

Research Paper

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Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism

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Summary

- States often assist each other in armed conflicts and in counterterrorism operations. This assistance can take many forms, for example the loan of airbases, the exchange of intelligence information and the strengthening of the capacity of armed forces. This paper considers the implications of such assistance under international law.
- This is not an academic paper and does not seek to address every nuance of this area of the law. Rather, it offers a practical perspective on the issues, illustrated with topical examples drawn from armed conflict and counterterrorism. For those who prefer not to dive into the legal complexities, the paper provides a self-contained final chapter, recommending strategies and policies to be adopted by governments that are considering the provision of assistance to states or non-state armed groups.
- The law in this area includes a general rule set out in Article 16 of the International Law Commission's Articles on State Responsibility, which provides that a state that aids or assists another state in the commission of an internationally wrongful act by the recipient state is internationally responsible, where certain conditions are fulfilled. The paper clarifies the application of these conditions, including the difficult issue of what degree of knowledge or intent engages the responsibility of an assisting state under Article 16.
- There are also specific rules of international law that are relevant to state-to-state assistance in armed conflict and counterterrorism situations, including under international humanitarian law and international human rights law. These typically impose stricter requirements on assisting states than the general rule in Article 16. The paper examines the relationship between the general rule and these specific rules. It also considers the application of relevant rules to assistance by states to non-state armed groups.
- The final chapter of the paper highlights the importance of governments carrying out thorough enquiries before they provide assistance to other states, so that they can assess in advance the risks of cooperating in an act that may be internationally wrongful. Once the risks have been identified, states need to put in place strategies to reduce and mitigate these risks. Such strategies might include attaching conditions to assistance; vetting and training recipients of assistance; and monitoring and following up on any risks identified.
- Greater transparency is needed about the assistance that states provide to one another, and to non-state groups. This applies both to the factual information surrounding the assistance and to the assisting state's understanding of the applicable legal framework, particularly where allegations of breaches of international law are concerned.

1. Introduction

1. In modern warfare, armed conflicts are increasingly undertaken in coalition, with states offering technical, financial and logistical assistance to one other. Cooperation between states on security arrangements for the purposes of counterterrorism is also on the rise, including in the form of capacity-building, military training, weapons transfers, intelligence cooperation and ‘proxy detention’.¹ The legal issues surrounding cooperation among states in the fields of armed conflict and counterterrorism are thus highly topical today.

2. If a state provides assistance that will be used by the recipient state to carry out actions that are wrongful in international law, will the assisting state be responsible in international law for assisting a wrongful act? For example, is the provision of airbases on a state’s territory unlawful if flights from those bases will be used to carry out airstrikes in breach of international law? If the assisting state provides intelligence to support these strikes, is it under a duty to verify in advance the circumstances in which that intelligence will be used? And is the position any different under general international law as compared to other areas of international law, for example international human rights law (IHRL)?

3. Many recent examples of these issues arise in international law. The 2003 intervention in Iraq raised questions not only about the legality of that action, but also about the extent to which non-coalition states that allowed the invading forces to enter their airspace or territory were violating international law.² Similar issues arose with regard to states assisting the US in its programme of rendition and questioning of persons suspected of terrorist acts.³ Allegations have also been made regarding the responsibility of certain states for their part in assisting the US in drone strikes outside the theatre of war (e.g. in Yemen and Pakistan).⁴

The law

4. In 2001, the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (the ‘Articles on State Responsibility’), including Article 16 on the responsibility of states that aid or assist internationally unlawful acts by other states. Specific rules relevant to issues of aiding and assisting already existed in international law before that – including under primary rules in international humanitarian law (IHL), IHRL and international

¹ For discussion of the trend towards increased cooperation in armed conflict and counterterrorism, see Dworkin, A. (2016), *Europe’s New Counter-Terror Wars*, European Council on Foreign Relations Policy Brief, October 2016, London: European Council on Foreign Relations, http://www.ecfr.eu/publications/summary/europes_new_counter_terror_wars7155 (accessed 24 Oct. 2016). A table on page 7 illustrates the various forms of cooperation between nine European states in the US-led coalition against Islamist armed groups. A number of other European states have also sent military contingents to train anti-ISIS forces in Iraq.

² See Nolte, G. and Aust, H. (2009), ‘Equivocal Helpers: Complicit States, Mixed Messages and International Law’, 58 *International and Comparative Law Quarterly*, No. 1, pp. 1–30.

³ UK Cabinet Office (2013), *The Report of the Detainee Inquiry*, http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf, pp. 4–5 (accessed 30 Sep. 2016).

⁴ See, for example, Serle, J., ‘UK complicity in US drone strikes is ‘inevitable’, Emerson tells parliament’, Bureau of Investigative Journalism, 5 December 2013, <https://www.thebureauinvestigates.com/2013/12/05/uk-complicity-in-us-drone-strikes-is-inevitable-emerson-tells-parliament/> (accessed 30 Sep. 2016).

criminal law⁵ – and they continue to develop. These are distinct but overlapping branches of law, which together comprise a substantial body of international law on the relevant issues.

5. The interpretation and application of this area of law are not always free from doubt, and are contested in certain critical respects, particularly as far as Article 16 is concerned. There is growing state practice, as states increasingly take into account Article 16 in their assessments of the risks of cooperation.⁶ The statements of governments regarding the ILC's work may also be relevant in the formation of customary international law. But there are gaps left by the ILC, and there is a lack of case law in this area. There are therefore concerns that the legal framework is not sufficiently clear to enable states to avoid the risk of facilitating internationally wrongful acts through their cooperation with other states.

Purpose of this research paper

6. The purpose of this paper is to set out a clear statement of the law on aiding and assisting as it stands, with particular regard to its application in situations of armed conflict and counterterrorism.⁷ The paper also aims to provide guidance to governments on best practice in their cooperation in armed conflict and counterterrorism, taking into account the legal and policy issues raised by the various rules in this area.

7. The paper is divided into three chapters, in addition to this introduction. Chapter 2 discusses the law set out in Article 16 of the Articles on State Responsibility. Chapter 3 considers other rules of international law that are relevant to acts of aiding and assisting, and the relationship between these different rules and Article 16. Although the paper deals primarily with assistance given by and to states, Chapters 2 and 3 also consider briefly the law applicable to assistance given by states to non-state armed groups. Finally, Chapter 4 considers strategies available to states to reduce the risk of assisting in internationally unlawful acts, and makes recommendations for governments.

Scope

8. The paper considers the legal issues that should be addressed before a state provides aid or assistance, or that might inform a state's review of ongoing aid or assistance. It assesses the state of the law as it currently stands, rather than as it might or should stand. While the paper cannot claim to provide definitive answers to all the questions arising in this complex area, it aims to provide greater legal certainty on some key issues, and to highlight issues of continuing debate that may be ripe for further research. It draws on topical examples of aiding or assisting in the fields of armed conflict and counterterrorism in order to clarify where the limits of the law lie with reference to specific scenarios in practice.

⁵ See Aust, H. (2011), *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press, pp. 107–68, for examples.

⁶ Jackson, M. (2015), *Complicity in International Law*, Oxford Monographs in International Law, Oxford: Oxford University Press, p. 172.

⁷ The project of which this paper is the outcome was conducted using desk research and roundtable meetings of academics, government legal advisers and NGO experts, who discussed the issues by reference to examples in armed conflict and counterterrorism. It is recognized that although the paper is intended to state international law as it stands, the examples taken are primarily from Western sources. Efforts were made to gather perspectives from a broader range of states, but with limited success.

9. Some areas are not covered. The paper does not address directly the responsibility of states in connection with the conduct of international organizations,⁸ or the responsibility of international organizations that assist states in wrongful conduct⁹ – both circumstances that are pertinent in the context of cooperation in armed conflict and counterterrorism. It does not consider defences to claims of state responsibility; these are not unique to Article 16 and apply across international law more generally. Nor does it examine the legal consequences of state responsibility, such as reparations.

10. Although the paper looks at state responsibility, the question of the individual responsibility of government officials for activities that could amount to the aiding or abetting of war crimes may also be relevant on the same facts and will often need to be considered in parallel. Individual responsibility under international or national criminal law is a separate body of law with its own criteria. This paper does not seek to address individual responsibility, except insofar as it may be helpful in informing the approach to international law on state responsibility.

11. This paper will generally refer to ‘assisting’ rather than ‘aiding or assisting’; it is not clear that there is any material difference between the two.¹⁰ It generally avoids the term ‘complicity’, which is not a term of art in international law and is usually associated with international criminal law.¹¹

⁸ This is addressed by Article 58 of the Draft Articles on the Responsibility of International Organizations 2011 (DARIO).

⁹ Article 14 DARIO.

¹⁰ See International Law Commission (2001), ‘State responsibility – comments and observations received from Governments’, 53rd session, UN Doc. A/CN.4/515, p. 52 for the comments of the UK.

¹¹ See Lanovoy, V. (2014), ‘Complicity in an Internationally Wrongful Act’, SHARES Research Paper 38, p. 4. Lanovoy notes that Special Rapporteur Roberto Ago used the term ‘complicity’ but dropped it after criticisms from states and some ILC members; p. 4.

2. Article 16 of the Articles on State Responsibility

I. Introduction

12. Article 16 provides that:

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.

13. The ILC's accompanying Commentary to the Articles on State Responsibility (the 'ILC Commentary'), in its discussion of Article 16, sets out three conditions circumscribing the scope of responsibility for aid or assistance:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.¹²

14. Article 16 is a general rule negotiated by the ILC (made up of independent experts in international law) over a period of nearly 40 years. The Articles were adopted by the ILC in 2001, and noted and commended to governments by the UN General Assembly later that year. While the Articles have yet to be formally adopted by the General Assembly, it commends them to the attention of governments on a regular basis.¹³ James Crawford, Special Rapporteur to the ILC on the draft Articles from 1997 to 2001, has stated that – at least initially – Article 16 was a measure of progressive development on the part of the ILC.¹⁴ But in the *Bosnian Genocide* case of 2007, the International Court of Justice (ICJ) held that Article 16 had attained the status of customary international law.¹⁵

15. Responsibility under Article 16 is not responsibility *for* the internationally wrongful act committed by the assisted state, but responsibility for assisting that state to commit the

¹² ILC Commentary to Article 16 of the Articles on State Responsibility, para (3).

¹³ The UN General Assembly's Sixth Committee has established a Working Group on the Responsibility of States for Internationally Wrongful Acts to consider further the question of whether the draft Articles should be turned into a Convention (UNGA Res 68/104 of 16 December 2013 on the Responsibility of States for Internationally Wrongful Acts).

¹⁴ Crawford, J. (2013), *State Responsibility: The General Part*, Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press, p. 408.

¹⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) (2007) ICJ Rep 43, para 417 (hereinafter *Bosnian Genocide* case); for detailed analysis of the customary law status of Article 16, see Aust (2011), *Complicity and the Law of State Responsibility*, pp. 97–191.

internationally wrongful act. It is therefore an ancillary responsibility, arising simply from the fact that a state facilitated the wrongful act.¹⁶ The ILC Commentary implies that the remedial consequences of ancillary responsibility are lower than the responsibility of the principal, since ‘the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act’.¹⁷

16. The primary rules concerned in the context of armed conflict and counterterrorism operations will include the rules on the use of force, IHL and IHRL. If a state acts inconsistently with any of these rules, the secondary rules of state responsibility become relevant; there may also be individual liability for state agents under international criminal law. The distinction between primary and secondary liability is not accepted by all; nor is it entirely clear cut, particularly where Article 16 is concerned.¹⁸ In some respects, Article 16 has the characteristics of a primary rule, as it does not merely address the consequences of a wrongful act, but extends responsibility for that act to the assisting state.¹⁹ Yet it also has the characteristics of a secondary rule, as the wrongfulness of the assisting state’s conduct is derived from the wrongfulness of the conduct of the state that it is assisting.²⁰

17. Because of its ancillary nature, responsibility under Article 16 will always depend on the content of the primary obligation breached by the recipient state and on the surrounding circumstances.²¹ Thus, while the primary norms are not the focus of this paper, in practice their content – and the controversies over how those norms are interpreted in the context of armed conflict and counterterrorism – will be highly relevant to the assessment under Article 16.

Conditions

18. Responsibility under Article 16 depends upon each of the following four conditions being met:

- (i) The assisting state must provide aid or assistance.
- (ii) There must be a sufficient nexus between the assistance and the principal wrong.
- (iii) The assisting state must possess the requisite mental element.
- (iv) The act committed by the recipient state must also be wrongful if committed by the assisting state.

¹⁶ See ILC Commentary to Article 16, paras (1) and (10); and Lowe, V. (2002), ‘Responsibility for the Conduct of Other States’, 101 *Kokusaiho Gaiko Zasshi*, p. 11.

¹⁷ See para (1) of the ILC Commentary on Article 16. Graefrath argues that in general it may be assumed that participation by aid entails a lesser degree of responsibility than equal participation in the wrongful act. Graefrath, B. (1996), ‘Complicity in the Law of International Responsibility’, *Revue Belge de Droit International*, p. 380.

