MARTINUS NIJHOFF PUBLISHERS

International Organizations Law Review 7 (2010) 63–77

International Organizations Law Review

brill.nl/iolr

Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts

August Reinisch*

Professor, International and European Law, University of Vienna, Austria;
Professorial Lecturer, Bologna Center of SAIS/Johns Hopkins,
University of Bologna, Italy

Abstract

Questions concerning the international responsibility of international organizations and/or their member States for internationally wrongful acts primarily raise important issues of attribution. In addition, a concurrent responsibility may arise from situations where international organizations aid or assist or direct and control the acts of States or other international organizations. This contribution intends to highlight some problems that stem from the fact that the current formulations of Articles 13 and 14 of the ILC Draft Articles on responsibility of international organizations are largely based on the corresponding provisions of the 2001 ILC Articles on State responsibility.

Keywords

international responsibility of international organizations, State responsibility, attribution, contribution, aid or assistance, direction and control, financial assistance, legal obligations of international organizations

1. Introduction

When it comes to establishing responsibility for wrongful acts, the relationship between international organizations and their Member States is already an intensely discussed topic. This debate was partly triggered by questions concerning a possible subsidiary or even joint or 'joint and several' liability for private law debts, as evidenced by the litigation concerning the question who should ultimately bear the costs of the bankrupt *International*

DOI: 10.1163/157237310X523821

Tin Council.[1] Also the *Westland Helicopters* arbitration has raised similar issues.[2] More recently, however, questions concerning the international responsibility of international organizations and/or their Member States for internationally wrongful acts as well as the relationship between these actors have come to the fore. Peacekeeping missions, the administration of territories, as well as military operations, in particular by the UN, but also involving other international organizations, have raised a host of problems concerning the correct attribution of specific conduct, the participation of States in the unlawful acts of international organizations, and other issues.[3]

---

1) *In re International Tin Council*, High Court, Chancery Division, 22 January 1987, 77 ILR (1988), p. 18; *J H Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, House of Lords, 26 October 1989, [1990] 3 W.L.R. 969, 81 ILR (1990), p. 670. *See also* I. Cheyne, "The International Tin Council", 38 *ICLQ* 417 (1989); I. Cheyne and C. Warbrick, "The International Tin Council", 36 *ICLQ* 931 (1987); C. T. Ebenroth, "Shareholders' Liability in International Organizations: The Settlement of the International Tin Council Case", 4 *Leiden Journal of International Law* 171 (1991); C. Greenwood, "Put Not Your Trust in Princes: The Tin Council Appeals", 48 *Cambridge Law Journal* 46 (1989); C. Greenwood, "The Tin Council Litigation in the House of Lords", 49 *Cambridge Law Journal* (1990), p. 8; R. Sadurska and C. M. Chinkin, "The Collapse of the International Tin Council: A Case of State Responsibility?" 30 *Virginia Journal of International Law* 845 (1990); H. G. Schermers, "Liability of International Organizations", 1 *Leiden Journal of International Law* (1988), pp. 3–14; I. Seidl-Hohenveldern, "Failure of Controls in the Sixth International Tin Agreement", in N. Blokker and S. Muller (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* 255 (1994).

2) *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, Arbitration Award, Case No. 3879/AS, ICC, Court of Arbitration, Interim Award Regarding Jurisdiction, 5 March 1984, 23 ILM (1984), 1071–1089, 62 JDI (1985), pp. 232–246; 8 June 1982, 5 March 1984, 25 July 1985; 80 ILR (1989), pp. 595–622. For the ensuing litigation before English courts *see Westland Helicopters Ltd.* v. *Arab Organization for Industrialization*, High Court, Queen's Bench Division, 3 August 1994, [1995] 2 All ER 387; 108 ILR (1998), 564–596; 108 ILR (1998), pp. 564–596.

