aim of regulating the tin market. When it due to insufficient funds collapsed in 1985 third party creditors were left with large debt claims towards the member states. The question arose to whether the member states were responsible of the organization's debts.<sup>111</sup>

After having had no success in claims before British courts under municipal law the creditors attempted to approach the issue under international law. The claimants argued that under international law, the member states had a

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<sup>108</sup> *Legality of use of force, Serbia and Montenegro v. Canada*, Oral pleading of Mr. Kirsh, Canada on 12 May 1999, 99/27.

<sup>109</sup> See [www.un.org/law/ilc/sessions/56/56sess.htm](http://www.un.org/law/ilc/sessions/56/56sess.htm).

<sup>110</sup> Report of the ILC on the work of its Fifty-fourth Session (2002), A/57/10, Chapter III para. 479-480.

<sup>111</sup> Shaw, pp. 921-923.

joint or subsidiary responsibility of the organization unless such responsibility was expressly excluded in the constituent documents.<sup>112</sup>

The Court held that practice witnessed of no such rule of international law. It noted that instead, an explicit provision in the constituent documents could give rise to responsibility of the member states. Responsibility could also be imputed to the member states if they carried out direct control of the organization.<sup>113</sup>

### 5.3.2 Effective control and the principle of due diligence

Critics to the Tin Council Case have further examined the question of control. One of the arguments put forward concerns responsibility due to the member states' negligent supervision of the organization.<sup>114</sup>

According to the International Law Association, members of an organization have a fundamental duty to exercise supervision over the organization, to secure the lawfulness of its actions and to protect interest of third parties.<sup>115</sup>

The International Court of Justice took a similar approach with regard to state responsibility in *Corfu Channel case*.<sup>116</sup> The Court had to determine whether Albania could be held responsible due to negligence in protecting the Corfu Channel from the placing of landmines, causing damage to British ships. The Court found that Albania carried out territorial control of the channel and therefore was responsible of the damage due to its failure to prevent the mining.

In *Teheran Hostage case*<sup>117</sup> the ICJ made a similar observation. Iranian security forces had failed to intervene when the American Embassy was attacked by a group of demonstrators. The Court held that the state of Iran was responsible for the events due to its omission to protect the American Embassy from the taking of hostages.

Bearing in mind that the *Corfu Channel case* and *Teheran Hostage case* concern the issue of control linked to territorial competence, it may be controversial to argue that the members of an organization similarly have a legal obligation to protect third parties.<sup>118</sup> Nevertheless, if such an obligation can be considered a customary provision, failure to provide

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> See Sadurska, Chinkin, p. 857.

<sup>115</sup> ILA, Second report on the Accountability of international organizations, London conference (2000), p. 892.

<sup>116</sup> *Corfu Channel, UK v. Albania*, ICJ judgement of April 9, 1949.

<sup>117</sup> *United States diplomatic and consular staff in Teheran, US v Iran*, ICJ judgement of May 24, 1980.

<sup>118</sup> Sadurska, Chinkin, pp. 882.

protection would give rise to international responsibility. The omission in such case would constitute a breach of the principle of *due diligence*.

The requirement of adequate supervision relies on the assumption that the members carry out a certain control of the organization. Although the international organization can not function without its members, its conceptual status requires certain autonomy. Hence, its relationship with its members is not an obvious one and may vary significantly. Naturally, the members of an organization with limited membership, or very specific aims, are naturally more capable of maintaining control over the organization.

One must also recall that an organization often has a significant hierarchy wherein financially stronger and weaker states may carry out different degrees of control. If a subsidiary responsibility entails a shared responsibility between members, weaker states may be exposed to an undeserved responsibility of an action they did not in fact control.<sup>119</sup> An organization such as the United Nations would in this regard be an example of an organization where the majority of the member states are unable to maintain a direct control.

This raises an issue of practical relevance. If one were to assume a situation where an omission to protect third parties occurs, for instance due to an exercise of veto power in the Security Council by a state with an individual interest, it may seem unreasonable that the remaining parties should stand the responsibility of such.<sup>120</sup>

One may argue that article 16 of the draft articles on state responsibility, already provide for a system of responsibility when a state controls another entity.<sup>121</sup> However, this provision remains inapplicable in that it speaks only of states as subjects. Even though analogy here constitutes an attractive solution, practice does not support such a possibility.