¹⁸ The ILC Commentary notes that Article 16 may seem to blur the distinction between primary and secondary liability; para (7). See also Aust (2011), *Complicity and the Law of State Responsibility*, p. 188. Nollkaemper argues that the dichotomy between primary and secondary rules was adopted for essentially pragmatic reasons rather than conceptual ones. Nollkaemper, A. and Jacobs, D. (2011), ‘Shared Responsibility in International Law: A Conceptual Framework’, SHARES Research Paper 03 (2011), p. 84.

¹⁹ Aust (2011), *Complicity and the Law of State Responsibility*, p. 188.

²⁰ ILC Commentary to Article 16, para (11)

²¹ Article 16 has been described as a ‘normative and case-specific concept’, meaning that its content will always have to be determined in the specific situation. Aust (2011), *Complicity and the Law of State Responsibility*, p. 230.

Condition (i): aid or assistance

19. The ‘aid or assistance’ referred to in condition (i) above is not defined in Article 16, but is generally accepted as covering a broad range of activity and is not limited to acts of particular gravity.²² It may include not only the provision of material aid such as weapons, but also logistical and technical assistance, and financial support such as export credit guarantees.²³ In the context of armed conflict and counterterrorism, it may include, for example, the provision of territory (e.g. bases for launching aerial attacks),²⁴ of intelligence (e.g. to locate targets for attack by armed drone, or for detention and arrest), and of equipment such as satellite phones.

20. But it must be actual ‘aid or assistance’; mere expressions of approval, or refraining from disapproval, in a political forum would not normally qualify. Nor does aid or assistance under Article 16 include mere encouragement or moral support,²⁵ though incitement may breach other rules of international law and domestic criminal law.²⁶ Further, the traditional view is that Article 16 does not include omissions.²⁷

Condition (ii): the nexus element

21. Condition (ii) requires a link between the assistance and the internationally wrongful act. The ILC Commentary states that ‘the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act’.²⁸ It goes on to make clear that ‘[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’.²⁹ From this, it appears that the test is not direct causation or a ‘but for’ test, but that some causative connection is required.

22. Later, the ILC Commentary states that ‘the assistance ... may have contributed only to a minor degree’ to the commission of the primary act.³⁰ This appears to be at odds with the earlier reference to a significant contribution. The ILC’s 2011 Commentary to the Draft Articles on the Responsibility of International Organizations states that the aid or assistance should contribute ‘significantly’ to the commission of the act when discussing Article 14 (on aid or assistance in the commission of an internationally wrongful act),³¹ suggesting that the internal discrepancy should be resolved in favour of that language.³² The fact that the reference to significant contribution appears within one

²² Jackson (2015), *Complicity in International Law*, p. 153; Crawford (2013), *State Responsibility: The General Part*, p. 402; Aust (2011), *Complicity and the Law of State Responsibility*, p. 239; Lowe (2002), ‘Responsibility for the Conduct of Other States’, pp. 5–6.

²³ Lanovoy (2014), ‘Complicity in an Internationally Wrongful Act’, p. 9.

²⁴ The ILC Commentary to Article 16 cites the UK authorizing the US to use its airbases for the launching of US fighter planes to attack Libyan targets in 1986; para (8).

²⁵ ILC Commentary, ‘Introduction to Chapter IV’, para (9), p. 147; Crawford (2013), *State Responsibility: The General Part*, pp. 403–04; Quigley, J. (1986), ‘Complicity in International Law: A New Direction in the Law of State Responsibility’, *British Yearbook of International Law*, Vol. 57(1), p. 80; Nolte and Aust (2009), ‘Equivocal Helpers’, p. 13; Aust (2011), *Complicity and the Law of State Responsibility*, p. 221. Jackson, while accepting the orthodox position, argues that a principled approach to complicity under Article 16 would encompass the provision of complicit influence – see Jackson (2015), *Complicity in International Law*, p. 155.

²⁶ Dominice, C. (2010), ‘Attribution of conduct to multiple States and the implication of a State in the act of another State’, in Crawford J. et al. (eds) (2010), *The Law of State Responsibility*, p. 285; Crawford (2013), *State Responsibility: The General Part*, p. 403.

²⁷ Crawford (2013), *State Responsibility: The General Part*, pp. 403–05. This has been questioned by some scholars: Jackson (2015), *Complicity in International Law*, pp. 156–58; Aust (2011), *Complicity and the Law of State Responsibility*, p. 230; Lanovoy (2014), ‘Complicity in an Internationally Wrongful Act’, p.13. Lowe includes as an example of aid and assistance the non-application of mandatory sanctions – see Lowe (2002), ‘Responsibility for the Conduct of Other States’, p. 4.

²⁸ ILC Commentary to Article 16, para (1).

²⁹ *Ibid.*, para (5), emphasis added.

³⁰ *Ibid.*, para (10).

³¹ ILC Commentary to Article 14 of the Draft Articles on the Responsibility of International Organizations, para (4), quoting from para (5) of the ILC Commentary to Article 16.

³² See Crawford (2013), *State Responsibility: The General Part*, p. 403.

of the paragraphs of the ILC Commentary that defines the scope of the test (para (5)) may also argue in its favour.³³

23. The Special Rapporteurs in the ILC's negotiations on the draft Articles on State Responsibility referred to the relevant link as 'material facilitation',³⁴ but it appears that this phrase was avoided in the final ILC Commentary because of a fear of confusion with the term 'material breach' in Article 60 of the Vienna Convention on the Law of Treaties.³⁵ It is unclear whether the choice of significant contribution was intended to be equivalent to, or a higher threshold than, 'material facilitation'. Crawford concludes that the required standard appears to be one of 'substantial involvement on the part of the complicit State', which seems to be higher than material facilitation.

24. The above suggests that there is a *de minimis* threshold: aid that assists in a remote and indirect or minimal way is not a sufficient basis for responsibility.³⁶ At the other end of the spectrum, if the aid is sufficiently significant, the contributing state's role may transcend that of mere assistance and the state may become jointly responsible for the act.³⁷ The threshold for this element of Article 16 lies somewhere in between, and will depend on the facts in each case.

25. In order to understand better where the line might be drawn in practice, it is helpful to consider examples at either end of the spectrum. An example of where a state's actions amount to a significant contribution to the principal act might include where State A provides a military base to State B, which State B uses to refuel its aircraft en route to carrying out an armed attack against State C in breach of international law on the use of force. Without the ability to refuel at the base in State A, it would be much more difficult for State B to reach its target. In this case, it would appear that State A significantly contributed to State B's principal act, because State A's contribution makes it materially easier for State B to carry out the principal act in each case.³⁸

26. By contrast, it is possible to envisage examples in which assistance may fall below the requisite threshold of significant contribution. State A is assisting State B with building up its capacity for law enforcement. It provides State B with 10 jeeps for its police to undertake traffic control and other policing activities in its capital. In the event, this frees up State B's other jeeps, which are then used to carry out human rights violations on a rebel group elsewhere in its territory. Here, although State A's assistance has made some form of contribution to the principal act, the connection between the two is much more remote. It is doubtful whether the provision of assistance that leads to a freeing up of resources by the recipient state to carry out violations in other areas is sufficient to meet the significant contribution threshold under Article 16. Similarly, assistance to strengthen a state in a

³³ Jackson (2015), *Complicity in International Law*, p. 158.

³⁴ Lowe (2002), 'Responsibility for the Conduct of Other States', p. 5.

³⁵ In his Second Report on the draft Articles, Special Rapporteur Crawford states that the word 'materially' should thus be avoided. Crawford, J. (1999), 'Second report on State Responsibility', 51st session of the ILC (1999), UN Doc A/CN.4/498, p. 50.

³⁶ Lowe (2002), 'Responsibility for the Conduct of Other States', p. 5.

³⁷ In that case, responsibility would be considered under Article 47 of the Articles on State Responsibility ('Plurality of responsible States'): Crawford (2013), *State Responsibility: The General Part*, p. 405. Article 6 of the Articles deals with the conduct of organs placed at the disposal of a state by another state, which is relevant to issues such as the embedding of troops and the sharing of military assets. See McLaughlin, R. (2015), 'State responsibility for third country deployed/embedded military personnel engaged in armed conflict', EJIL: Talk! blog, 10 September 2015, <http://www.ejiltalk.org/state-responsibility-for-third-country-deployed-embedded-military-personnel-engaged-in-armed-conflict/> (accessed 30 Sep. 2016). In practice, the distinction between joint and ancillary responsibility is not always easy to draw. See Quigley (1986), 'Complicity in International Law', p. 105; Lanovoy (2014), 'Complicity in an Internationally Wrongful Act', p. 11; Brownlie, I. (1983), *System of the Law of Nations – State Responsibility Part I*, Oxford: Oxford University Press, p. 191.

³⁸ The ILC's first reading commentary stated that 'the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'; International Law Commission (1978), *Yearbook of the International Law Commission*, Vol. II, Part II, UN Doc A/CN.4/SER.A/1978/Add.1 (Part 2), p. 104, para 17.

generalized way, for example aid directed towards capacity-building, will not necessarily meet the threshold. Otherwise, it would be virtually impossible for one state lawfully to assist another state in capacity-building unless the recipient state had completely clean hands in every particular.

27. In the jeeps example given above, there may be a linkage between conditions (ii) (nexus) and (iii) (mental element), with some of the same evidence being relevant to the establishment of both elements. In the context of the diversion of resources, if the assisting state knows that the resources will be diverted for illegal purposes, this in itself suggests the existence of a nexus between the assistance and the illegal act.

Condition (iv): the double obligation rule

28. Condition (iv) above derives from Article 16(b), which requires that ‘the act would be internationally wrongful if committed by [the assisting] State’. As a result of this requirement, responsibility will only be engaged where the act carried out by the recipient state would also be unlawful for the assisting state. Without this limitation, an assisting state could be held independently liable for the breach of a bilateral treaty to which it was not itself a party,³⁹ in breach of the *pacta tertiis* rule, which provides that a treaty does not create obligations or rights for a third state without its consent.⁴⁰

29. Where the rule is one of customary international law, both parties will be bound by the obligation. But in the case of treaty law, this condition may serve as a limiting factor to the application of Article 16, for example in situations of cooperation where one state is bound by a human rights treaty obligation and another is not.⁴¹

Condition (iii): the mental element

30. The rest of this chapter concentrates on the most difficult and contested element of Article 16, namely condition (iii) above – the question of what constitutes the requisite mental element. Article 16 requires the assisting state to have ‘knowledge’ of the circumstances of the internationally wrongful act. Para (3) of the ILC Commentary states that the aid or assistance must be given ‘with a view to’ facilitating the commission of the internationally wrongful act. Para (5) of the Commentary refers to the need for the assisting state to have ‘intended’, by the aid or assistance given, to facilitate the occurrence of the internationally wrongful conduct. The key issue is whether both knowledge and intent are required under Article 16, or just one of them.

31. There is clearly a tension between the text in Article 16 and the ILC Commentary. Section II below considers ‘knowledge’ and Section III discusses ‘intent’. Section IV considers whether the difference between the two is in practice more apparent than real.

³⁹ Crawford (2013), *State Responsibility: The General Part*, p. 409.

⁴⁰ ILC Commentary on Article 16, para (6). The *pacta tertiis* rule is reflected in Articles 34 and 35 of the Vienna Convention on the Law of Treaties.

⁴¹ For example, no responsibility would arise under Article 16 if China assisted the UK in violating rights guaranteed by the ECHR that extend beyond customary international law – see Jackson (2015), *Complicity in International Law*, p. 162 – and beyond China’s treaty obligations.

II. The mental element (1): knowledge

32. It is clear from the text of Article 16 that knowledge is an essential component of the mental element. But it is important to ascertain at the outset what is meant by ‘knowledge’ in this context. A number of questions need to be asked here: (a) *What* must be known by the state in question? (b) What *degree* of knowledge is required? (c) At what *point* in the decision-making process must the assisting state possess the relevant knowledge? And (d) *who* is supposed to have knowledge for the purposes of assistance provided by a state? These questions are considered in turn below.

33. Responsibility under Article 16 does not attach unless the act that is assisted turns out, in the event, to be unlawful.⁴² Thus, it is necessary for a government to assess in advance the consequences of its assistance to other states. The government will need to assess situations in which there are not only existing circumstances of illegality (for example, as a result of a continuing practice by a recipient state), but also potential illegality flowing from the assistance to be provided.

(a) Knowledge of what?

34. Article 16 refers to knowledge ‘of the circumstances of the internationally wrongful act’. Some have interpreted this to mean that the assisting state does not necessarily have to be aware specifically of the unlawfulness of the assisted conduct but, rather, must simply be aware of the factual circumstances making it unlawful.⁴³

35. The ILC Commentary to Article 16 indicates that the state in question must be aware of the circumstances *making it wrongful*.⁴⁴ While this could be interpreted to support the argument above for mere awareness of the factual circumstances making it unlawful, the majority of commentators argue that this implies knowledge of specific illegality. In other words, where the assisting state has knowledge of the circumstances more broadly (for example, the supply of certain weapons to a particular state), but does not have knowledge of specific illegality (for example, that the weapons in question will be used to carry out intentionally indiscriminate attacks), then the mental element would not be present.⁴⁵ On this basis, an assisting state is not responsible if the recipient state pursues an objective that could be achieved in a lawful manner, but in fact pursues it in an unlawful manner.⁴⁶ During the negotiations in the Second Reading of the draft Articles, an ILC member stated that the state that was to be held responsible ‘must indeed have knowledge not merely of the circumstances of the act but also of its wrongfulness’.⁴⁷

36. In the *Bosnian Genocide* case, the ICJ held, when considering the complicity provision in the Genocide Convention by reference to Article 16 of the Articles on State Responsibility, that Serbia

⁴² The ILC Commentary to Article 16 states that ‘the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so’ (emphasis added), para (3).