3) *See* R. J. Aranjo, "Objective Meaning of Constituent Instruments and Responsibility of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* 343 (2005); J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", 4 *International Organizations Law Review* 91–119 (2007); S. Besson, "La pluralité d'Etats responsables: Vers une solidarité internationale?", 17 *Revue Suisse de Droit International et Européen,* pp. 13–38 (2007); I. Brownlie, "The Responsibility of States for Acts of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* 353 (2005); G. Hafner, "Can International Organizations be Controlled? Accountability and Responsibility", 97 *Proceedings of the Annual Meeting of the American Society of International*

What has been less prominent in the current debate is the issue of the responsibility of international organizations in connection with unlawful acts of a State or another international organization. These situations, sometimes referred to as rather theoretical, are addressed in three Articles of the current ILC project on responsibility of international organizations,[4] Articles 13, 14 and 15, the first and the second of which will form the subject-matter of the following considerations.

As remarked by the ILC Special Rapporteur, Professor Gaja, there is in principle no reason not to assume that international organizations may become internationally responsible for wrongful acts of States or other international organizations in the same manner as States,[5] provided that their own involvement with the commission of such unlawful acts by other subjects is sufficiently high. In the terms of the conceptual framework of international responsibility, such connection may exist in the form of aid or assistance, direction and control as well as coercion. It thus should not be surprising that the proposed approach, followed also with regard to other responsibility aspects, is to closely mirror the existing State responsibility articles. As will be demonstrated in the following remarks focusing on the

---

Law 236 (2003); P. J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", 1 *International Organizations Law Review* 111–138 (2004); G. Nolte and H.P. Aust, "Equivical Helpers: Complicit States, Mixed Messages and International Law", 59 *International and Comparative Law Quarterly* 1–30 (2009); E. Paasivirta and P. J. Kuijper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations", 36 *Netherland Yearbook of International Law* 169–226 (2005); A. Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", 48 *Harvard International Law Journal* 553 (2007); S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* 405 (2005); R. Wilde, "Enhancing Accountability at the International Level", 12 *ILSA Journal of International & Comparative Law* 395–415 (2006); S. Yee, "The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or Their Normal Conduct Associated with Membership", in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* 435 (2005).

4) *See* the ILC's work on responsibility of international organizations, available at <www.untreaty.un.org/ilc/guide/9_11.htm>, 30 June 2010.

5) G. Gaja, Special Rapporteur, *Third Report on Responsibility of International Organizations*, International Law Commission, Fifty-Seventh Session, 2005, UN Doc. A /CN.4/553 (hereinafter Third Report), p. 11.

current Draft Articles 13 and 14, as well as the corresponding Draft Articles 57 and 58[6] dealing with State responsibility in connection with the acts of international organizations, this adoption of a State responsibility approach may entail some theoretical and practical difficulties.

2. Aid or Assistance

Draft Article 13 entitled "Aid or assistance in the commission of an internationally wrongful act" provides as follows:

> An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:
>
> (a) that organization does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that organization.

This largely corresponds to Article 16 of the Articles on State Responsibility.[7]

As mentioned by the Special Rapporteur, it is indeed hard to imagine many cases where an international organization may incur responsibility as a result of aiding or assisting a State or another international organization in the commission of an internationally wrongful act and there is thus little practice in this regard.[8] Nevertheless, since aid or assistance is often used

---

6) Draft Article 57, "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization" and Draft Article 58 "Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization" are found at ILC, *Report of the 58th Session*, UN Doc. A/61/10, 2006, p. 250. They mirror Draft Articles 13 and 14.

7) Article 16 Articles on State Responsibility, *Report of the International Law Commission on the Work of its Fifty-third Session*, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, UN Doc. A/56/10, chap. IV.E.2, p. 155, provides:

> 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.

