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Informal Organizations:
The Case of the Quartet on the Middle East**

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The Elusive Allocation of Responsibility to Informal Organizations: The Case of the Quartet on the Middle East

John Dugard and Annemarieke Vermeer-Künzli¹

1. Introduction

It is a great pleasure to have been invited to contribute to this collection of essays in memory of Ian Brownlie. Both authors knew Ian principally as a member of the International Law Commission, where John served as a member with Ian for thirteen years and Annemarieke was a research assistant to John. Ian was a powerful presence in the Commission. Ian preferred to be called Mr. Brownlie and not Professor Brownlie in the Commission as he wished to make it clear that he spoke as one well-versed in the practice of law, which was more important than the opinions of academics. But the Commission never quite believed him. For the Commission, he was *Professor* Ian Brownlie, the author of many books and articles, whose intellect and erudition had shaped the development of international law. Both in the International Law Commission and in his writings Ian made it clear that he was concerned about law as it was practised by States, but at the same time aware of the need to include principle and coherence in the process of the law. In this contribution dedicated to the memory of Ian Brownlie we are mindful of the need to be guided by these values.

This chapter is about the Quartet, the strange institution created by the Security Council, or perhaps only approved by the Security Council, to guide the peace process in the Middle East. We are mainly concerned with the composition, creation, nature, powers and accountability of the institution and the question whether any international organization or State is responsible for its actions or inactions. We do not intend to judge whether the Quartet has contributed to peace in the Middle East. However, because issues of responsibility cannot be examined in isolation, it

¹ This paper will be published in M. Ragazzi (ed.) *The Responsibility of International Organizations* (Essays in memory of Sir Ian Brownlie), (Forthcoming 2013). The authors would like to thank Profs. Pieter Jan Kuiper and André Nollkaemper for helpful comments and suggestions. All websites have been last visited on 22 Oct. 2012.

will be necessary to consider the acts and omissions of the Quartet which might result in some international body or state incurring responsibility. Possible violations of international law are considered in this context.

2. The Quartet: Creation, Composition and Powers

The Quartet was created in 2001 to deal with the deteriorating security and humanitarian crisis in the Middle East arising from the Second Intifada and to involve the Bush administration in the search for peace in that region. As an informal mechanism that brought together the four most important international actors in the Middle East peace process – the United States, the European Union, the United Nations and the Russian Federation – it was seen as the ideal body for brokering an Israeli–Palestinian peace agreement.²

The relationship between the Quartet and the UN is not clear. It was created outside the UN by the envoys of the United States, the UN, the EU and Russia in 2001-2002. But from the outset it operated under the umbrella of the UN, fully aware that any legitimacy it might have was dependent on its association with the UN. Thus on 25 October 2001 the first joint statement of the four envoys was endorsed by the President of the Security Council,³ and in March 2002 the Security Council welcomed the diplomatic efforts of the four envoys to secure peace in the Middle East.⁴ Later that year the Security Council recognized and gave its ‘full support’ for the efforts of the Quartet.⁵ Stronger support came in November 2003 in Resolution 1515 which endorsed the ‘Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict’ and called on parties to the dispute to fulfil their obligations under the Roadmap and to cooperate with the Quartet ‘to achieve the vision of two States living side by side in peace and security’.⁶ Later, in December 2008, in Resolution 1850, the Security Council again gave its approval to the Quartet.⁷ In the meantime the General Assembly had also welcomed the ‘ongoing

² K. Elgindy, ‘The Middle East Quartet: A Post Mortem’, The Saban Center for Middle East Policy at Brookings, Analysis Paper No 25, February 2012, 8.

³ Ibid., 7.

⁴ S/RES/1397 (Mar. 12, 2002).

⁵ S/RES/1435 (Sep. 24, 2002).

⁶ S/RES/1515 (Nov. 19, 2003).

⁷ S/RES/1850 (Dec. 16, 2008).

efforts’ of the Quartet to establish a comprehensive, just and lasting peace in the Middle East.⁸

As was stated in a Brookings Institution paper in 2012, the Quartet has ‘for all intents and purposes replaced the Security Council as the international address for all matters related to the Israeli-Palestinian conflict’.⁹

The Quartet has no formal structure. It holds regular meetings at two levels – ministerial and special envoys – which are convened on an *ad hoc* basis. Such meetings are held every few months. A communiqué expressing the principal concerns of the Quartet is issued after each meeting which is submitted to the Security Council. The Quartet has no secretariat but is served by a special envoy who has a staff office in Jerusalem. The first special envoy (2005-2006) was James Wolfensohn, former president of the World Bank. The present special envoy (now known as Quartet representative) is Tony Blair, former Prime Minister of the United Kingdom, who was appointed in July 2007.