⁴³ See, for example, Melzer, N. (2013), *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament Directorate-General for External Policies of the Union, p. 38.

⁴⁴ ILC Commentary to Article 16, para (4).

⁴⁵ See Crawford (2013), *State Responsibility: The General Part*, p. 407, citing Dominic, who refers to the need for ‘specific knowledge of ... an internationally wrongful act with a high degree of particularity’, referring to the ICJ’s decision in the *Bosnian Genocide* case, Dominic (2010), ‘Attribution of conduct to multiple States and the implication of a State in the act of another State’, p. 286; also Nolte and Aust (2009), ‘Equivocal Helpers’, p. 12.

⁴⁶ Lowe (2002), ‘Responsibility for the Conduct of Other States’, pp. 9–10.

⁴⁷ Statement at the 2577th Meeting of the ILC (1999), *Yearbook of the International Law Commission*, Vol. I, p. 69, para 13.

did not know that genocide was being committed by the Bosnian Serb army, since Serbia did not know of the specific intent of the forces concerned.⁴⁸ This suggests the need for knowledge of illegality, not just of the facts more generally.⁴⁹

37. In some situations, knowledge of the factual circumstances will automatically imply knowledge of breaches of the law. This is likely where both the factual circumstances, and the underlying law and its application to the circumstances surrounding the assistance, are clear. However, this is not always the case, for the reasons set out below:

- (i) There may be a factual gap in knowledge that prevents the assisting state from concluding a thorough assessment of legality, because the purpose for which the assistance is going to be used is unclear. This might be the case, for example, in the context of intelligence that the assisting state provides to the recipient state in order to contribute to a picture of the operations of a terrorist group over time; the assisting state may well not know exactly how that intelligence will be used by the recipient state.
- (ii) While ignorance of the law is generally no excuse,⁵⁰ there may be circumstances in which it is genuinely unclear by what law another state is bound. This may be the case, for example, where a state is not a party to a treaty and only considers itself bound by the customary international law provisions in the treaty, the precise contours of which may be unclear and contested.⁵¹
- (iii) Even where the law and the facts are established, it will be necessary for the assisting state to consider how the recipient state will interpret and apply the relevant law. This may be possible by reference to the recipient state's written manuals on armed conflict, or to written statements on interpretations of the law (e.g. notifications to the UN Security Council explaining the legal basis for military action under Article 51 of the UN Charter). Or it may involve an exercise in inference in the absence of easily available information. Where the situation is legally ambiguous or contested, this is likely to complicate the assisting state's assessment of the legality of the underlying act. For example, the relationship between IHL and IHRL in the context of detention in a non-international armed conflict is an area of law that is unclear and disputed.⁵² In that context, it may be difficult to reach a view on the responsibility of a state that assists in detention (for example, through the provision of territory for detention facilities) if the legality of the underlying act itself is unclear.

⁴⁸ *Bosnian Genocide case* (ICJ 2007): '... there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the *specific intent (dolus specialis) of the principal perpetrator*', para 421 (emphasis added).

⁴⁹ Crawford also takes this reference in the *Bosnian Genocide case* to 'at the least', as quoted in footnote 48 above, to indicate that something more than mere knowledge is required, 'namely the need for actual intent that aid and assistance be given to the illegal act'. See Crawford (2013), *State Responsibility: The General Part*, p. 407. See also Dominice (2010), 'Attribution of conduct to multiple States and the implication of a State in the act of another State', p. 286; Nolte and Aust (2009), 'Equivocal Helpers', p. 14; Aust (2011), *Complicity and the Law of State Responsibility*, p. 236; cf. Jackson (2015), *Complicity in International Law*, p. 160.

⁵⁰ Statement of Special Rapporteur James Crawford at the 2577th Meeting of the ILC (1999), *Yearbook of the International Law Commission*, Vol. I, 69, para 14.

⁵¹ For example, states, such as the US, which are not party to Additional Protocol II to the Geneva Conventions and which consider that they are bound by some provisions as a matter of custom but not by others.

⁵² As is reflected in the case of *Serdar Mohammed v Ministry of Defence*, which is before the UK's Supreme Court.

38. The factual and legal analysis may also be complicated where armed conflicts overlap, with states invoking different and competing legal rationales as the grounds for their participation, as in the conflict in Syria. In practice, legal and factual uncertainty will often compound one another.⁵³

(b) What degree of knowledge?

39. It is clear that actual knowledge of the circumstances of the principal wrongful act will meet the knowledge element in Article 16.⁵⁴ Commentators also generally accept that the knowledge element can be met by virtual certainty, on the part of the assisting state, of the eventual possibility of unlawful use of its assistance.⁵⁵ The examples of aiding and assisting given in the ILC reports appear to support this. For example, Special Rapporteur Roberto Ago cited as an example of aid and assistance Germany's provision of airbases to the US in 1958 to send US airplanes to Lebanon for military intervention.⁵⁶ It has been argued that this was an example of unlawful state assistance because Germany was not merely aware of the possibility of eventual unlawful use by the US, but based on the facts would have been 'practically certain' of that use.⁵⁷

40. On the other hand, the negotiating history in the ILC suggests that constructive knowledge (i.e. that an assisting state 'should have known' that it was assisting an internationally wrongful act) is insufficient to meet the mental element in Article 16. During the negotiations on the text of Article 16, the Netherlands proposed that Article 16 should make the assisting state responsible 'where it knows *or should have known* the circumstances of the internationally wrongful act'.⁵⁸ The rationale for such an argument is that it is a general principle of law that if a state does something believing it to be lawful and it turns out to be unlawful, it is nonetheless responsible.⁵⁹ By extension, it might be argued that it would be incongruous for an assisting state to be able to escape responsibility through a belief that the act it is assisting is lawful, when it turns out to be unlawful.⁶⁰ But the ancillary, derivative responsibility for aiding or assisting wrongdoing is distinct from principal or joint responsibility.⁶¹ In the ILC's negotiations, the Netherlands' proposal was not taken up, and other states argued for a stricter requirement of knowledge.⁶²

41. There are other arguments against a standard of constructive knowledge. In the *Bosnian Genocide* case, the ICJ, when considering the provision on complicity in the Genocide Convention by analogy with Article 16 of the Articles on State Responsibility, stated that complicity requires 'at

⁵³ Nolte and Aust (2009) 'Equivocal Helpers', p. 12.

⁵⁴ Crawford (2013), *State Responsibility: The General Part*, p. 406; Jackson (2015), *Complicity in International Law*, p. 161; Lowe (2002), 'Responsibility for the Conduct of Other States', p. 10.

⁵⁵ Crawford refers to 'actual or near-certain knowledge' in relation to imputation with intent (emphasis added). Crawford (2013), *State Responsibility: The General Part*, p. 408. Jackson argues that 'knowing participation means awareness with something approaching practical certainty as to the circumstances of the principal wrongful act'. Jackson (2015), *Complicity in International Law*, p. 161.

⁵⁶ International Law Commission (1978), *Yearbook of the International Law Commission*, Vol. 2, Part II, p. 111, para 10 (UN Doc A/CN.4/SER.A/1978/Add.1 (Part 2)). For discussion of this, see Quigley (1986), 'Complicity in International Law', p. 113.

⁵⁷ Quigley (1986), 'Complicity in International Law', p. 113.

⁵⁸ Statement of the Netherlands in International Law Commission (2001), *Yearbook of the International Law Commission*, Vol. II(1), p. 52 (emphasis added). See also the statements of Ustor in International Law Commission (1975), *Yearbook of the International Law Commission*, Vol. I, p. 48, cited in Crawford (2013), *State Responsibility: The General Part*, p. 406.

⁵⁹ Lowe (2002), 'Responsibility for the Conduct of Other States', p. 10.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, p. 11.

⁶² For a discussion of the views of different states during the ILC negotiations on the mental element, see Aust (2011), *Complicity and the Law of State Responsibility*, p. 172 and pp. 233–35.

least' knowledge,⁶³ which suggests actual knowledge as a minimum, and thus a higher standard of knowledge than 'should have known'.

42. The more difficult and contested issue is whether a state may meet the knowledge element under Article 16 if its knowledge lies somewhere in between actual or near-certain knowledge and constructive knowledge. This leads us on to the issue of 'wilful blindness'.

Wilful blindness

43. The term 'wilful blindness' does not appear in either Article 16 or the ILC Commentary. It is not a term of art in international law, but has been used by commentators.⁶⁴ It might be defined as a deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality.

44. Domestic law analogies may be useful to illustrate the concept. Under English criminal law, wilful blindness has been defined as where a defendant 'suspected the fact, he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge'.⁶⁵ Under US criminal law, the knowledge element of aiding and abetting is satisfied where the alleged aider and abettor attempted to escape responsibility through a 'deliberate effort to avoid guilty knowledge' of the primary actor's intentions.⁶⁶ Someone who suspected that his or her actions were furthering illegal activity, and who took steps to ensure that the suspicion was never confirmed, 'far from showing that he was not an aider and abettor ... would show that he was'.⁶⁷ Where the situation is dynamic, the suspicions of the assisting state about a breach of international law on the part of the recipient state, and the knowledge available to the assisting state, may evolve. If the breach continues for a period of time, and information about it becomes widespread, the presumption that the assisting state is turning a blind eye may increase.

45. But the wilful blindness concept must be applied with caution. Simply because information is in the public domain does not mean that a state is turning a blind eye to it. It does not necessarily follow that the information in question is available to the state – evidence may be clear to some parts of the international community but not to others. Or what is argued to be 'clear evidence' of illegality may in fact be disputed. On the other hand, where the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a state cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence.⁶⁸

⁶³ *Bosnian Genocide case* (ICJ 2007), para 421; see discussion in Jackson (2015), *Complicity in International Law*, p. 160.

⁶⁴ For example, Jackson (2015), *Complicity in International Law*, p. 54 and p. 162.

⁶⁵ Williams, G. (1961), *Criminal Law - The General Part*, London: Stevens & Sons, p. 159, quoted by Jackson (2015), *Complicity in International Law*, p. 54.

⁶⁶ Dellinger, W., Assistant Attorney General, Office of Legal Counsel (1994), 'Memorandum Opinion for the Deputy Attorney General on US Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking', 14 July 1994, p. 157, quoting the case of *Giovannetti*, 919 F.2d at 1229.

⁶⁷ *Ibid.*

⁶⁸ Lowe (2002), 'Responsibility for the Conduct of Other States', states that '... it is in my view unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner', p. 10; Jackson (2015), *Complicity in International Law*, p. 162; Quigley also suggests that where a state has information about the recipient state's plans for illegality, it should not be allowed to turn a blind eye; see Quigley (1986), 'Complicity in International Law', p. 120.

46. In sum, where an assisting state has actual or near-certain knowledge that the assistance will be used for unlawful purposes by the recipient state, or where the state is wilfully blind to such knowledge, it will have the degree of knowledge specified in Article 16.

A duty to make enquiries?

47. The notion of wilful blindness introduces an additional dynamic to Article 16. If an assisting state should not be able to get away with deliberately avoiding knowledge of credible evidence of illegality on the part of the recipient state, is there therefore a duty on the part of the assisting state to look into credible evidence of illegality?⁶⁹

48. While wilful blindness is relevant to the standard of knowledge under Article 16, it does not necessarily follow that it implies an obligation to make enquiries or to conduct what is known as ‘due diligence’.⁷⁰ The obligation to make enquiries is the natural counterpoint of constructive knowledge (‘should have known’), not of wilful blindness (‘deliberately avoided knowing’). The case law in international criminal law offers a possible analogy: in *Blaskic* the Appeals Chamber of the UN International Criminal Tribunal for the former Yugoslavia (ICTY) distinguished (in the context of command responsibility) between deliberately refraining from finding out and negligently failing to find out.⁷¹

49. It is also notable that the term ‘due diligence’ does not appear in the Articles on State Responsibility. The general approach in the Articles is that primary rules of conduct, rather than secondary rules of responsibility, determine the applicable standards of behaviour.⁷² The ILC Commentary states that the Articles are neutral on the question of fault or intention, focusing instead on the objective conduct of states and leaving the mental element to be defined by the primary obligations at issue.⁷³ But in a departure from this general approach, the ILC did specify a fault element in Article 16 – the requirement for the assisting state to possess the requisite mental element. It is this fault element, rather than a requirement of due diligence, that is the condition for the fulfilment of Article 16. It is therefore unsurprising that the ILC Commentary to Article 16 makes no reference to a duty on states to make enquiries. Further, as noted in para 33 above, responsibility attaches under Article 16 only if the unlawful act is in fact committed, whereas due diligence is a prior consideration, relevant to obligations with a prospective nature, such as the obligation to protect in IHRL or the obligation to prevent in IHL.

50. Although Article 16 does not place assisting states under a duty to make enquiries, there is a relationship between wilful blindness and the obligation to enquire. If a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have

⁶⁹ See Jackson (2015), *Complicity in International Law*. Jackson argues that ‘Beyond that [wilful blindness], international law does not yet recognize a general due diligence obligation conditioning the provision of aid or assistance to another State’, p. 162, suggesting that wilful blindness implies some form of due diligence obligation.