8) *Third Report*, *supra* note 5, p. 11.

in a financial context, it is not surprising that the ILC Special Rapporteur himself mentions the possibility that

> [A]n international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals.[9]

There is, in fact, a growing academic debate about the human rights accountability of International Financial Institutions (IFIs) and, in particular, about the role of the International Monetary Fund (IMF) and even more of development banks like the World Bank/International Bank for Reconstruction and Development (IBRD) and other regional development banks.[10]

What is particularly interesting in this context is less the assumption, and ensuing suggestion, of the ILC Special Rapporteur that aid or assistance by international organizations deserves a similar treatment as aid or assistance by States than the way how the potentially affected international organizations have reacted to this Draft Article.

---

9) *Ibid*.

10) *See* C. Barry and A. Wood, *Accountability of the International Monetary Fund* (2005); D. Bradlow, "Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions", 36 *Georgetown Journal of International Law* 403 (2005); D. Clark, "The World Bank and Human Rights: The Need for Greater Accountability", 15 *Harvard Human Rights Journal* 205–226 (2002); D. Clark (ed.), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (2003); P. Dann, "Accountability in Development Aid Law: the World Bank, UNDP and Emerging Structures of Transnational Oversight", 44 *Archiv des Völkerrechts* 381–404 (2006); M. Darrow, *Between Light and Shadow. The World Bank, the International Monetary Fund and International Human Rights Law* (2003); W. Genugten (ed.), *World Bank, IMF and Human Rights: Including the Tilburg Guiding Principles on World Bank, IMF and Human Rights* (2003); S. Narula, "The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle against the World Bank", in D. Hurwitz and M. L. Satterthwaite (eds.), *Human Rights Advocacy Stories* 351–383 (2009); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001). *See also* more generally A. Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in P. Alston (ed.), *Non-State Actors and Human Rights* 37–89, at 63 (2005).

The IMF voiced its disagreement with "the blanket application of article 16 of the draft articles on State responsibility to international organizations."[11] It basically argued that because of the 'fungible nature of financial assistance' aid or assistance of a financial nature can only mean assistance that is earmarked for the wrongful conduct. After explaining the IMF's statutory purposes and stating that the "IMF was established, inter alia, to provide financial assistance to its members to assist in addressing their balance of payments problems,"[12] the organization continues in an apologetic tone to assert that basically the IMF is unable to influence the behaviour of borrowing States – even by loan conditionality.[13] Further, since IMF financing is not targeted to a particular conduct it cannot significantly contribute to a State's wrongful conduct.[14] This leads to the conclusion that "[t]he fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for purposes of this draft article 13."[15]

What is really surprising is the fact that the other IFIs, which do in fact engage in project loans where there is indeed a much closer link between the financial aid received and specific potentially wrongful conduct, have not reacted at all.

In fact, it is the IBRD's and its regional counterparts' lending practice involving project loans for dams leading to the large-scale dislocation of local population, etc. which has led to a debate about the accountability but certainly also the responsibility of IFIs for contributing to unlawful State action by aiding or assisting even though only in a financial way.[16]

---

11) International Law Commission, *Fifty-ninth Session, Responsibility of International Organizations, Comments and Observations received from International Organizations*, 1 May 2007, UN Doc. A/CN.4/582, p. 10.

12) *Ibid.*, p. 10.

13) A. Buira, *An Analysis of IMF Conditionality* (2003); E. Denters, *Law and Policy of IMF Conditionality* (1996); O. Eldar, "Reform of IMF Conditionality", 8 *Journal of International Economic Law* 509–549 (2005); J. Gold, *Conditionality* (1982); World Bank Group/Operations Policy and Country Services, *Modalities of Conditionality* (2005).

14) The limited role of the IMF as "a monetary agency, not a development agency" was also stressed by F. Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund", in P. Alston (ed.), *Non-State Actors and Human Rights* 113–138 (2005), at p. 116.

15) UN Doc. A/CN.4/582, *supra* note 11, p. 11.

16) *See also* the authors cited *supra* note 10.