## 5.4 Concluding remarks

Establishing provisions regarding the responsibility of the member states requires a conclusive determination of the relationship between the organization and its members.

Through the inclusion of this issue in the present draft, it must be considered confirmed that the member states of an organization do in fact have a certain responsibility of its actions. Moreover, regardless of which type of responsibility may come in to question, rules on this issue will disable states' ability to use the organization as a haven for illegal conduct.

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<sup>119</sup> Ibid., pp. 887-890.

<sup>120</sup> See Topical summary of the discussion held in the sixth Committee of the General Assembly during its fifty-eighth session (2003), A/CN.4/537, para. 36.

<sup>121</sup> See article 16, (Supplement B).

It is noteworthy that practice provides little guidance on the issue of joint or subsidiary responsibility, as well as on the extent to which the organization shall enjoy autonomy towards its members.

One may argue that it is somewhat unreasonable that the members of an organization with for instance their financial benefit as its purpose are not liable for its flaws. Whereas the shareholders of a corporation are not considered liable for the actions of the same, they may not have contributed to the creation of the corporation. Most members of an international organization on the other hand are parties to its constituent documents.

At the same time, in order to maintain a system of autonomy of international organizations, it may be necessary to as far as possible distance the actions of the organizations to the states.

Whichever standpoint one takes on this issue, there are indicators of that contemporary international law does not support subsidiary responsibility of the member states when the organization lacks financial means, nor provides for an indirect responsibility of the members due to their responsibility of funding the organization.

The Commission intends to address the issue of the relationship between the organization and its member states in 2005, and it has yet to be seen how the rules on responsibility of member states will be formulated in the new draft.

# 6 Future considerations

## 6.1 Upcoming work in the Commission

At its fifty-seventh session in 2005 the Commission intends to further examine some of the issues that have been brought up upon during its prior sessions, such as the responsibility of an international organization in connection with the wrongful act of a state or another organization. It also intends to continue drafting articles with further counterparts in the articles on state responsibility, including the breach of an international obligation and circumstances precluding wrongfulness.<sup>122</sup>

The Commission has requested states and organizations to express their view on several issues in relation to its upcoming work.

One of those issues concerns to what extent the commission in its future work should consider breaches of obligations an organization may have towards its member states or its agents. This internal relationship between the organization and its members and agents is governed by the internal rules of the organization, which status under international law is controversial. Another issue concerns whether *necessity*, as described in the articles on state responsibility, can constitute a circumstance precluding wrongfulness for international organizations.<sup>123</sup>

## 6.2 Settlement of disputes

An issue of practical relevance with the regard to responsibility, although separate from the drafting as such, is the choice of a *forum conveniens* for the settlement of disputes.<sup>124</sup>

With few exceptions, such as with regard to the EC<sup>125</sup>, international organizations have no court capable of making definitive judgements.<sup>126</sup>

In practise, international organizations rarely appear before international dispute- settlement bodies. For instance, in disputes arising in relation to peacekeeping the tendency is that the United Nations accepts responsibility for the act and reparation is provided without controversy.<sup>127</sup>

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<sup>122</sup> [www.un.org/law/ilc/sessions/56/56sess.htm](http://www.un.org/law/ilc/sessions/56/56sess.htm), last visited 27-08-2004 at 13.00.

<sup>123</sup> Ibid.

<sup>124</sup> See e.g. Bowett, p. 332.

<sup>125</sup> See e.g. article 19 of the *Statute of the Court of Justice of the European Communities*.

<sup>126</sup> Bowett, p. 325.

<sup>127</sup> See e.g. Shaw, p. 920.

In the context of the responsibility of international organizations, there may in future become necessary to examine whether there is need to establish a permanent forum for dispute-settlement between States and international organizations, or between international organizations.<sup>128</sup> Given the similarities between the rules on state responsibility and the draft articles on responsibility of international organizations, one must consider whether the absence of a court with regard to organizations may constitute a gap in international dispute-settlement.

Nevertheless, some existing methods of dispute-settlement with regard to international organizations must in this context be recalled.

The International Court of Justice is through its statute limited to handle cases only concerning states.<sup>129</sup> Nevertheless, the Court has the capacity to give advisory opinions on issues, at the request of, and with regard to some international organizations.<sup>130</sup> Although an advisory opinion by the ICJ is generally not binding, it is noteworthy that the member states may agree upon a binding effect of such.