The work of the Quartet is founded on a Roadmap which guides it in its endeavours and may be described as representing the mandate of the Quartet.

2.1 The Roadmap

The Roadmap of 2003¹⁰ is described as a ‘performance-based roadmap to a permanent two-State solution to the Israeli-Palestinian conflict’. It contains timelines and target dates designed to secure ‘a final and comprehensive settlement of the Israel-Palestinian conflict by 2005’. It contemplates three phases: the first for ending terror and violence, normalizing Palestinian life and building Palestinian institutions; the second for transition to a Palestinian State with provisional borders; and the third for a permanent status agreement between Israel and Palestine, to be confirmed by an international conference that would end the Israeli-Palestinian conflict in 2005. From the outset it seemed that this ambitious plan was unlikely to succeed, particularly as

⁸ A/RES60/39 (Dec. 1, 2005).

⁹ K. Elgindy, ‘Post Mortem’, 36.

¹⁰ See Quartet Roadmap to Israeli-Palestinian Peace (Apr. 30, 2003), at Appendix II to K. Elgindy, ‘Post Mortem’, and at <www.mideastweb.org/quartetrm3.htm>.

the Israeli government attached fourteen reservations to its acceptance of the Roadmap.¹¹

The failure of the Quartet to achieve its goals by 2005 has not deterred it from still invoking the Roadmap as the basis for peace in the Middle East. Doubtless this is because the Quartet sees the Roadmap's concerns and principles as determinant for the peace process. These include security, the ending of terror and violence, the freezing of settlement activity and the dismantling of settlement outposts, reform of the Palestinian Authority, the ending of deportations, attacks on civilians, demolition of Palestinian homes and the easing of restrictions on freedom of movement and, above all, the creation of an independent Palestinian State with provisional borders.

2.2 Quartet statements

For the past decade the Quartet has issued regular press statements, addressed to the President of the Security Council, about its concerns relating to events in the Middle East. Whether these statements are intended as a form of accountability to the Security Council is not clear.

The statements repeatedly call for compliance with the Roadmap, non-violence, and recognition of Israel. They stress the need for security, particularly Israel's security needs, and on occasion refer to terror attacks on Israeli civilians,¹² but not to Israel Defense Forces (IDF) attacks on Palestinian civilians. There were frequent calls for the release of Corporal Gilad Shalit, who was held as prisoner of war in Gaza, but no mention of Palestinian prisoners in Israeli jails. Rocket attacks on Israel from Gaza have been condemned but there was no condemnation of the hundreds of Palestinian civilians killed by the IDF in Operation Cast Lead 2008-9¹³ or comment on the Report of the Human Rights Council Fact Finding Mission on the Gaza Conflict (the 'Goldstone report')¹⁴ finding that the IDF had committed international crimes in the course of this operation. The ICJ's *Wall Advisory Opinion*¹⁵ has only once been mentioned by the Quartet,¹⁶ although it did express

¹¹ Israeli Reservations regarding the Quartet Roadmap to Israeli-Palestinian Peace (Apr. 30, 2003), at <www.mideastweb.org/roadmapreservations.htm>.

¹² Statement of Mar. 14, 2011 (SG/2172).

¹³ On Jun. 26, 2009 (SG/2152), six months after Operation Cast Lead, the Quartet 'expressed serious concern at the humanitarian and human rights situation of the civilian population' of Gaza.

¹⁴ A/HRC/12/48 of Sep. 28, 2009.

¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory*

concern over the ‘route of the barrier’.¹⁷ The Quartet has endorsed endeavours to overcome divisions between the Fatah and Hamas, but its refusal to speak to Hamas has not been viewed by some as helping to resolve this impasse,¹⁸ leading them to suggest that Quartet pronouncements have favoured Israel.¹⁹ In large measure this is because of the dominant role played by the United States in the Quartet, which has restrained it from taking positions contrary to those of the United States.²⁰

3. Breach: The Failure of the Quartet to Take Action to Prevent the Commission to Take Action to Prevent the Commission of Serious Internationally Wrongful Acts

Recent developments strongly suggest that international law today imposes an obligation on both States and international organizations to take steps to prevent the commission of serious internationally wrongful acts, particularly those qualifying as international crimes, within their jurisdiction or in respect of territories under their authority. *A fortiori*, such an obligation is imposed on an international organization or its member States that have been entrusted with advancing peace and securing human rights in an occupied territory with an international status.²¹

The obligation of prevention is still at an evolutionary stage. It finds support in the 2005 General Assembly resolution on responsibility to protect,²² in which the international community assumed responsibility to protect populations from serious international crimes. That an obligation of prevention applies to States, particularly when it arises from a treaty obligation, has recently been confirmed by the International Court of Justice in the *Genocide* case.²³ It also applies to international organizations. Article 12(3) of the ILC’s Draft Articles on the Responsibility of International Organizations (DARIO) considers the matter of the ‘breach of an

Opinion, ICJ Reports 2004, 136.

¹⁶ Statement of Sep. 23, 2004 (SG/2091).

¹⁷ See Appendix IV to K. Elgindy, ‘Post Mortem’.

¹⁸ K. Elgindy, ‘Post Mortem’, 44.

¹⁹ *Ibid.*, 47-8.

²⁰ James Wolfensohn, the Quartet Special Envoy from 2005 to 2006, has described the Quartet as a ‘fig leaf’ for United States policies. (Cited in K. Elgindy, ‘Post Mortem’, 46. See also www.nytimes.com/2007/07/23/world/europe/23iht-23cndblair.6789288.html?pagewanted=all&_moc.semityn.www).

²¹ As a former mandated territory under the League of Nations, Palestine enjoys an international status.

²² 2005 World Summit Outcome, A/RES60/1 (Oct. 24, 2005), paras. 138-9.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, at 133-5, paras. 220-6.

international obligation requiring an international organization to prevent a given event'.²⁴

The statements of the International Court of Justice in the *Genocide Case* are apposite to the obligation of prevention. Although the Court was concerned with an obligation of prevention contained in article 1 of the Genocide Convention,²⁵ its comments on the obligation of prevention are of a general nature.

The Court made it clear that the obligation of prevention is 'one of conduct and not one of result'.²⁶ A State is not under an obligation to succeed in preventing the commission of the crime in question but it is obliged to 'employ all means reasonably available' to prevent the commission of the crime,²⁷ and will incur responsibility if it has 'manifestly failed to take all measures to prevent the commission of the crime'.²⁸ The Court made it clear that a State can only be held responsible for breaching the obligation of prevention if the crime was actually committed.²⁹ It stressed that violation of the obligation of prevention 'results from omission'³⁰ and declared that for a State 'to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that [that crime] would be committed'.³¹

Judged by its mandate, the Roadmap, which has been endorsed by the Security Council, the Quartet has committed a number of important omissions. It remained silent and inactive when 1,400 Palestinians were killed and 5,000 injured and extensive damage done to homes and property in the course of Operation Cast Lead. It has not endorsed the *Wall Advisory Opinion* of the ICJ, despite the fact that it is arguably binding on the UN,³² and the Report of the Fact-Finding Mission on Gaza,

²⁴ 'Draft articles on the Responsibility of International Organizations, with commentaries 2011', Report of the International Law Commission on the Work of its Sixty-third Session, *Gen. Ass. Off. Recs., Sixty-sixth Session*, Supp. No. 10 (A/66/10), 69-172, at 102. See too the Commentary on Article 10, which recognizes that an international organization 'may have acquired an obligation to prevent its member States from carrying out a certain conduct.' (Ibid., 101.)

²⁵ The Court declared that it did not 'purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law', *ICJ Reports 2007*, 43, at 220, para. 429.

²⁶ Ibid., 221, para. 430.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid., para. 431.

³⁰ Ibid. 223, para. 432.

³¹ Ibid.

³² See J. Dugard, 'Advisory Opinions and the Secretary-General

and hence legitimized silence over the illegality of the wall in Palestinian territory. It has not forcefully resisted the construction of settlements, which are contrary to article 49(6) of the Fourth Geneva Convention,³³ nor opposed the US veto of a draft resolution of the Security Council condemning settlements.³⁴ Moreover, it has not supported the establishment of independent Palestinian statehood, despite this being an important target in the Roadmap.³⁵ The inevitable conclusion from the foregoing is that serious allegations of omission can, and perhaps should, be raised against the Quartet.