Recently, the public in a number of German speaking countries was quite well-informed about an intended project loan to be given to Turkey in order to finance the construction of the so-called Ilisu dam.[17] After a prolonged controversy, the Swiss and the Austrian export financing agencies decided to refrain from funding the project because many of the conditions, including human rights conditions were thought not to be fulfilled. Though the source of funding in this case was from State agencies, it is easy to imagine the World Bank or other development banks in similar situations.

It would not be farfetched to construe such a case hypothesis involving an international organization as lending institution providing financial assistance to a State which then commits an internationally wrongful act using the aid received. In fact, it is exactly the distinction between, on the one hand, general lending to States without any influence on, or even control over, the actual use of the money and, on the other hand, project financing where lending institutions regularly keep a rather strong hold over the borrowing states' freedom to use the money received, which demonstrates that such responsibility issues may arise.

The crucial importance of this distinction is also implicitly acknowledged in the ILC Special Rapporteur's Report where he alludes to an international organization's potential responsibility for providing financial assistance to a State's project that leads to human rights violations.[18] In the footnote to this statement he quotes the former General Counsel of the World Bank, Ibrahim Shihata, who had held the view that "[a] loan agreement to a country which violates such rights does not in itself violate any human rights rule, or for that matter, condone violations of such rights."[19] Gaja hastens to add, however, that this conclusion "considered the different case of a loan which is not directly targeted to a project involving an infringement of human rights."[20] Thereby Gaja not only puts Shihata's defensive position into perspective, he

---

17) *See* C. Binder, "Völkerrecht und Staudammbauten: das Ilisu-Projekt", in *Juridikum* 10–14 (2007); A. Epiney, "Nachbarrechtliche Pflichten im internationalen Wasserrecht und Implikationen von 'Drittstaaten'", 39 *Archiv des Völkerrechts* 1–56 (2001); J. McCrystie Adams, "Environmental and Human Rights Objections Stall Turkey's Proposed Ilisu Dam", *Colorado Journal of International Environmental Law and Policy* 173–182 (2000).

18) *See supra* note 9.

19) I. F. I. Shihata, "Human Rights, Development and International Financial Institutions", 8 *American University Journal of International Law and Policy* (1992–1993), p. 27.

20) *Third Report*, *supra* note 5, p. 11, footnote 35.

also clearly refutes the sweeping statement of the IMF which argued that because of the fungible nature of money, financial assistance could never incur the responsibility of the lender since the borrower could always use other money to commit the unlawful act.

That the terms of Draft Article 13 does not exclude the possibility of an international organization's becoming responsible for providing financial assistance to a State seems clear. It speaks broadly of "aid or assistance" without qualifying or restricting the type of contribution made. According to Draft Article 13 an international organization's responsibility ultimately depends only upon the fulfilment of two further conditions: 1) the knowledge of the circumstances of the internationally wrongful act and 2) the international wrongfulness of the act if committed by the international organization itself.

It seems worthwhile to reflect on these preconditions keeping the example of financial assistance in mind.

On the one hand, it appears that Article 13 envisages a surprisingly low threshold for becoming responsible since it does not require the 'aid or assistance' to reach a certain significant level. On the other hand, the second requirement, that the assisted State's act would be internationally wrongful if committed by the assisting organization, may in practice eliminate international responsibility for most cases of financial assistance provided to States violating human rights.

As regards the first problem, the IMF appears to have a point when it implicitly suggests that only an 'essential or significant' financial contribution should trigger an international organization's responsibility for acts committed by a State assisted by such international organization. In this regard it is instructive to refer to the ILC Commentary on the Articles on State Responsibility which expressly holds that the aid or assistance should have significantly contributed to the commission of the wrongful act.[21] In fact, it is quite remarkable that the ILC portrays this as the "second condition" in addition to the first condition of knowledge of the assisting State and the third condition of the assisting state itself being bound by the obligation breached by the assisted State. This is remarkable because the wording of

---

[21] *Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001)*, UN Doc A/56/10, (hereinafter *ILC State Responsibility Report*), p. 66 ("There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.").

the corresponding Article 16 of the Articles on State Responsibility only makes conditions one and three explicit,[22] while the "second condition" cannot be directly found in the text.