⁷⁰ This concept, which is gaining increasing traction in international law, has been defined as ‘reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion to address them’. See International Law Association (2014), *First Report of the ILA Study Group on Due Diligence in International Law*, pp. 6–7, quoting Stephens, T. (2009), *International Courts and Environmental Protection*, Cambridge: Cambridge University Press, p. 158.

⁷¹ *Prosecutor v Blaskic*, ICTY Appeals Chamber, IT-95-14-A, Judgment of 29 July 2004, para 406.

⁷² The Commentary to Article 2 provides that the draft Articles lay down no general rule in relation to standards, whether they involve ‘some degree of fault, negligence or want of due diligence’ on the part of the state to which a wrongful act is attributed under Article 2, instead leaving this to the content of the primary obligation in question (para (3), p. 82).

⁷³ Boivin, A. (2005), ‘Complicity and Beyond: International law and the transfer of small arms and light weapons’, 87 *International Review of the Red Cross* 859, p. 471; ILC Commentary to Article 2, para (3), p. 82 and para (10), p. 84.

turned a blind eye. The concept of due diligence may therefore be useful in assessing whether knowledge is possessed, but not in creating a new obligation under Article 16.

A court's approach to knowledge

51. The aim of this chapter is to clarify the legal standards applicable in relation to Article 16, rather than to consider the approach that a court would take to these issues. At the same time, it is important to be aware of the separate issue of how a court or tribunal would come to a view on the mental element of an assisting state in light of the facts and the evidence; in other words, how knowledge is proved.

52. It is difficult to prove the subjective mental element of an organization, particularly one such as a state. An assisting state may not advertise its purpose in giving aid, and it can also be difficult to determine a state's state of mind because the state is represented by a variety of officials, whose statements may not always be consistent.⁷⁴ To ascertain whether an assisting state had 'knowledge' will include looking at questions of what a state was able to foresee about the act in question, and whether, on the evidence, it must have known about the underlying illegality. As with any of the primary rules binding states where a certain mental element is required, this exercise is likely to involve a court examining the evidence available (both what the state claims to know and what is in the public domain generally, for example in the form of public statements and official policies) and, in practice, inferring from that evidence whether the state had knowledge at the relevant time.

53. In the process of inferring whether a state had knowledge, the distinction between the different levels of knowledge – what a state actually knew, what a state must have known and what a state ought to have known – becomes a fine one. In the context of armed conflict and counterterrorism, where the primary wrongful acts are likely to be serious, a court may be reluctant to allow an assisting state to rely on ignorance when in today's 'information era' significant amounts of data are potentially available to states, including in the form of reports from non-governmental organizations. This consideration should inform the advice of government lawyers about the level of risk a government faces, as the government will need advice not only on the standards required under Article 16 but also on how a court is likely to apply them in practice.

54. In the *Corfu Channel* case,⁷⁵ the ICJ considered Albania's role in the laying of mines that exploded in its territorial waters, damaging British ships passing through those waters and causing serious personal injury. The ICJ examined the circumstantial evidence available, including evidence that it would have been impossible for Albania not to have noticed a ship laying the mines, given the proximity of the incident to the Albanian coast. In light of this evidence, the ICJ went on to infer that Albania 'must have known' about the illegal act in question.⁷⁶ A court may even go so far as to

⁷⁴ Quigley (1986), 'Complicity in International Law', p.111.

⁷⁵ *Corfu Channel* case (UK v Albania) (Merits) [1949] ICJ Rep 4.

⁷⁶ Aust (2011), *Complicity and the Law of State Responsibility*, p. 245. The facts of the case have led some to argue that this was in fact a case of joint (and thus direct) responsibility under Article 47 of the draft Articles rather than ancillary responsibility for aid or assistance under Article 16; Crawford (2013), *State Responsibility: The General Part*, p. 658. In practice, the distinction is often difficult to draw (footnote 37 above).

frame the issue in terms of what a state ought reasonably to have known, based on objective factors, whether or not it explicitly uses the concept of constructive knowledge.⁷⁷

(c) Knowledge at what point in time?

55. There may be situations in which it is clear that the assisting state knows in advance that the act it is assisting is unlawful. But frequently the assisting state may be acting at speed with imperfect knowledge. What it knows is likely to change as more information is provided.

56. In the case of the provision of intelligence from one state to another in order to prevent a threatened terrorist attack, for example, an assisting state will need to assess in advance the risks of future illegal conduct by the recipient state (for example, the infringement of the human rights of terrorist suspects by the police or armed forces). Based on this and other considerations, it will need to take a view on both the legality of the underlying act by the recipient state and the legality of the assistance. In circumstances such as these, the illegality may not be clearly foreseeable; the assisting state will have to identify and evaluate risk in a dynamic situation amid competing claims of what is happening on the ground.

57. The point at which knowledge by the assisting state of the wrongfulness becomes actual or near-certain will depend on the facts in each case. Where the situation is dynamic, there will be a need for the assisting state to keep an ongoing watch on its own liability as the facts, and its level of knowledge, develop. Where the breach of the primary rule is continuing, the presumption that the assisting state knows about the breach is likely to increase.⁷⁸ Of course, termination of assistance as a result of changed circumstances should not necessarily be taken as implying responsibility on the part of the assisting state up to that point. On the contrary, it is because the situation – and the assisting state’s knowledge of it – has changed that the responsibility issue arises, and termination at that point is sought in order to avoid the risk of assisting an internationally wrongful act.

(d) Knowledge by whom?

58. As noted above, it is not straightforward to assess the mental position of a state. The question of whether a state is held to be fixed with knowledge of a particular fact or matter necessarily involves the issue of attribution of the knowledge of relevant individuals. The factual question of who knows what, and when that triggers responsibility on the part of the state, will be important.

59. If, for example, junior-level intelligence officers have knowledge of illegality, but the relevant minister, as ultimate decision-maker, does not, is the state acting with knowledge or being wilfully blind? In practice, officials in parts of a national system may be aware of certain information about potential illegality (for example, officials in an embassy in the recipient state), while those in other parts (for example, government departments in the capital) may not. If a person or group whose acts are legally attributable to the state has relevant knowledge, the state is fixed with that knowledge.

⁷⁷ Bethlehem, D. (2012), ‘The Secret Life of International Law’, 1 *Cambridge Journal of International and Comparative Law*, p. 34; Boivin (2005), ‘Complicity and Beyond’, p. 471.

⁷⁸ Lanovoy (2014), ‘Complicity in an Internationally Wrongful Act’, p. 21.

III. The mental element (2): intent

Is intent an element of Article 16?

60. Whether or not intent is a necessary component of Article 16 has been the subject of much academic dispute. Various arguments have been made against the proposition that intent is required.⁷⁹ Intent is not mentioned in the Article itself, only in the ILC Commentary. It has been argued, in relation to discrepancies between the ILC's Articles and the corresponding Commentary on those Articles, that when a provision that is not in the Articles appears in the ILC Commentary, greater attention should be paid to the text of the Articles, unless the discrepancy was discussed in plenary and the provision is nonetheless adopted in the Commentary (which was not the case with Article 16).⁸⁰

61. Others have emphasized the role of the ILC Commentary. Crawford has noted that the Articles are evidence of international law rather than a source, and are to be read in conjunction with the Commentary, preferably alongside the preparatory work of the ILC.⁸¹ It is also significant that the ILC alludes to the requirement of intent under Article 16 in its 2011 Commentary to the Draft Articles on the Responsibility of International Organizations.⁸²

62. As Article 16 reflects a rule of customary international law, and the product of the ILC's drafting over many years, the negotiating history on the mental element of Article 16 is also important. The statements of governments during the many years of negotiation of the draft Articles suggest that most states were, perhaps unsurprisingly, more inclined towards an element of intent rather than knowledge alone.⁸³ For example, in 2001 the US administration submitted, in its comments to the ILC on the text of Article 16, that the draft Article should be clarified to demonstrate an intent requirement, and that this requirement should be narrowly construed.⁸⁴

63. Legal policy arguments have also been put forward in favour of the intent requirement. For example, it has been argued that if knowledge alone were sufficient, that would have a chilling effect on cooperation between states.⁸⁵ But equally there are legal policy arguments the other way – for example, that including intent would make Article 16 unduly restrictive, undermining the entire purpose of the prohibition on aiding and assisting.⁸⁶ So these policy arguments are not conclusive either way. States should be able to cooperate without being unduly fettered where they have no reason to anticipate the wrongful use of their assistance,⁸⁷ but they should not be able to deny their

⁷⁹ Aust (2011), *Complicity and the Law of State Responsibility*, p. 236, sets these out in detail.

⁸⁰ Gava G. (2015), 'Interpreting Articles Adopted by the International Law Commission', 86 *BYIL* 1.

⁸¹ Crawford (2013), *State Responsibility: The General Part*, p. 87.

⁸² See ILC Commentary to Article 14 of the Draft Articles on the Responsibility of International Organizations, para (4), p. 37.

⁸³ Aust, H. (2015), 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20(1) *Journal of Conflict and Security Law*, p. 69. For discussion of the views of different states on the intent requirement, see Aust (2011), *Complicity and the Law of State Responsibility*, p. 172.

⁸⁴ Comments of the US Government in the 50th session of the ILC, 22 October 1997, UN Doc A/CN.4/488.

⁸⁵ See Chinkin quoted in Aust (2011), *Complicity and the Law of State Responsibility*, p. 240; and generally Aust at p. 239 ff. and p. 427 on these legal policy arguments. Crawford (2013), *State Responsibility: The General Part*, p. 408; Aust (2015), 'The UN Human Rights Due Diligence Policy', p. 69 and footnote 35 quoting Crawford.

⁸⁶ Gibney, M. et al. (1999), 'Transnational State Responsibility for Violations of Human Rights', 12 *Harvard Human Rights Journal*, p. 294; Howard, J. (2001), 'Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the US and the Question of East Timor', 2 *Melbourne Journal of International Law*, p. 46; Nahapetian, K. (2002), 'Confronting State Complicity in International Law', 52 *ICLQ*, p. 108; Quigley (1986), 'Complicity in International Law', p. 111.

⁸⁷ Quigley (1986), 'Complicity in International Law', p. 117.

responsibility for assistance in situations in which internationally wrongful acts are manifestly being committed.⁸⁸

64. On the whole, the better view appears to be that intent is a necessary part of Article 16, in addition to knowledge. But there are significant differences in the concepts of intent (or intention) used by the major legal cultures around the world, in both criminal and civil law contexts.⁸⁹ It is therefore important to establish what is meant by intent in the context of Article 16.

What is intent?

65. The ILC Commentary is not much help in this regard. It states: ‘Article 16 deals with the situation where one State provides aid or assistance to another *with a view to facilitating* the commission of an internationally wrongful act.’⁹⁰ It then goes on to state: ‘A State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended, by the aid or assistance given, to facilitate* the occurrence of the wrongful conduct.’⁹¹ The ILC provides no definition of intent, and it is unclear from the Commentary whether ‘intent’ is meant in the sense of motive, purpose, wish, desire or intentional conduct, or a combination of these. It is indeed a pity that a concise statement of the requirement of intent was not included in the Article itself.

66. Analogies between individual responsibility under international criminal law on the one hand and state responsibility under Article 16 on the other must be employed with care: they are different areas of international law with different histories and characteristics. Further, the standard of civil responsibility across legal systems is not generally as high as that for criminal responsibility. But given the lack of case law interpreting Article 16, and the lack of clear state practice on this issue, consideration of the various meanings of ‘intent’ in international criminal law may help to provide a better understanding of what the intent requirement of Article 16 might entail.⁹²

67. The definition of intent in Article 30(2) of the Statute to the International Criminal Court (the ‘Rome Statute’)⁹³ encompasses a mixture of knowledge and intent:

A person has intent where:

(a) in relation to conduct, that person means to engage in the conduct;

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

68. Sub-paragraph (b) above describes two different forms of intent. The first part – ‘means to cause that consequence’ – describes direct intent. The ICC Pre-Trial Chamber in *Prosecutor v Bemba*, in its consideration of Article 30 of the Rome Statute, stated that direct intent requires that

⁸⁸ Crawford (2013), *State Responsibility: The General Part*, p. 408; Nolte and Aust (2009), ‘Equivocal Helpers’, pp. 15–16.

⁸⁹ See, for example, Van Sliedregt, E. (2012), *Individual Criminal Responsibility in International Law*, Oxford: OUP, p. 40 ff.; Ohlin, J. D. (2013), ‘Targeting and the Concept of Intent’, 35 *Michigan Journal of International Law* 79, p. 82 ff.

⁹⁰ ILC Commentary to Article 16, para (1) (emphasis added).

⁹¹ *Ibid.*, para (5) (emphasis added).

⁹² In the *Bosnian Genocide* case (ICJ 2007), the ICJ considered Article 16 by analogy with the complicity provision in the Genocide Convention in the context of its consideration of the mental element, suggesting some read across between these different areas of law is permitted.