Having established a possible breach, we will now turn to attribution. To whom should the conduct be attributed: the Quartet itself? Or its members?

4. Attribution of Conduct

The members of the Quartet are all bound by international law and cannot avoid international responsibility by creating an entity that conducts itself contrary to the obligations of its members. This rule, confirmed in Articles 61 (States) and 18 (international organizations) of the DARIO, is derived from the principle of delegation: one cannot grant a right to another entity when one does not possess that right.³⁶ This raises the question of allocation of responsibility. To answer that question it is necessary to determine first what entity the United States, Russia, the UN and the EU have created.

There is no doubt that the Quartet and its conduct are governed by international law. The Quartet was not created as a private law entity, nor placed under the legal regime of a State. In itself, the creation of the Quartet is perfectly compatible with international law. Nothing prevents States from creating such entities, and the international organizations involved are also acting within their competences. The UN, under Articles 7 and 53, is entitled to create subsidiary organs and participate in regional arrangements.³⁷ The EU is also entitled under its own legal

³³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949), 75 *UNTS* 287. The construction of settlements is a crime in terms of Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court (2187 *UNTS* 90). Settlements were unanimously declared illegal by the ICJ in the *Wall* Opinion. (*ICJ Reports 2004*, 136, at 183-4, para. 120.)

³⁴ Draft resolution dated Feb. 18, 2011. See K. Elgindy, 'Post Mortem', 48.

³⁵ K. Elgindy, 'Post Mortem', 31.

³⁶ See H.G. Schermers and N.M. Blokker, *International Institutional Law. Unity within Diversity*, (5th edn., Boston and Leiden, 2011), 171-3.

³⁷ See Q. Qerimi, 'An Informal World: the Role and Status of "Contact Group" Under International

regime to delegate Baroness Ashton to the Quartet. Under Articles 18 and 27(2) of the Treaty on European Union (TEU),³⁸ she is entitled to conduct the EU's Common Foreign and Security Policy (CFSP). Maintenance of peace and security according to Article 21(2)(c) TEU, in line with the principles of the UN Charter and the Final Act of Helsinki, is one of the goals of the EU in the domain of the CFSP.³⁹

There are essentially two possibilities for attribution of conduct. Either the Quartet can be characterized as an international organization with separate legal personality and its conduct will be attributed to the organization as such; or its conduct will be attributable to its members.

International organizations come in many shapes and sizes. Most features of the Quartet are in one way or another comparable to those of other international organizations. Its size is similar to the Benelux, which has three members (Belgium, The Netherlands and Luxembourg). Its membership, a mixture of States and international organizations, is similar to that of the WTO. Like the Quartet, other organizations have been created to take care of a specific regional issue. For instance, the Arctic Council 'is a high-level intergovernmental forum to promote cooperation, coordination and interaction among the Arctic States'⁴⁰ and has eight member states. Finally, it is not uncommon for an organization to be created for a limited duration, until its purpose is fulfilled. Examples of such organizations are the criminal tribunals for Rwanda and the former Yugoslavia. The Quartet will in any event cease to exist if and when the Israeli-Palestine conflict is resolved, if not before. Despite these similarities, however, the Quartet lacks some features common to international organizations, which makes its characterization as an international organization problematic.

The major obstacle to defining the Quartet as an international organization is the issue of separate international legal personality. Unlike the majority of

Law', 7 *Chicago-Kent J. Int'l & Comp. Law* (2007), 117-43, at 122.

³⁸ Treaty on European Union, Official Journal C 115, 09/05/2008 P. 0001 – 0388.

³⁹ The 'key documents' published by the EU on this issue do not include a document endorsing the participation of the EU, represented by Baroness Ashton, in the Quartet. See <http://eeas.europa.eu/mepp/docs/index_en.htm>. These documents do include various policy statements on the Middle East Peace Process, including support for a two-State solution.

⁴⁰ See the description at <www.arctic-council.org/index.php/en/>, which summarily reflects para. 1 of the Declaration on the Establishment of the Arctic Council (Ottawa, Canada, Sep. 19, 1996), available at the same website.

international organizations, the Quartet was not created by a treaty or convention that could qualify as its constituent instrument. There is thus no express rule granting the Quartet legal personality. In itself, the absence of explicit attribution of powers, including legal personality, does not necessarily deprive an organization of such powers, as the ICJ has explained in a number of advisory opinions, including the *Reparation for Injuries*⁴¹ and the *Threat or Use of Nuclear Weapons in Armed Conflict*.⁴² As these advisory opinions show, the failure to grant powers explicitly is not conclusive. Such powers may be inferred from the intention of the member States and the actual functioning of the organization. A balance will have to be struck between the actual conduct of the organization – and the question whether this conduct requires or presumes legal personality – and the intention of the members.