Nevertheless, the ILC insists that the aid or assistance must be of a certain level of intensity. When referring to the situation of a State aiding another State in the commission of human rights violations, the ILC speaks of the provision of "material aid"[23] which suggests that the aid must be significant, important or at least pertinent.

From a policy perspective, however, the introduction of such an additional prerequisite for the responsibility of a State or international organization may be questionable. First, it introduces a highly undetermined and relative element, the "significance" of the aid or assistance. It is unclear whether, to remain within the financial assistance example, such significance should be measured by standards of the contributing international organization or in relation to the means used by the receiving State or international organization committing the wrongful act. To give an example, on the one hand, a fairly small EBRD loan may amount to almost the entire financing needs for a particular project that implicates human rights violations. On the other hand, even a very large World Bank credit may constitute only a small portion in a co-financed project. If, in the latter example, the significance is measured in terms of financing percentages, the aid or assistance may not be significant enough to trigger that organization's responsibility – always provided that this prerequisite is accepted as an implicit one. However, given the fact that World Bank financing is often seen as a 'seal of approval' triggering financing by other official and also private lenders, one may even consider such relatively low financial contributions to be significant enough for the purposes of establishing responsibility.

Apart from these difficulties of assessing the level of contribution in practice one may also question whether such an additional requirement is justified from a broader perspective of compliance interest. Why should it matter whether the 'aid or assistance' is big or small? It is the knowing participation in another subject's unlawful act through "aid or assistance" which entails a separate responsibility of the assisting international organization.

---

22) *See* the text of Article 16, *supra* note 7.

23) *ILC State Responsibility Report*, *supra* note 21, p. 67 ("[A] State may incur responsibility if it … provides material aid to a State that uses the aid to commit human rights violations.").

There may well be internationally wrongful acts stemming from the violation of international obligations of different importance, ranging from *jus cogens*, to human rights, to merely technical rules. However, as there is no 'half-responsibility' for committing a breach of international law, there should not be dispensation of lesser assistance given to the commission of a breach of international law.

Also, the two expressly formulated preconditions for the responsibility of an 'aiding or assisting' international organization in Article 13, pose problems.

Pursuant to Article 13(a) the organization must do so "with knowledge of the circumstances of the internationally wrongful act." The wording appears very clear, just demanding knowledge. It would thus seem that an IFI faced with an allegation that it aided or assisted a State in the commission of a wrongful act could not successfully argue that it had in no way intended to do so if it had at least knowledge.

Again a look at the ILC's Commentary to the corresponding Article 16 of the State Responsibility Articles demonstrates that this seemingly clear assessment may be questioned. In a passage discussing a potential assistance of one State to another State's commission of human rights violations, the ILC cautioned that one should carefully examine whether the aiding State "was aware of and intended to" facilitate the commission of the internationally wrongful conduct.[24] A requirement of intent, and not merely knowledge, would significantly reduce the risk of IFIs to become internationally responsible for human rights violations of their borrowing countries.[25] It appears that such a modification of the text, if indeed intended, should be reflected in the wording of the draft articles or least find some expression in the Commentary.

---

[24] *ILC State Responsibility Report*, *supra* note 21, p. 67 ("Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.").

[25] In this context it appears relevant to refer to the discussion of the accountability/responsibility of multinational or transnational corporations for human rights violations perpetrated by host States. Though it seems that in the current debate about corporate complicity, it is mostly a higher standard of *mens rea* which is required in order to hold a company responsible for aiding and abetting human rights violations. *See* A. Clapham and S. Jerbi, Categories of Corporate Complicity in Human Rights Abuses, 24 *Hastings International & Comparative Law Review* 339 (2001).