⁹³ Rome Statute of the International Criminal Court, 17 July 1998, ISBN 92-9227-227-6.

the suspect ‘knows that his or her acts will bring about the material elements of the crime and carries them out with the purpose, will or desire to attain this result’.⁹⁴ The second part of subparagraph (b) – ‘is aware that it will occur in the ordinary course of events’ – describes a more oblique form of intent, where a person does not have the desire or will to bring about the consequences of the crime but is aware that those elements will be the almost inevitable outcome of his or her acts or omissions. The ICC Pre-Trial Chamber in *Bemba* stated that, in relation to this more oblique form of intent, the volitional element decreases substantially and is overridden by the cognitive element, i.e. awareness that his or her acts ‘will’ cause the undesired proscribed consequence.⁹⁵ This reflects the orthodox standard of intention in English criminal law, which includes knowledge that the consequence was virtually certain to follow.⁹⁶

69. For the purposes of Article 16, the question is whether intent exists with regard to a particular consequence, namely the facilitation of the wrongful act. Using by analogy the definition in the Rome Statute on intent in relation to a consequence, the assisting state has the necessary intent if either its purpose in acting is to facilitate the recipient state’s unlawful act, or it knows or is virtually certain that State B *will* act unlawfully in the ordinary course of events. This conforms with some of the examples of responsibility for aiding and assisting given by the ILC, for example the USSR’s charge of complicity against Germany and Turkey for the launching of US balloons from their territory in 1956, which Special Rapporteur Ago noted was ‘based on passive conduct or toleration on the part of their organs’, i.e. acceptance of an outcome that the assisting state knew was virtually certain, without actively desiring it.⁹⁷

70. The above suggests that, in spite of the fact that the ILC Commentary uses the term ‘with a view to’, Article 16 does not require purpose on the part of the assisting state, nor does the assisting state have to be in common cause with the principal.⁹⁸ Knowledge or virtual certainty that the recipient state will use the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever its desire or purpose.

71. In some jurisdictions, particularly those with civil law systems, intent is sometimes taken to include also the concept of *dolus eventualis*. In *Prosecutor v Bemba*, the Pre-Trial Chamber of the ICC noted that the common law counterpart to *dolus eventualis* is advertent recklessness (also known as subjective recklessness)⁹⁹ – that is, ‘foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility’¹⁰⁰ and proceeding anyway. This concept does not form part of the definition of intent in Article 30 of the Rome Statute,¹⁰¹ and it is doubtful that the definition of intent for the purposes of Article 16 stretches this far either. *Dolus eventualis* has a relationship with wilful blindness, for in each case the assister suspects or can foresee potential

⁹⁴ *Prosecutor v Bemba*, Pre-Trial Chamber, ICC-01/05-01/08, Judgment of 15 June 2009, para 358.

⁹⁵ *Ibid.*, para 359.

⁹⁶ Horder, J. (2016), *Ashworth’s Principles of Criminal Law*, Oxford: OUP, p 193.

⁹⁷ See Quigley (1986), ‘Complicity in International Law’, for discussion of this and other examples of oblique intent, p. 111 ff.

⁹⁸ Crawford (2013), *State Responsibility: The General Part*, p. 408, citing Lowe (2002), ‘Responsibility for the Conduct of Other States’, pp. 6–9.

⁹⁹ *Prosecutor v Bemba* (ICC 2009), paras 363 and 366. Subjective recklessness requires the assisting state to be able to foresee risk and carry on anyway, whereas objective recklessness is a higher standard, under which the assisting state is negligent regardless of whether it was aware of the risk.

¹⁰⁰ *Ibid.*, para 363.

¹⁰¹ *Ibid.*, paras 363–69.

illegality. But in the case of wilful blindness there is, in addition, a deliberate attempt to avoid knowledge of that illegality (see para 43, above).

72. As with knowledge, the issue of *who* has intent will also be relevant to the assessment of whether the mental element is satisfied, and is likely to involve issues of attribution.¹⁰²

IV. The relationship between knowledge and intent

73. We have seen from para 70 above that knowledge and intent are closely intertwined, and that in light of Article 30(2)(b) of the Rome Statute, actual or near-certain knowledge of illegality is effectively a form of intent. Applying this to Article 16, if an assisting state has actual or near-certain knowledge that unlawful conduct will be committed, it cannot shield itself from responsibility by arguing that its purpose is not to facilitate unlawful conduct.

74. Commentators have suggested that where a state has actual or near-certain knowledge of illegality, intent can be ‘imputed’ to that state.¹⁰³ This is an alternative way of reaching the same conclusion that if there is actual or near-certain knowledge of specific illegality, there is intent. With this conclusion, the disagreement between those who require only knowledge and those who also require intent is of little practical effect.¹⁰⁴

75. This conclusion has implications for the scope of application of Article 16, because an assisting state is more likely to be indifferent to the consequences of assistance than to actively desire an illegal act.¹⁰⁵ Applying this to a practical example, suppose that State A supplies aid to State B for use in building up capacity in State B’s justice and home affairs sector. Some of the money is used by State B to buy weapons to carry out human rights violations against its citizens. State A knows that State B carries out human rights violations against its citizens.¹⁰⁶

76. State A thus has knowledge of the circumstances of the wrongful act but did not provide the money ‘with a view’ to facilitating it. The test under Article 16 is not whether State A had the purpose of assisting an illegal act, but whether State A knew, or was virtually certain, that the assistance would be used for illegal purposes. As noted in para 27 above, in practice liability is likely to turn as much on whether or not the money made a significant contribution to the wrongful act in question as on the mental element.

Proving the mental element

77. As noted above,¹⁰⁷ the legal standards applicable under Article 16, and how a court would apply those standards on the evidence available, are two distinct issues. The drafting history underlines

¹⁰² See paras 58–59 above.

¹⁰³ Crawford (2013), *State Responsibility: The General Part*, p. 408; Jackson (2015), *Complicity in International Law*, p. 160. Nolte and Aust (2009), ‘Equivocal Helpers’, note that in some cases ‘a lack of intent can be offset by sufficient knowledge’, p. 15. Lowe (2002), ‘Responsibility for the Conduct of Other States’, argues that ‘As a matter of general principle States must be supposed to intend the foreseeable consequences of their acts’, p. 8.

¹⁰⁴ Jackson (2015), *Complicity in International Law*, p. 159.

¹⁰⁵ Quigley (1986), ‘Complicity in International Law’, p. 111; Gibney et al. (1999), ‘Transnational State Responsibility’, p. 294.

¹⁰⁶ Jackson (2015), *Complicity in International Law*, p. 160.

¹⁰⁷ At para 51.

the importance of a state's intent being 'established' rather than 'presumed'. ('Nor is it sufficient for intention to be "presumed"; as the article emphasises, it must be established.')¹⁰⁸ In practice, it is highly unlikely that an assisting state will say expressly that it is providing assistance with the intention of facilitating the commission of an internationally wrongful act. A court will therefore have to infer whether a state had the requisite intent.

78. It has been argued that it is harder to establish that an assisting state intended to further an internationally wrongful act than to establish that it simply had knowledge of that act.¹⁰⁹ Indeed, the difficulty of establishing intent has led many commentators to criticize a standard of intent as unworkable.¹¹⁰ But if, as indicated above, actual or near-certain knowledge of specific illegality is understood as effectively a form of intent, these issues are less of a concern.¹¹¹

V. Is the mental threshold different for a breach of a peremptory norm?

79. In the context of armed conflict and counterterrorism, some of the allegations made against states in relation to responsibility for assistance in the commission of internationally wrongful acts involve the breach of peremptory norms (that is, fundamental rules from which no derogation is possible). An example is the use of torture (the prohibition of which is generally accepted to be a peremptory norm of international law) in the context of the treatment of detainees. It is therefore also necessary to consider whether Article 41 of the Articles on State Responsibility may be relevant.

80. Article 41 provides that:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, *nor render aid or assistance in maintaining that situation*.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.¹¹²

81. Under Article 41, there is no need to show knowledge or intent in the case of assistance for acts that breach peremptory norms of international law. The rule is therefore stronger than Article 16,¹¹³ although it is not clear whether it represents customary international law.¹¹⁴ The reference to a

¹⁰⁸ Commentaries (14) and (18) to draft article 27 in the *Yearbook of the International Law Commission* (1978), Vol. II (Part Two), pp. 99–105.

¹⁰⁹ Quigley (1986), 'Complicity in International Law', p. 111; Lanovoy (2014), 'Complicity in an Internationally Wrongful Act', p. 18; Boivin (2005), 'Complicity and Beyond', p. 472.

¹¹⁰ Aust (2011), *Complicity and the Law of State Responsibility*, p. 236, quoting (*inter alia*) Quigley (1986), 'Complicity in International Law', p. 111; Graefrath (1996), 'Complicity in the Law of International Responsibility', p. 375; Aust (2015), 'The UN Human Rights Due Diligence Policy', cites several authors who consider a requirement of intent to be unworkable, p.68. See also Nolte and Aust (2009), 'Equivocal Helpers', p. 14.

¹¹¹ On the relationship between intent and knowledge with standards concerning evidence and proof, see further Aust (2011), *Complicity and the Law of State Responsibility*, pp. 242–43.

¹¹² Article 41 of the Articles on State Responsibility (emphasis added).

¹¹³ Nolte and Aust (2009), 'Equivocal Helpers', p. 16.

¹¹⁴ Aust (2011), *Complicity and the Law of State Responsibility*, p. 343.

‘serious breach’ in this context means a gross and systematic failure by the responsible state to fulfil an obligation imposed by a peremptory norm.¹¹⁵ The ILC Commentary notes that the lack of the subjective element in Article 41(2) is motivated by the fact that ‘it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State’.¹¹⁶

82. However, Article 41 deals with conduct after the fact, i.e. assistance to the recipient state in maintaining a situation created by a serious breach of a peremptory norm. It is formulated narrowly. Article 16 is neutral as to the norm in question, so does not distinguish between assistance for breaches of ordinary rules of international law and assistance for breaches of peremptory norms. Consequently, it does not impose any higher duty on states in their cooperation prior to a serious breach.

83. Nevertheless, it could be argued that Article 41 more generally implies that states are under a stricter duty not to render aid or assistance where peremptory norms are invoked, and that the importance of peremptory norms warrants that states should be more careful about the ways in which they cooperate with one another.¹¹⁷

VI. Application to non-state actors

84. States increasingly assist non-state actors in conflict and counterterrorism situations. This is evident, for example, in relation to the US’s training and equipping of non-state groups fighting Islamic State of Iraq and Syria (ISIS) in Syria; Russia’s provision of weapons, training and support to separatists in eastern Ukraine; and Iran’s arming and funding of Hezbollah in Lebanon. Article 16 only applies to state-to-state assistance in an internationally wrongful act, and so will not be engaged in relation to non-state groups.¹¹⁸ A state will be internationally responsible under Article 16 for assisting a non-state armed group only if the acts of that group are attributable to another state under the ordinary rules of attribution.¹¹⁹ Under these rules, state responsibility only attaches if the assisted non-state actor committing a wrongful act was either a formal or de facto agent or organ of a state. The way in which these rules have been interpreted by the ICJ in cases such as *Nicaragua*¹²⁰ and *Bosnian Genocide*¹²¹ sets a high threshold for the conduct of the non-state actor to be attributed to a state.¹²²

85. Article 16 has, however, been invoked by analogy in the context of state assistance to non-state actors where the non-state actors in question have breached international law.¹²³ For example, an Austrian position paper, arguing against the lifting of an EU arms embargo on the supply of

¹¹⁵ ILC Commentary to Article 40 of the draft Articles, para (7).

¹¹⁶ ILC Commentary to Article 41, para (11).

¹¹⁷ See Aust (2011), *Complicity and the Law of State Responsibility*, p. 422.

¹¹⁸ Graefrath (1996), ‘Complicity in the Law of International Responsibility’, p. 371.

¹¹⁹ These rules are reflected in Articles 4 and 8 of the Articles on State Responsibility.

¹²⁰ *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*; Merits, ICJ Reports 1986, p. 14.

¹²¹ *Bosnian Genocide case* (ICJ 2007).

¹²² Hathaway, O. et al. (2017, forthcoming), ‘Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors’, *Texas Law Review* (forthcoming), pp. 14–16.

¹²³ Jackson (2015), *Complicity in International Law*, p. 215.

weapons to the Syrian opposition, stated that such supply would trigger responsibility under Article 16 because the Syrian opposition had engaged in war crimes.¹²⁴

VII. Conclusions

- (i) International law regulates the giving of assistance by one state to another for purposes such as the sharing of intelligence, the lending of military bases and the provision of weapons.
- (ii) Article 16 of the Articles on State Responsibility reflects customary international law on aid or assistance given by states to other states.
- (iii) In order for Article 16 to be engaged:
 - (a) A state must provide ‘aid’ or ‘assistance’: these are construed broadly, to cover a wide range of types of assistance.
 - (b) The assistance must contribute significantly to the internationally wrongful act.
 - (c) The international obligation breached by the state receiving the assistance must also bind the state providing the assistance.
 - (d) It is necessary for the assisting state to have both knowledge and intent.
- (iv) ‘Knowledge’ in this context means actual or near-certain knowledge of specific illegality on the part of the recipient state. Where the assisting state is ‘wilfully blind’ – that is, makes a deliberate effort to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality – that is also sufficient to satisfy the mental element under Article 16. Constructive knowledge – that the assisting state ‘should have known’ – is not sufficient.
- (v) If a person whose acts are legally attributable to the state has relevant knowledge, the state is fixed with that knowledge. Where the situation is dynamic, the responsibility of the assisting state may evolve as the facts, and its level of knowledge, develop.
- (vi) ‘Intent’ in this context does not require the assisting state to desire that the unlawful conduct be committed. Nor does the assisting state have to be in common cause with the principal. Knowledge or virtual certainty that the recipient state will use the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever the assisting state’s desire or purpose.
- (vii) Article 16 does not impose a duty on assisting states to make enquiries before providing assistance. This matter is governed by the primary rules in question. But if a state has not

¹²⁴ Borger, J. (2013), ‘The Austrian position on arms embargo in Syria - official document’, *Guardian*, 15 May 2013, <http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf> (accessed 30 Sep. 2016).

made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye.