There are several examples of international conventions that include articles expressing the consent to a binding effect of an advisory opinion, if given by the ICJ. The *Convention of the privileges and immunities of the United Nations* includes the following provision: “The opinion given by the Court shall be accepted as decisive by the parties.”<sup>131</sup>

One must however bear in mind that there are limitations to the possibility of requesting advisory opinions of the Court. Article 96 of the UN Charter in fact only grants its own organs and specialized agencies such capacity. Moreover, the organs and agencies may only request for advisory opinions concerning questions related to their activities.<sup>132</sup>

In the absence of a court with general competence of dispute-settlement with regard to international organizations, one must recognize the importance of arbitrary bodies. Arbitration is generally considered an efficient method in the settlement of disputes for instance where certain expertise on a subject is required. It is also considered a cost-effective and flexible option.<sup>133</sup>

While it may be argued that arbitration constitutes the most convenient choice of dispute-settlement with regard to organizations, some of its disadvantages, such as its *ad hoc* basis, must also be considered. Moreover,

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<sup>128</sup> See e.g Report of the ILC on the work of its Fifty-fourth Session (2002), A/57/10, Chapter III, para. 486.

<sup>129</sup> See article 34 of the *Statute of the International Court of Justice*.

<sup>130</sup> See *ibid.*, article 65 and article 96 of the *Charter of the United Nations*.

<sup>131</sup> *1946 Convention on the privileges and immunities of the United Nations*, article VIII, section 30, last sentence.

<sup>132</sup> See Shaw, pp. 771-772.

<sup>133</sup> *Ibid.*, p. 742.

it must not be forgotten that the absence of an applicable codification regarding responsibility of international organizations naturally has contributed to the sporadic dispute-settlement between organizations, or between states and organizations. Thus, what has constituted a cost-effective solution so far may ultimately become the very opposite.

### **6.3 Concluding remarks**

The Commission, still at an early stage of its work, has several issues left to consider with regard to the issue of responsibility. It seems however that some of the most complex issues in relation to the subject have been considered and now constitute the very basis for the Commission's future work.

It is noteworthy that the issue of dispute-settlement in relation to the question of responsibility of international organizations has so far attracted little international attention. The establishment of a permanent forum may however seem somewhat premature at present. Needless to say, it is not up to the Commission to consider this question. One should bear in mind that this issue, along with that of responsibility, is a part of an on-going development in international law on the subject of international organizations.

# Supplement A

*The ILC draft articles on the responsibility of international organizations, as provisionally adopted 2003-2004.*

## **Article 1**

### **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**

### **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 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.

## **Article 4**

### **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.  
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.

**Article 5**

**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.

**Article 6**

**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**

**Conduct acknowledged and adopted by an international organization as its own**

Conduct which is not attributable to an international organization under proceeding 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.

# Supplement B

*Articles 1-11, 16-17 and 57 of the ILC draft articles on the responsibility of states of internationally wrongful acts, as adopted 2001.*

## **Article 1**

### **Responsibility of a State for its internationally wrongful acts**

Every internationally wrongful act of a State entails the international responsibility of that State.

## **Article 2**

### **Elements of an internationally wrongful act of a State**

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

## **Article 3**

### **Characterization of an act of a State as internationally wrongful**

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

## **Article 4**

### **Conduct of organs of a State**

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

## **Article 5**

### **Conduct of persons or entities exercising elements of governmental authority**

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

## **Article 6**

### **Conduct of organs placed at the disposal of a State by another State**

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the

organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

#### **Article 7**

##### **Excess of authority or contravention of instructions**

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

#### **Article 8**

##### **Conduct directed or controlled by a State**

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

#### **Article 9**

##### **Conduct carried out in the absence or default of the official authorities**

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

#### **Article 10**

##### **Conduct of an insurrectional or other movement**

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

#### **Article 11**

##### **Conduct acknowledged and adopted by a State as its own**

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

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**Article 16**

**Aid or assistance in the commission of an internationally wrongful act**

A State which aids or assists another State 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 17**

**Direction and control exercised over the commission of an internationally wrongful act**

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

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

...

**Article 57**

**Responsibility of an international organization**

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

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