Finally, the second express requirement of Draft Article 13 may also contain unintended consequences. Draft Article 13(b) requires that in order to lead to an aiding or assisting organization's international responsibility the act must be internationally wrongful "if committed by that organization." In other words, the obligation breached by the assisted State or international organization must be one that is also binding on the assisting international organization. In the context of the hypothetical case of IFIs contributing to a State's human rights violations through project loans, this precondition may prove to be a veritable and maybe unnecessary obstacle to establishing the IFIs' responsibility. While it is nowadays largely accepted that international organizations may commit human rights violations in principle and thus incur international responsibility for such violations,[26] there are still uncertainties about the precise extent to which international organizations are bound by human rights obligations which are linked to the issue of the scope of customary international law comprising human rights.[27] This may lead to the rather unsatisfactory result that an IFI financially aiding a State to commit a violation of a human rights treaty obligation will remain unaccountable if it can be shown that the treaty obligation breached does not also form part of unwritten international law binding upon the aiding IFI.

3. Direction and Control

Article 14 entitled "Direction and control exercised over the commission of an internationally wrongful act" provides as follows:

---

[26] *See* among others, K. Wellens, *Remedies against International Organizations* (2002); A. Reinisch, "Securing the Accountability of International Organizations", 7 *Global Governance* 131–149 (2001); F. Mégret and F. Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", 25 *Human Rights Quarterly* 314–342 (2003).

[27] *See* A. Reinisch, "Developing a Human Rights and Humanitarian Law Accountability of the UN Security Council for the Imposition of Economic Sanctions", 95 *American Journal of International Law* 851–872 (2001); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001); E. de Wet, "Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", 14 *Leiden Journal of International Law* 277–300 (2001).

> An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:
>
> (a) that organization does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that organization.

This largely corresponds to Article 17 of the Articles on State Responsibility.[28] However, Draft Article 14 equally raises a number of problems. On a primary level, the lack of any definition of the crucial notion of 'direction and control' both in the text of the articles and in the commentary is unhelpful. Given the ILC Special Rapporteur's conviction that there would be no reason for distinguishing, for the purposes of international responsibility, between the case of a State directing and controlling another State and that of an organization directing and controlling another organization or a State in the commission of an internationally wrongful act,[29] it appears legitimate to take recourse again to the ILC commentary on its State Responsibility Articles. There the Commission clarified that "direction and control" implied a high level of factual control. According to the ILC,

> [T]he term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.[30]

Since Draft Article 14 clearly speaks of "direction and control", as opposed to "aid or assistance", it is clear that direction and control have to be cumu-

---

28) Article 17, Articles on State Responsibility, *supra* note 7, provides:
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.

29) *Third Report*, *supra* note 5, p. 11.

30) *ILC State Responsibility Report*, *supra* note 21, p. 69.

latively present.[31] Nevertheless, the only example given by the ILC Special Rapporteur in his Report may cast doubt on the cumulative nature of the requirement.[32] He mentions as an "example of a organization's direction and control in the commission of allegedly wrongful acts" the French Government's argument in relation to KFOR as contained in France's preliminary objections in *Legality of Use of Force (Yugoslavia v. France)*:[33] "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[34] This quotation invites an interpretation according to which there would be no need for the cumulative presence of both 'direction and control' since one organization is considered responsible for 'directing' KFOR and another organization for 'controlling' it. In its preliminary objections, France relied on the 1996 version of the Draft State Responsibility Articles which spoke of "direction or control"[35] and argued that "[t]his principle [was] fully transposable to cases where the power of *direction or control* (emphasis added) is exercised not by another State but, as is the case here, by one (or two – since NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it) – international organization(s)."[36]

To this author, however, it appears that the question is less one of the logical alternatives between cumulative and alternative requirements than an issue of the proper understanding of a phrase like 'direction and/or control'. Are 'direction' and 'control' two different concepts, or are they largely synonymous?[37] In case the latter is true, the question of a cumulative

---

31) *See also* with regard to the parallel provision on State Responsibility, ILC State Responsibility Report, *supra* note 21, p. 69 ("Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility.").