- (viii) Under Article 41 of the Articles, where a state assists in maintaining a breach of a peremptory norm of international law, there is no need to show knowledge or intent.
- (ix) Assistance provided by a state to a non-state actor will give rise to international responsibility where the acts of the non-state actor can be attributed to another state under the rules of attribution. Article 16 has been invoked by analogy in the context of state assistance to non-state actors.

3. Other Rules of International Law Relevant to Aiding or Assisting

I. Introduction

86. Article 16 of the Articles on State Responsibility is a rule of general international law on aiding and assisting. Some areas of international law also contain primary rules relevant to issues of aiding and assisting. A full treatment of the responsibility of states for assisting wrongful acts requires consideration of both the general rule under Article 16 and relevant primary rules.

87. Some of the primary rules relevant to aiding and assisting are specifically directed to prohibiting the assistance of one state to another in an internationally wrongful act. Others are not strictly rules on aiding or assisting, but have been interpreted by courts to hold states responsible for assisting in the wrongful acts of a principal. This chapter identifies the primary rules most relevant to aiding and assisting in the context of armed conflict and counterterrorism, and explores how Article 16 relates to them. It also considers the extent of a state's obligations under relevant primary rules to make pre-assistance enquiries before providing assistance to another state; the application of relevant primary rules to the assistance of non-state actors; and issues of enforcement.

II. Relevant primary rules

88. International humanitarian law (IHL) has a number of rules relevant to aiding and assisting in the context of armed conflict. Common Article 1 of the Geneva Conventions (and the equivalent provision in Additional Protocol I to the Conventions) requires High Contracting Parties 'to respect and ensure respect' for the Conventions. This obligation includes a negative duty on High Contracting Parties not to encourage, nor aid or assist, in violations of the Conventions by parties to a conflict.¹²⁵ The obligation was recognized by the ICJ in the *Nicaragua* case in the context of US financing and training of the Contra rebels.¹²⁶

89. The 2016 International Committee of the Red Cross (ICRC) commentary to Common Article 1 states that the obligation to 'respect and ensure respect' extends further than simply not assisting in specific violations of IHL. It also involves a positive duty on the assisting state to 'ensure respect' for the rules of IHL by all other states.¹²⁷ This positive duty includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in the event that they have already occurred.¹²⁸ Although the extent of this obligation is subject to

¹²⁵ 2016 Commentary to the First Geneva Convention, paras 154 and 158.

¹²⁶ *Nicaragua* case (ICJ 1986), para 220.

¹²⁷ 2016 Commentary to the First Geneva Convention, para 154; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Rep 2004, p. 131.

¹²⁸ 2016 Commentary to the First Geneva Convention, para 164. This obligation, like others, is conditioned by other rules of international law, including principles of sovereignty and non-intervention.

controversy,¹²⁹ it seems to impose higher standards on states that assist other states in the context of armed conflict than those in Article 16.¹³⁰ For example, if an assisting state knows that the receiving state systematically commits violations of IHL with certain weapons, under the duty to ‘ensure respect’ for IHL the assisting state has to deny further transfers of those weapons, even if those weapons could also be used lawfully.¹³¹ In that case, the track record of the recipient state suggests a clear and foreseeable risk that the weapons could be used to violate IHL, so the assisting state must refrain from transferring them.¹³² By comparison, for responsibility to arise under Article 16 it would be necessary to meet all four of its conditions, including that the assisting state knows or is virtually certain that the particular weapons transferred will be used in breach of IHL, and that those weapons will contribute significantly to the wrongful act.

90. In addition to general IHL, there are specific treaties that prohibit or limit the use of certain weapons, and that contain provisions prohibiting assistance in this regard. For example, Article 1(c) of the Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction provides that ‘Each State Party undertakes never under any circumstances ... to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State party under this Convention’.¹³³ The Arms Trade Treaty prohibits the transfer of arms where (*inter alia*) the authorizing state has knowledge at the time of authorization that the weapons will be used by the recipient state to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions or other war crimes.¹³⁴

91. International human rights law (IHRL) does not contain explicit rules on aiding and assisting. But human rights courts have interpreted certain rights to imply a positive obligation on states to undertake specific protective actions to secure those rights to the individuals within the state’s jurisdiction. The European Court of Human Rights (ECtHR) has relied on positive obligations to hold states directly responsible for assisting in the unlawful acts of other states. For example, in *El Masri v Macedonia*, the ECtHR considered Macedonia’s facilitation of the alleged ill-treatment of the applicant by the US.¹³⁵ The ECtHR held that, in handing over the applicant to the CIA at Skopje airport, Macedonia had failed to comply with its positive obligation to protect the applicant from being arbitrarily detained, contrary to Article 5 of the European Convention on Human Rights (ECHR).¹³⁶

92. Similarly, in relation to some rights, states have a negative obligation to refrain from certain activities that would harm individuals within their jurisdiction. The right not to be subjected to ill-treatment or torture, for example, under Article 3 of the ECHR and Article 7 of the International

¹²⁹ See ICRC Commentary para 169; Aust, H. (2015), ‘Complicity in violations of IHL’, in Kreiger, H. (ed.) (2015), *Inducing Compliance with IHL: Lessons from the African Great Lakes Region*, Cambridge: CUP, pp. 455–56; Hathaway et al. (2017, forthcoming), ‘Ensuring Responsibility’, p. 35.

¹³⁰ Aust (2015), ‘Complicity in violations of IHL’, p. 458.

¹³¹ The Arms Trade Treaty also now governs the transfer of many forms of weapons.

¹³² See further Sassoli, M. (2002), ‘State responsibility for violations of international humanitarian law’, 84 *IRRC* no. 846, p. 413; and Dormann, K. and Serralvo, J. (2014), ‘Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations’, 96 *IRRC* 895/896, p. 734.

¹³³ Oslo, 18 September 1997, entered into force 1 March 1999, UNTS 2056, p. 211.

¹³⁴ New York, 2 April 2013, entered into force 24 December 2014, No. 52373, Article 6(3).

¹³⁵ *El Masri v Macedonia*, App. No. 39630/09, 13 December 2012.

¹³⁶ *Ibid.*, para 239. *El Masri* was the first in a line of cases against several states on similar facts, including *Husayn (Abu Zubaydah) v Poland*, App. No. 7511/13, 24 July 2014; *Al Nashiri v Poland*, App. No. 28761/11, 24 July 2014; and *Nasr and Ghali v Italy*, App. No. 44883/09, 23 February 2016. Similar cases are pending before the ECtHR against Romania and Lithuania (see ECHR factsheet: http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF).

Covenant on Civil and Political Rights (ICCPR) has been interpreted to include the obligation not to remove an individual to another state where that individual faces a real risk of ill-treatment at the hands of that other state. This principle of *non-refoulement* is also present in IHL, and of course in refugee law.¹³⁷ The ECtHR has applied this principle regularly in the context of deportation and extradition.¹³⁸ This approach has been followed by the UN Human Rights Committee, for example in *Alzery v Sweden* (2005),¹³⁹ and by the UN Committee Against Torture in *Agiza v Sweden* (2006).¹⁴⁰ In *El Masri*, the ECtHR applied this principle to the facilitation by Macedonia of the US's rendition of the applicant to detention in Afghanistan.¹⁴¹ This demonstrates how the ECtHR is prepared to use the principle of *non-refoulement* to hold assisting states directly responsible for assisting wrongful acts.

93. International law on the use of force contains some rules relevant to aiding and assisting. In particular, the definition of aggression in UN General Assembly Resolution 3314 (XXIX) includes one state allowing another to use its territory for an act of aggression against a third state.

94. International criminal law both articulates primary rules and addresses the consequences of a violation of those rules. There is also a link between individual criminal responsibility for complicity and state responsibility for complicity.¹⁴² For example, the Genocide Convention provides that an individual's complicity in genocide shall be punishable¹⁴³ and, as interpreted by the ICJ, imposes a specific obligation on states not to be complicit in genocide.¹⁴⁴

III. A network of rules?

95. Article 16 and the other rules of international law relevant to aiding and assisting, such as those mentioned above, have been characterized as a 'network of rules' relating to states' obligations in respect of the conduct of other actors.¹⁴⁵ Article 16 has been used as a reference point for other rules on aiding and assisting,¹⁴⁶ notably by the ICJ in the *Bosnian Genocide* case.¹⁴⁷ It has been observed that many courts – both domestic and international – use a framework for complicity liability similar to the formula provided in Article 16.¹⁴⁸

96. But it would be misleading to conceive of the various rules and approaches to aiding and assisting as working in harmony. In reality, they are quite diverse, drawn from different fields of

¹³⁷ For example, Article 45 of Fourth Geneva Convention regarding the transfer of protected persons; Article 33(1) of the Refugee Convention.

¹³⁸ *Soering v UK*, App. No. 14038/88, 7 July 1989. This obligation has also been cast as a positive obligation to protect, and argued to be to some extent *sui generis*. See Hakimi, M. (2010), 'State Bystander Responsibility', 21(2) *EJIL*, p. 366.

¹³⁹ CCPR/C/88/D/1416/2005, 10 November 2006.

¹⁴⁰ CAT/C/34/D/233/2003, 24 May 2005.

¹⁴¹ *El Masri* (ECtHR 2012), paras 220–22.

¹⁴² Although the relationship between the two is not straightforward: see Nollkaemper, A. (2013), 'The Charles Taylor Judgment: Disconnecting the Responsibilities of Presidents and States', SHARES Project, 1 October 2013, <http://www.sharesproject.nl/the-charles-taylor-judgment-disconnecting-the-responsibilities-of-presidents-and-states/> (accessed 30 Sep. 2016).

¹⁴³ Article III(e) of the Convention on the Prevention and Punishment of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277.

¹⁴⁴ *Bosnian Genocide* case (ICJ 2007). Individual responsibility under international criminal law may also operate in parallel with state responsibility on the same facts; see, for example, Jackson (2015), *Complicity in International Law*, p. 204.

¹⁴⁵ Aust (2011), *Complicity and the Law of State Responsibility*, p. 376; see also Jackson (2015), *Complicity in International Law*, p. 172.

¹⁴⁶ Jackson (2015), *Complicity in International Law*, p. 172; see also Aust (2011), *Complicity and the Law of State Responsibility*, p. 422 and pp. 380–400.

¹⁴⁷ *Bosnian Genocide* case (ICJ 2007).

¹⁴⁸ Shepson, S. (2015), 'Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts', 53 *Columbia Journal of International Law*, p. 711.

international law with different aims and histories. In particular, the substantive tests as to when the responsibility of the state is engaged under each rule differ in each case.¹⁴⁹ Some of the key differences in approach are set out below.

97. First, the rules relevant to aiding and assisting under primary norms generally use a direct responsibility model, under which responsibility is engaged independently of the breach by the other state.¹⁵⁰ Article 16, by contrast, only covers ancillary responsibility derived from the act of the state assisted, and is characterized in the ILC Commentary as a narrow and exceptional basis of responsibility for collaborative conduct.

98. Although the direct responsibility model can cover a wide variety of collaborative conduct between states,¹⁵¹ including joint military operations (e.g. coalition airstrikes), joint patrols to protect borders from security threats, and joint administration of territory,¹⁵² it can also cover situations in which the conduct of another state is relevant but not required in order for the assisting state to be held responsible, as in cases where a state returns a person to another state where there is a real risk of ill-treatment or torture. In these cases, responsibility is predicated on the foreseeability of wrongfulness; the wrongfulness need not in fact ensue. Under Article 16, on the other hand, responsibility only attaches once the illegal act of the recipient state has taken place. If the aided act is not carried out, or turns out not to be unlawful, no responsibility arises.¹⁵³

99. Secondly, under the direct model of responsibility applicable in primary rules, there is no requirement for the same obligation to bind both the assisting and recipient states. The obligation in question need bind only the assisting state, which is held responsible for the risk of unlawful conduct by the recipient state.

100. Thirdly, primary rules on aiding and assisting may differ from Article 16 in their material and mental elements.¹⁵⁴ For example, the ECtHR has held, in the context of claims based on Article 3 of the ECHR, that the relevant test is whether the assisting state ‘knew or should have known’ that there was a ‘real risk’ of the internationally wrongful act (in this case, ill-treatment or torture) occurring.¹⁵⁵ The test depends on whether there is some objectively foreseeable (i.e. to the reasonable observer) threat of ill-treatment, rather than on the intent and actual or near-certain knowledge of the assisting state.¹⁵⁶ This is a lower threshold than under Article 16. Another example is the Arms Trade Treaty, where the test for the nexus between the contribution by the assisting state and the wrongful act of the recipient state is for the exporting state to ‘facilitate’ the recipient

¹⁴⁹ Ibid., p. 710.