For implied legal personality to exist, the Quartet must act in a way that necessitates such personality. For most of its existence, the Quartet's role has been to issue statements on events in the Middle East and to offer its services as a broker in the conflict. Perhaps, the most important achievement of the Quartet has been the creation of the Roadmap, which purports to impose obligations on Israel and the Palestinians but more realistically simply expresses expectations in respect of their behaviour. It is not uncommon for international entities such as the Quartet to be engaged in some form of law-making or rule imposing. As Wessel has noted, 'international organizations and informal international regimes and networks are engaged in normative processes that, *de jure* or *de facto*, impact on states and even on individuals and businesses.'⁴³ Others have also noted the growing influence of informal, i.e. non-treaty-based, entities engaged in regulatory processes.⁴⁴ Yet, the vast majority of these bodies have a very technical scope.⁴⁵ They primarily regulate the behaviour of non-State actors (such as health-professionals and internet-users) and their authority does not to affect the territorial sovereignty of States or matters of

⁴¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 179.

⁴² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 66, paras. 18-26.

⁴³ R.A. Wessel, 'Informal International Law-Making as a New Form of World Legislation?', 8 *IOLR* (2011) 253-65, at 254.

⁴⁴ See for instance, on the role of information institutions, A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008), 1375-400 (available at <<http://ssrn.com/abstract=1348809>>).

⁴⁵ See R.A. Wessel, 'Informal International Law-Making', 295.

peace and security. Their decisions may be influential and it may be difficult for professionals operating in their field to ignore their decisions. Even so, the decisions of these entities are usually not of the same status as that attributed to the Roadmap.⁴⁶ The Roadmap does not create binding obligations for its members without their consent and the organization can therefore not be considered ‘supranational’ similar the UN Security Council and the EU. Nor has it succeeded in imposing obligations on Israel or the Palestinians as evidenced by the reservations unilaterally attached to the Roadmap by Israel.⁴⁷ The Quartet does not therefore derive legal personality as a result of a capacity to impose obligations on third parties.⁴⁸ The other major activity of the Quartet concerns the work of its representative, Tony Blair. The fact that he has not been given formal immunity by Israel suggests that he is not viewed as representing an international organization. Finally, the members of the Quartet have never claimed legal personality for the Quartet.

The Quartet, therefore, cannot be considered an international organization possessing separate international legal personality. This conclusion has a number of consequences. From the perspective of applicable law, it means that the rules on the responsibility of international organizations, as reflected in the DARIO, are not applicable to the Quartet as such. It also means that its conduct will be attributable to its members and not to the organization, since the organization lacks separate legal personality under international law. From this it follows that the organizational veil will be pierced and the Quartet characterized as an agent for its members.⁴⁹ The implications of this conclusion will be discussed, in the context, first, of the Quartet as an agent for its members and, secondly, of the responsibility of its members.

4.1 The Quartet as an agent

States creating an entity as an agent or a common organ, or empowering a private party to act on its behalf, will be responsible for conduct emanating from such entities or parties.⁵⁰ On the issue of agency, Sadurska and Chinkin note that both common

⁴⁶ Ibid., 262.

⁴⁷ See the Goldstone report.

⁴⁸ It may not be necessary to qualify the Road Map as a creator of legal obligations for third parties, as many of the obligations contained in the Roadmap are to be found in rules of international law that have their source in treaty or customary law.

⁴⁹ See on this subject C. Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Oxford and Portland, 2007).