32) *See also* P.J. Kuijper, Introduction to the Symposium, in this volume, p. 9.

33) *Case Concerning Legality of Use of Force (Yugoslavia* v. *France)*, Preliminary Objections of the French Republic, 5 July 2000, available at <www.icj-cij.org/docket/files/107/10873.pdf>, 1 July 2010.

34) *Third Report*, *supra* note 5, p. 12.

35) "'An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State' (*Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, p. 61).", cited in *Case Concerning Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections of the French Republic, *supra* note 33, p. 33, para. 46.

36) *Ibid*. (emphasis added).

37) *See* the debate concerning a similar pair of legally relevant notions I. Buffard and K. Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?" 3 *Austrian Review of*

or alternative requirement would become superfluous. The commentaries by the ILC and its Special Rapporteur on responsibility of international organizations do not address this issue. However, it appears that the above-mentioned definition of 'control' and 'direction' as "domination over the commission of wrongful conduct" and as "actual direction of an operative kind"[38] indicates that both concepts are closely related to each other.

What is probably most interesting from a conceptual point of view is the nature of the responsibility incurred by an international organization 'directing and controlling' a State or another international organization in the commission of an unlawful act. While referred to as derived responsibility, it appears that 'direction and control' may in fact lead already to an original responsibility of an international organization, to which the unlawful act of the directed and controlled State or international organization is attributed. This ambiguity is nourished by the ILC's remark in the State Responsibility Commentary, finding that

> a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.[39]

Seen from this angle, it becomes difficult to distinguish between an international organization's derived responsibility in connection with the unlawful act of a State or another international organization and the original responsibility of an international organization to which acts of a State or another international organization can be attributed. Thus, there seems to be an overlap between the derived responsibility for 'directing and controlling' acts of others and the original responsibility for acts effectively controlled by an international organization.[40]

International and European Law 311–343 (1998).

38) *See* the definition in the *ILC State Responsibility Report*, text cited *supra* note 30.

39) *ILC State Responsibility Report*, *supra* note 21, p. 68.

40) There is also a possible overlap between Article 13 and Article 16. *See* N. Blokker, Decisions and Authorizations resulting in Circumvention of Legal Obligations by International Organizations, in this volume, p. 35.

Such original responsibility is envisaged in Draft Article 6 entitled "Conduct of organs placed at the disposal of an international organization by a State or another international organization" which provides:

> The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization's functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.

Given that the difference between such 'effective control' leading to the attribution of another subject's acts and the high requirements for 'direction and control' over another subject's acts may be insignificant the future will have to show whether the distinction is workable in practice.

4. Conclusions

The ILC Draft Articles on responsibility of international organizations raise a number of fascinating questions, in particular, in those sections where they deal with situations where an international organization does not act on isolation, but rather acts in conjunction with other international organizations or States. From this perspective, the Draft Articles on "aid and assistance" as well as on "direction and control" evidence that the peculiar nature of international organizations may often render the transfer of State responsibility concepts to international organizations problematic. Most likely the most dramatic implication may occur in a field hinted at by the ILC Special Rapporteur himself: the potential responsibility of international organizations financially aiding or assisting States (or other international organizations) in the commission of unlawful acts. The more limited scope of customary international law obligations of international organizations (compared to States) may imply that their 'derived' responsibility would often not apply. If the Draft Articles will be adopted in the present form, it will be the task of future law-appliers – courts, arbitral tribunals, lawyers operating in international practice – to shape the existing rules in a way that ensures that international organizations are neither overly restricted in their ability to fulfil their functions, on the one hand, nor that they may escape responsibility where they have acted unlawfully, on the other hand.