¹⁵⁰ Den Heijer, M. (2012), ‘Issues of Shared Responsibility before the European Court of Human Rights’, SHARES Research Paper 06, p. 28; Shepson (2015), ‘Jurisdiction in Complicity Cases’, p. 726 ff.

¹⁵¹ See ILC Commentary, Introduction to Chapter IV (Responsibility of a State in Connection with the Act of another State), p. 146, para (4).

¹⁵² For example, the Coalition Provisional Authority in occupied Iraq during 2002.

¹⁵³ Lowe (2002), ‘Responsibility for the Conduct of Other States’, p. 9.

¹⁵⁴ Nolte and Aust (2009), ‘Equivocal Helpers’, p. 16.

¹⁵⁵ In *Soering v UK*, the ECtHR specified the test as ‘substantial grounds for believing that the applicant faces a real risk’; para 91. In *Abu Zubaydah v Poland*, the ECtHR found that, given Poland’s knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, it ‘ought to have known’ that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention; para 512.

¹⁵⁶ Shepson (2015), ‘Jurisdiction in Complicity Cases’, p. 713. In *Abu Zubaydah v Poland*, the court referred to the exposure of the applicant to a ‘foreseeable serious risk’; para 512; Aust (2015), ‘Complicity in violations of IHL’, p. 454.

state's act.¹⁵⁷ Under Article 16, the assistance must have 'contributed significantly' to the underlying act.¹⁵⁸

101. In other respects, the two sets of rules (primary rules relevant to aiding and assisting, and Article 16), while different in their concept and substance, are at the same time capable of interacting. This is the case in relation to pre-assistance enquiries, their application to non-state groups, and enforcement. These three issues are considered in turn below.

IV. Pre-assistance enquiries

102. The obligations under primary rules may in practice demand that a state makes certain enquiries before it provides assistance to another state. These duties, which might also be termed 'due diligence', require the institutions of a state to function diligently in the upholding of that state's obligations. As noted above, however, Article 16 is neutral on this point.¹⁵⁹

103. In the *Corfu Channel* case, the ICJ referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.¹⁶⁰ This has been argued to be an articulation of a general due diligence principle in international law, which has developed over a lengthy period.¹⁶¹ It obliges states to ensure that within their jurisdiction other states' rights and interests are not violated.¹⁶² In addition to this general principle, specific expressions of due diligence arise in sub-branches of international law, including the primary rules relevant to armed conflict and counterterrorism.

104. Under IHL, the duty on states to 'respect and ensure respect' for the Geneva Conventions in all circumstances under Common Article 1 may be said to involve a duty of due diligence.¹⁶³ This conditions states' behaviour in areas such as the protection of civilians and the prevention and prosecution of grave breaches of IHL. The duty to ensure respect may be particularly strong in the case of a partner in a joint operation, as stated by the ICRC Commentary:

The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.¹⁶⁴

¹⁵⁷ Article 7 of the Arms Trade Treaty.

¹⁵⁸ ILC Commentary to Article 16, para (5), and para 22 above.

¹⁵⁹ See paras 47–49 above.

¹⁶⁰ *Corfu Channel* case (UK v Albania), [1949] ICJ Rep 4, p. 22.

¹⁶¹ ILA Study Group on Due Diligence in International Law: Second Report, July 2016, pp. 5–6.

¹⁶² *Ibid.*

¹⁶³ As maintained by the ICRC in the 2016 Commentary to the First Geneva Convention, para 165.

¹⁶⁴ *Ibid.*, para 167. This statement is capable of applying equally to assistance and to joint responsibility, which as noted above are treated differently under the Articles on State Responsibility (footnote 37 above). The Dutch government recently acknowledged the duty under Common Article 1 in a response to parliamentary questions about the possibility that Dutch intelligence had been used by the US in drone strikes. The government stated that in its understanding of the duty, 'when the Government knows that a partner is using or will use intelligence that has been shared by the Netherlands to commit a violation of international law and/or IHL, the question whether such intelligence is shared will have to be reconsidered'. See Tweede Kamer der Staten-Generaal (2016), 'Vergaderjaar 2015–2016, Aanhangsel van de Handelingen' [Lower House of Parliament (2016), 'Session year 2015–2016, Appendix of the Proceedings'], <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2015Z23454&did=2016D01462> (accessed 2 Nov. 2016).

105. The rationale is that since any form of assistance establishes a closer than usual relationship between states, it seems reasonable to expect more from an assisting state regarding suspected IHL violations by the partner state than might be expected from other states.

106. The Arms Trade Treaty, which currently has 82 states parties, sets out a due diligence procedure for exporting states parties, to be undertaken prior to the export of certain arms. It lists relevant factors that exporting states parties should take into account, including the risk that the arms in question could be used to breach IHL or IHRL.¹⁶⁵ Exporting states must consider whether measures could be undertaken to mitigate any risks identified, for example confidence-building measures or jointly agreed programmes by the exporting and importing states.¹⁶⁶ If, after conducting the assessment and considering mitigating measures, an exporting state determines that there is an overriding risk of exported material being used to commit or facilitate a serious violation of IHL or IHRL, the exporting state is obliged not to authorize the export.¹⁶⁷ The EU Common Position on arms exports, which is legally binding on all member states,¹⁶⁸ sets out eight criteria guiding national licensing policies. These criteria include respect for IHL and IHRL; the behaviour of the importing state and its relation to terrorism; and the risk of diversion.

107. Under IHRL, the obligation to protect includes duties that might be termed due diligence to take effective measures to safeguard against the risk of a breach of international law. For example, the ECtHR has held that the obligation on contracting parties under Article 1 of the ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3 of the ECHR, requires states to take measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment. In the *El Masri* case, the ECtHR held that Macedonia, in its assistance to the US, failed to take reasonable steps to avoid a risk of ill-treatment about which it knew or ought to have known.¹⁶⁹ Its agents actively facilitated the ill-treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring (para 211), for example seeking assurances from the US to avert the risk of the applicant being ill-treated (para 219).

108. In the arms export sector, some states are also subject to domestic laws requiring them to scrutinize in advance the risks of providing weapons to another state which could be used by the recipient state to commit a breach of international law.¹⁷⁰ In the US, both the Foreign Assistance Act and the Leahy Law contain specific due diligence obligations requiring the US administration to verify the human rights situation on the ground before providing assistance to other states.¹⁷¹

109. The nature and degree of enquiries required under these primary rules will depend on the specific requirements of the case.¹⁷² These include whether the primary rule in question contains particular requirements for due diligence; and the factual circumstances, including the capacity of

¹⁶⁵ Article 7(1) of the Arms Trade Treaty.

¹⁶⁶ Article 7(2) of the Arms Trade Treaty.

¹⁶⁷ Article 7(3) of the Arms Trade Treaty.

¹⁶⁸ EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹⁶⁹ *El Masri* case (ECtHR 2012), para 198.

¹⁷⁰ For example, the UK's Consolidated EU and National Arms Export Licensing Criteria, HC Deb 25 March 2014, vol 578, col 9-14WS.

¹⁷¹ Foreign Assistance Act 1961, s. 502B(b), and The 'Leahy Law' on Assistance to Security Forces, 22 USC para 2378d (2006).

¹⁷² See *Bosnian Genocide* case (ICJ 2007), para 430; Hakimi (2010), 'State Bystander Responsibility', p. 372; ICRC's 2016 Commentary to the First Geneva Convention, para 165.

the assisting state, the degree of influence that the assisting state exercises over those responsible for the breach, issues of proximity, the gravity of the situation and the urgency of the threat.¹⁷³ In some fields of cooperation, the requirements may be relatively clear, for example arms transfers (where due diligence has been addressed in agreements such as the Arms Trade Treaty and in numerous soft law instruments);¹⁷⁴ in other forms of cooperation, they may be less so.

110. Article 16, by contrast, does not place states under a duty to make enquiries before they aid or assist other states.¹⁷⁵ But as noted above, there is a relationship between due diligence and the application of Article 16.¹⁷⁶ The degree of inquiry and risk assessment carried out by an assisting state – whether as a result of a belief that it is under a legal obligation to do so, or as a matter of policy – will be relevant when assessing under Article 16 the degree to which that state had actual or near-certain knowledge of the circumstances of the internationally wrongful act. On the one hand, it might be argued that the more detailed the risk assessment by the assisting state, the easier it will be to establish that the assisting state ‘should have known’ about an unlawful act in light of its enquiries. On the other hand, if an assisting state can show that it has exercised due diligence in making enquiries, so as to anticipate and mitigate the risks of assisting an unlawful act, it may be harder to prove actual or near-certain knowledge. If the assisting state proceeds to provide assistance having conducted these enquiries, there may be a presumption that the state is only doing so because it has satisfied itself that the risks are manageable.

V. Aiding or assisting non-state actors

111. As noted above, the classical position is that a state will be responsible under Article 16 for assisting a non-state armed group only if the acts of that group are attributable to another state under the ordinary rules of attribution.¹⁷⁷

112. Some primary rules may also be relevant to states’ assistance to non-state actors. There are primary obligations on states not to assist non-state actors in certain circumstances; the breach of these obligations will give rise to responsibility under that primary rule (for example, the principle of non-intervention). Separately, there are primary rules prohibiting states from assisting wrongful conduct by non-state actors. Non-state actors have few obligations in international law compared to states. Clearly it is impossible to establish responsibility for state assistance to the internationally wrongful act of a non-state actor if the non-state actor has no international law obligations to breach. But both state and non-state actors have obligations under Common Article 3 of the Geneva Conventions.¹⁷⁸ Non-state actors can also be held individually responsible for certain conduct under international criminal law (for example, for the commission of war crimes under Article 8(2)(c) and (e) of the Rome Statute).¹⁷⁹ Some commentators regard non-state actors as having obligations

¹⁷³ Lanovoy (2014), ‘Complicity in an Internationally Wrongful Act’, footnote 68.

¹⁷⁴ Dormann and Serralvo (2014), ‘Common Article 1 to the Geneva Conventions’, pp. 732–33.

¹⁷⁵ Paras 47–49 above.

¹⁷⁶ *Ibid.*

¹⁷⁷ Para 84 above.

¹⁷⁸ 2016 Commentary to Common Article 3, paras 505–08.

¹⁷⁹ The Rome Statute, above.

under IHRL.¹⁸⁰ It has been argued that if insurgents can have obligations under IHL, it is logical that they should also be able to bear human rights obligations.¹⁸¹

113. Under IHL, the duty on states parties under Common Article 1 of the Geneva Conventions to ‘respect and ensure respect’ for the Conventions applies not only in relation to other states parties but also to non-state parties to the conflict.¹⁸² IHL thus provides an example of states being obliged not to assist in wrongful conduct, regardless of whether that conduct is carried out by a state or by a non-state group. This obligation also requires that when states assist non-state actors, states must exercise due diligence to ensure that those non-state actors respect IHL.¹⁸³ On this basis, it has been argued that due diligence obligations under Common Article 1 extend, for example, to the support by some states for paramilitary groups in Syria.¹⁸⁴

VI. Enforcement

114. Some of the primary rules relevant to aiding or assisting may be more directly enforceable than Article 16, and thus offer better prospects for accountability. In other respects, Article 16 may avoid some of the problems of enforcement inherent in relevant primary rules. Sometimes the two sets of rules are invoked in tandem before the courts.

115. Certain primary rules relevant to aiding and assisting contain provisions for remedy or mechanisms for enforcement. Breaches of IHL that amount to complicity in war crimes are justiciable before international criminal courts and tribunals, and the ICC may soon have jurisdiction to try the crime of aggression,¹⁸⁵ the definition of which includes one state allowing another to use its territory for an act of aggression against a third state.¹⁸⁶ Human rights courts and treaty bodies have jurisdiction in relation to IHRL obligations, and this is the area in which there has been the most case law on assistance under primary norms. Domestic courts also provide a forum for claims concerning the breach of a state’s IHL and IHRL obligations in the context of aiding and assisting.¹⁸⁷

116. International and domestic courts may not have the competence to apply the general rule in Article 16 directly. Even if they do, they may prefer to apply more specific rules on aiding and assisting when they are available; these rules may have their own regime of consequences for

¹⁸⁰ For example, Clapham, A. (2016), ‘Human Rights Obligations for Non-State-Actors: Where are We Now?’, in Lafontaine, F. and Larocque, F. (eds) (2016), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, Belgium: Intersentia.

¹⁸¹ Clapham, A. (2006), *Human Rights Obligations of Non-State Actors*, Oxford: OUP, pp. 284–85.

¹⁸² Aust (2015), ‘Complicity in violations of IHL’, p. 466; *Nicaragua case* (ICJ 1986), para 220; Hathaway et al. (2017, forthcoming), ‘Ensuring Responsibility’, p. 37.

¹⁸³ Hathaway et al. (2017, forthcoming), ‘Ensuring Responsibility’, p. 41.

¹⁸⁴ Weizmann, N., ‘What happens if American-trained rebels commit war crimes’, Just Security blog, 18 August 2015, <https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/> (accessed 30 Sep. 2016).