⁵⁰ See article 5 of the ILC articles on State responsibility. The distinction between articles 4 and 5 on

and civil law systems provide for responsibility of the principal for conduct of the agent, to protect third parties.⁵¹ Clearly, the members of the Quartet are responsible for its conduct in the sense that they have at a minimum an obligation of due diligence to ensure that the Quartet acts in conformity with their, i.e. the members', international obligations. One could even go one step further. Since the Quartet is not, at least not in law, a separate entity, it remains a collection of individual agents. Its conduct will be directly attributed to the members, since the participants in the Quartet are all (State) organs. International law leaves no doubt that conduct of organs of a State – such as the Minister of Foreign Affairs, and officials on duty of international organizations, such as the UN Secretary General and the EU High Representative – directly engages the responsibility of the relevant States and international organizations.⁵² The argument that the respective officials were put at the disposal of the organization, and thereby relieve the members of their responsibilities, will not hold since this applies only when the relevant international organization has legal personality. In addition, such a transfer of responsibility is only applicable if the Quartet exercised effective control over the official placed at its disposal.⁵³ There can be no question of the Secretary-General of the UN or the EU High Representative being 'fully seconded' to the Quartet, to use the wording of the ILC,⁵⁴ just as it is equally unthinkable that the Quartet would exercise effective control over the US Secretary of State and the Russian Minister of Foreign Affairs or over Mr Ban Ki-Moon and Baroness Ashton. On the other hand, there is no doubt about the direction and control exercised by its members. Even assuming one member exercises undue control over the activities of the Quartet,⁵⁵ the Quartet will always be instructed in its course of action by its members. This leads to the conclusion that the Quartet is at best an agent in the form of a joint organ, a vehicle, for its members and

State responsibility is not maintained in the DARIO, since agency in the context of international organizations was deemed to be covered by article 2(d) and article 6 of the DARIO. (See para. 10 of the commentary to article 6.) See also J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *IOLR* (2007) 91-119, at 94.

⁵¹ R. Sadurska and C. Chinkin, 'The Collapse of the International Tin Council: a Case of State Responsibility?', 8 *Virginia Journal of International Law* (1990) 845-90, at 863-4.

⁵² See article 4 on State responsibility and article 6 of the DARIO.

⁵³ See article 7 of the DARIO.

⁵⁴ Para. 1 of the commentary to article 7.

⁵⁵ See the statements made by the former Representative of the Quartet, Mr. Wolfensohn. in the New York Times: <www.nytimes.com/2007/07/23/world/europe/23iht-23cndblair.6789288.html?pagewanted=all&_moc.semityn.www>. See also K. Elgindy, 'Post Mortem', 46.

that nothing stands in the way of attributing its conduct (act or omission) directly to the members of the Quartet.

4.2 Shared responsibility

It is not unusual under international law that member States incur responsibility for conduct of an international entity. Although in many ways different from the situation of the Quartet, the cases of the International Tin Council and Westland Helicopters bear some similarity in the sense that, absent an entity to which the conduct could be attributed (due to bankruptcy or liquidation), the responsibility of member States was, at least in theory, not ruled out even if practical obstacles to the claiming of this responsibility were insurmountable.⁵⁶ The situation of the Quartet also bears some similarity to the Eurotunnel case, in which France and the United Kingdom shared responsibility for the Eurotunnel's joint committee.⁵⁷ What is unusual in this case is the composition of membership, together with the specific structure of responsibility. The possibility of shared responsibility⁵⁸ among States is included in article 47 (plurality of responsible States) and to a lesser extent in articles 16 and 17 (aid, assistance, direction and control) of the articles on State responsibility. The corresponding provisions in the DARIO, applicable to the UN and the EU, are article 48 and to a lesser extent articles 14 and 15. Aid, assistance, direction, control and coercion are less relevant, since they require a separate entity to aid, assist, direct, control or coerce, and the Quartet, lacking separate legal personality, is not such an entity. What concerns us here is the establishment of responsibility of the members of the Quartet for its conduct.

This situation is not clearly envisaged in the articles on State responsibility and the DARIO. While both mention the existence of a joint or common organ, this only relates to attribution and assumes equality of the members of the joint organ with

⁵⁶ See generally J. Klabbers, *An Introduction to International Institutional Law* (Cambridge, 2002), 313-19. With respect to the International Tin Council, Sadurska and Chinkin ('Collapse of the Tin Council') provide an excellent analysis of the issues of admissibility and enforcement of claims and judgments against the International Tin Council.

⁵⁷ Eurotunnel Partial Award (Jan. 30, 2007), pp. 51-3, paras. 162-72, at <www.pca-cpa.org/showpage.asp?pag_id=1184>.

⁵⁸ The term 'shared responsibility' will be used throughout this chapter. Other terms are joint responsibility, complicity or concurrent responsibility. See generally A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law, a Conceptual Framework', 33 *Michigan Journal of International Law* (2012) (forthcoming).

respect to obligations.⁵⁹ So, while it is possible to *attribute* conduct to a plurality of States and international organizations, the ultimate *responsibility* will be individualized because the State and/or international organization can only be held responsible for a breach of its own obligations, not obligations imposed on others. Thus, ultimately, the presence of a plurality of responsible States and organizations has little effect on the individual responsibility of each of the components of the plurality. As the ILC noted with respect to States, the ‘responsibility of each participating state is determined individually on the basis of its own conduct and by reference to its own international obligations’⁶⁰ and ‘in most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility’.⁶¹ The ILC is in good company. States are very reluctant to accept responsibility for a joint operation unless it can be individualized.⁶²

Even if the conduct of the Quartet can thus be *attributed* to the four members, the ultimate *allocation of responsibility* depends on their individual obligations. The role of applicable obligations seriously complicates the allocation of responsibility for conduct of the Quartet.

The four members of the Quartet have diverging obligations under international law. Although they created the Roadmap, this document itself does not create obligations for them, so their obligations must be found elsewhere. Without attempting to provide the final argument on whether a breach has occurred, it is clear that the responsibility for possible omissions must be derived from individual obligations of the Quartet’s members. The UN is bound to implement the *Wall*

⁵⁹ ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’, Report of the International Law Commission on the Work of its Fifty-third Session (A/56/10), *YILC* (2001), vol. II, Part Two, 31-143, at ch. IV, para. 2; ‘Draft articles on the Responsibility of International Organizations, with commentaries 2011’, Report of the International Law Commission on the Work of its Sixty-third Session, *Gen. Ass. Off. Recs., Sixty-sixth Session*, Supp. No. 10 (A/66/10), 69-172, ch. II, para. 4.

⁶⁰ Para. 8 of the commentary to article 47 on State responsibility.

⁶¹ Para. 5 of the commentary to ch. IV on State responsibility.

⁶² In the *Legality of the Use of Force* case, the Netherlands argued that admissibility would require identifying the individual contributions to the allegedly wrongful act(s) of NATO member States, which it considered undesirable. The fact that it assumed such assessment was necessary demonstrates its support for individual, not collective responsibility. See *ICJ Pleadings, Case Concerning Legality of the Use of Force (Yugoslavia v. Netherlands)*, *Preliminary Objections of the Kingdom of the Netherlands* (Jul. 5, 2000), 62, para. 7.2.26 (at <www.icj-cij.org>).

Advisory Opinion of the ICJ,⁶³ but this is not the case for the United States, Russia and the EU. Russia and the United States have the obligation of non-recognition of illegality and a more general obligation of due diligence. The EU is arguably bound by international custom and may have a political commitment to pursue peace in the Middle East, but to what extent that would oblige it to not commit the omissions one could blame the Quartet for is far from clear.

This leads to the, very uncomfortable, conclusion that current international law has no answer to constructions like the Quartet with different members having diverging obligations. Under the current regime of international responsibility, the existence of a breach, defined as conduct not in conformity with an obligation binding upon the State or organization to which conduct is attributable, is a necessary requirement for responsibility to exist. Thus, if States and international organizations create a joint organ without aligning their obligations, they may effectively render the allocation of responsibility impossible. This is particularly true of joint organs such as the Quartet, because it is impossible to determine the individual contributions of each member to its conduct. There is no simple solution. A regime of strict liability for the kind of issues that concern the Quartet is unlikely to be acceptable to its members, and neither would be the complete alignment of their various obligations. Without it, the allocation of responsibility will remain elusive.

5. Conclusion

The Quartet has been criticized for failing to advance the peace process in the Middle East. This has led some to argue for its dissolution.⁶⁴ Allowing the Quartet to dissolve and ‘to go quietly into the night’⁶⁵ will, however, fail to do justice to the legal consequences of its inaction. Practical and political obstacles aside, legal action to invoke responsibility for the Quartet’s conduct will remain unlikely due to the elusive nature of the allocation of responsibility. As our analysis of the situation of the Quartet has demonstrated, States and international organizations can effectively create entities and avoid international responsibility. That this is undesirable requires no explanation. Even if reparation is impossible, the determination of legal responsibility carries with it a significant political judgment. Such a judgment on a body that has

⁶³ J. Dugard, ‘Advisory Opinions and the UN’, and text accompanying footnote 31.

⁶⁴ K. Elgindy, ‘Post Mortem’, 53.

⁶⁵ Ibid.

drastically failed to achieve its goals will do something to satisfy international public opinion.