¹⁸⁵ Resolution RC/Res.6 adopted on 11 June 2010 by the states parties to the Rome Statute. The ICC will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is made by states parties on whether to activate the jurisdiction.

¹⁸⁶ See Article 3(f) of the General Assembly’s 1974 Definition of Aggression, referred to in para 93 above.

¹⁸⁷ For example, the Campaign Against Arms Trade has brought a judicial review against the Secretary of State for Business, Innovation and Skills in the UK in relation to the sale or transfer of arms and military equipment to Saudi Arabia for possible use in the conflict in Yemen, alleging (*inter alia*) that this contravenes the Consolidated EU and National Arms Export Licensing Criteria. Details available at <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016>.

breaches of the obligations that they impose.¹⁸⁸ Article 55 of the Articles on State Responsibility (*Lex specialis*) provides that:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The *lex specialis* principle has been relied upon by the Inter-American Court of Human Rights when addressing issues of state responsibility, for example in the *Mapiripán Massacre* case.¹⁸⁹

117. But these primary rules should not be seen as self-contained regimes.¹⁹⁰ Depending on the rule in question, they may simultaneously be capable of direct enforcement or enforcement at the secondary level under Article 16. It has been argued, for example, that Common Article 1 of the Geneva Conventions in some respects applies the general rules on state responsibility, in other respects establishes a special secondary rule, and is also a primary rule to which the rules on state responsibility apply.¹⁹¹

118. Under Article 16, the fact that it is necessary for a court to pass judgment on the legality of the actions of two states creates difficulties in enforcement. The ability to litigate cases under Article 16 before the ICJ, for example, is limited by the *Monetary Gold* principle. Under this principle, the ICJ will not adjudicate on a case when the court would be required, as a necessary prerequisite, to adjudicate on the rights or responsibilities of a non-consenting and absent third state. This is reflected in the lack of interstate cases under Article 16. A study of recent decisions by international courts, tribunals and other bodies referring to the Articles on State Responsibility found only one case in which Article 16 was referenced by an international court (the *El Masri* case, in which the ECtHR did not rely on Article 16 directly).¹⁹² This difficulty does not exist under the primary rules because the direct responsibility model does not require a court to reach a conclusive judgment on the illegality of the conduct of the assisted state.¹⁹³

119. But there are also factors limiting the enforcement of some of the primary rules relevant to aiding and assisting. In IHL, enforcement of the duty to ensure respect under Common Article 1 of the Geneva Conventions is likely to pose challenges in practice (for example, it has been questioned whether an individual could bring a claim against a foreign state for a violation of this duty).¹⁹⁴ In IHRL, while a range of human rights impose positive obligations on states, courts have to date enforced these obligations only in relation to certain rights in the context of *non-refoulement*, such as the right not to be ill-treated or tortured, the right to life and the right to a fair trial.¹⁹⁵ Article 16, by contrast, applies in relation to responsibility arising under any primary norm and thus, in theory, to any human right, provided that the relevant conditions are met.

¹⁸⁸ Shepson (2015), 'Jurisdiction in Complicity Cases', p. 710.

¹⁸⁹ *Case of the Mapiripán Massacre v Colombia* (2005), Inter-American Court of Human Rights, Judgment of 15 September 2005, Series C No. 134, para 107. For discussion, see Jackson (2015), *Complicity in International Law*, pp. 192–93.

¹⁹⁰ Sassoli (2002), 'State responsibility for violations of international humanitarian law', p. 404, in relation to IHL.

¹⁹¹ *Ibid.*, p. 422.

¹⁹² UNGA Report to the Secretary-General, 'Responsibility of States for international wrongful acts: compilation of decisions of international courts, tribunals and other bodies', 30 April 2013, UN doc A/68/72. The period in question was 1 February 2010 to 31 January 2013.

¹⁹³ Shepson notes that in the *El Masri* case (ECtHR 2012), adjudication was possible because the analysis of the situation on the ground was characterized by a factual, rather than legal, determination. The factual determination could be made by relying on various open sources to determine the conduct of the US, including UN reports; Shepson (2015), 'Jurisdiction in Complicity Cases', p. 726.

¹⁹⁴ Aust (2015), 'Complicity in violations of IHL', p. 468.

¹⁹⁵ This may be due to a desire to contain the scope and volume of claims.

120. To take a highly theoretical example, suppose that State A deports a writer of a mild criticism of the government of State B to State B, knowing that State B plans to arrest her on arrival for the poems she has written. Both states are party to the ICCPR. State B arrests and detains the writer on her arrival because of her writings, in breach of her freedom of expression under Article 19 of the ICCPR.¹⁹⁶ This scenario would satisfy the double obligation, as both states are party to the same treaty and rule. It would of course be necessary also to satisfy a court that State A's deportation of the writer contributed significantly to the violation by State B of her right to freedom of expression; and that in deporting the poet State A knew, or was near certain, that her freedom of expression would be breached contrary to the ICCPR but proceeded with the deportation anyway. In this example, it is conceivable that all four conditions under Article 16 might in theory be met, sufficient to ground a claim, whereas under IHRL the prospects of a claim would be hampered by the fact that the doctrine of *non-refoulement* has not been applied in relation to freedom of expression.

121. The application of IHRL is also subject to the rules on jurisdiction: treaty obligations apply primarily to the territory of the state party concerned.¹⁹⁷ The ECtHR cases cited above¹⁹⁸ each concerned individuals situated in the territory of the assisting state. By contrast, where the individuals affected are outside the territory of the assisting state (for example, victims of torture carried out by State B as a result of intelligence provided by State A), there may be difficulty in establishing jurisdiction.¹⁹⁹ Under Article 16, on the other hand, there is no need for a territorial or jurisdictional nexus. The primary obligation being breached is that of State B, to which State A contributes through its assistance. As the assistance takes place under State A's jurisdiction, the extraterritorial issue does not arise.

122. As a general rule of international law on aiding and assisting, Article 16 is most likely to be invoked in support of claims based on primary rules, for example as a point of reference in the interpretation of international or common law, or in the context of a rationality or legality challenge.²⁰⁰ In *Horgan & Another v Taoiseach & Others*, the Irish High Court considered whether the use of an Irish airport for US aircraft engaged in a military attack in Iraq violated Irish neutrality and was contrary to the Irish constitution or international law. The claimants relied on IHL provisions regarding the use of neutral territory by the armed forces of another state,²⁰¹ citing Article 16 in support.²⁰² The court held that the issue was not justiciable, as governments have a wide margin of appreciation in this area. In *El Masri* and a number of subsequent cases on similar facts, the ECtHR listed Article 16 of the Articles on State Responsibility as a relevant norm of international law, before going on to consider the issue of responsibility under the relevant provisions of the ECHR.²⁰³

¹⁹⁶ This example assumes that none of the provisions in Article 19(3), under which restrictions may be placed on the application of the freedom of expression, is met.

¹⁹⁷ For example, Article 1 ECHR; Article 2 ICCPR.

¹⁹⁸ See para 91 and footnote 136.

¹⁹⁹ Nevertheless, the case law of the ECtHR is developing so as to render any act of a state agent within the jurisdiction of the state concerned. See, for example, *Al Skeini v UK* (App. No. 55721/07, 7 July 2011) and *Jaloud v Netherlands* (App. No. 47708/08, 20 November 2014).

²⁰⁰ For example, it was cited by the Intervenor before the UK Court of Appeal in *Belhaj v Straw*, a tort claim about the responsibility of individuals for providing intelligence to partners who carried out operations that were allegedly unlawful under UK law (Submissions of the International Commission of Jurists, Justice, Amnesty International and Redress in the Court of Appeal, 2014/0596).

²⁰¹ Specifically, customary international law corresponding to Articles 1, 2 and 5 of Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907, and Article 18 of the San Remo Manual (based on Article 42 of the Hague Convention 1923 Draft Rules of Aerial Warfare), which forbids the landing of belligerent aircraft in a neutral state.

²⁰² High Court (2003 No. 3739P) [2003] 2 IR 468.

²⁰³ *El Masri* case (ECtHR 2012), para 97.

123. In *Al-M*, the German Constitutional Court considered the granting of permission for the extradition of a Yemeni national to the US. The court noted the risk of Germany becoming responsible under Article 16 of the Articles on State Responsibility if Germany supported a US action that is contrary to international law, but the court eventually allowed the extradition.²⁰⁴ Germany's Federal Administrative Court also expressly referred to Article 16 in a case in 2005, holding that the attacks on Iraq by the US and UK in 2003 were unlawful and that aid or assistance to the commission of that international wrong by Germany would in itself constitute a wrongful act.²⁰⁵

VII. Conclusions

- (i) International law on the responsibility of states for assisting wrongful acts includes both the general rule under Article 16 and specific rules in some areas of international law, for example IHL and IHRL.
- (ii) Each primary rule has its own substantive criteria for state responsibility. These criteria typically impose stricter requirements on assisting states than the general rule under Article 16.
- (iii) But the primary rules do not constitute self-contained systems. They may be capable of both direct enforcement or enforcement at the secondary level under Article 16.
- (iv) Article 16 and relevant primary rules are capable of being invoked together in the context of enforcement in the courts of obligations regarding aiding and assisting, as is evident in the *El Masri* line of cases and some domestic litigation.
- (v) There are some specific obligations in primary rules regarding assistance to non-state armed groups. Under IHL, states are obliged not to assist wrongful conduct, regardless of whether that conduct is carried out by a state or non-state group.
- (vi) There are some primary rules that demand pre-assistance enquiries, which might also be termed 'due diligence'.

²⁰⁴ Judgment of 5 November 2003, cited in the Report of the Secretary General to the UN General Assembly (UN Doc A/62/63 of 9 March 2007), setting out comments by Germany on the draft Articles on State Responsibility (pp. 12–13).

²⁰⁵ Judgment of 21 June 2005, case No. BVerwG 2 WD 12.04.

4. Strategies and Recommendations for Governments to Reduce the Risk of Assisting in Unlawful Acts by Other States

I. Introduction

124. Article 16 and the primary rules relevant to aiding and assisting are having an increasing effect on the day-to-day practices of states and are relied upon in legal opinions, inquiries and litigation.²⁰⁶ They also have an important role to play in informing and influencing the analysis carried out by states prior to collaborating in armed conflict and counterterrorism. Where collaboration is already occurring, Article 16 and the primary rules relevant to aiding and assisting also need to be considered in reviewing whether to continue or withdraw assistance.

125. What should the analysis carried out by states look like? In the field of arms exports there are a number of indicators of the due diligence that states should carry out before authorizing the transfer of weapons. For example, the User's Guide to the EU's Council Common Position on arms exports²⁰⁷ provides best practice for the interpretation of the criteria in the EU Common Position.²⁰⁸ Many Western states also have their own national policies in this field.²⁰⁹ But in other areas there appears to be very little guidance or criteria. Policies and procedures need to be adopted for states to apply when they assist each other in armed conflict and counterterrorism across all sectors.

126. This chapter is designed to be a practical guide, setting out strategies for states to handle the legal responsibility issues under Article 16 and other rules of international law relevant to aiding and assisting. The level and nature of pre-assistance enquiries, and of enquiries pertaining to ongoing assistance, that are appropriate will depend on the circumstances in each case.²¹⁰ Nevertheless, guidance can offer a broad framework for best practice, while recognizing that each case will be different and resources will vary from one state to another.

127. As noted above, some primary rules will also be relevant to the assistance of states to non-state actors,²¹¹ and Article 16 has been applied, by analogy, to states' interactions with non-state actors.²¹²

²⁰⁶ See, for example, Joint Committee on Human Rights (2009), *Allegations of UK Complicity in Torture*, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf> (accessed 30 Sep. 2016); UK Cabinet Office (2013), *The Report of the Detainee Inquiry*; Sands, P. et al. (2015), *Legal Opinion: The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen*, London: Matrix Chambers.

²⁰⁷ Council of the EU (2009), 'User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment', 29 April 2009, 9241/09, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT> (accessed 30 Sep. 2016).

²⁰⁸ Council of the EU (2008), 'Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment', *Official Journal of the European Union*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF> (accessed 30 Sep. 2016).

²⁰⁹ Including Canada, Sweden, Switzerland, Australia, Belgium, the Netherlands, the UK and Germany.

²¹⁰ Hakimi (2010), 'State Bystander Responsibility', p. 372.

²¹¹ Para 112.

²¹² Para 85.

The strategies in this chapter are therefore capable of applying to states' assistance to both states and non-state actors.

128. In discussing strategies and recommendations for a government to adopt, this chapter does not take a view on whether or not these strategies are required as a matter of legal obligation. Nor does it take a view on whether the existing policies to which it refers represent state practice or stem from a belief that they are required as a matter of law. Regardless of the legal position, it is submitted that adoption of these recommendations is a strategic necessity for assisting states, who will pay at the very least a reputational and political price if their assistance contributes to a recipient state committing unlawful acts.

129. This chapter looks first at the type of pre-assessment enquiries that states should carry out before providing assistance; then at strategies to manage the risks of wrongful assistance, including transparency; and then at the possibility of a multilateral approach to standards in this area. In doing so, it draws on state practice as far as possible. The chapter concludes with recommendations for governments to reduce the risk of assisting in unlawful acts by other states.

II. The decision-making process for assistance to another state

130. States should have procedures and processes in place to enable them to make an informed decision in advance about assistance offered, including an assessment of the risks involved. These decisions will need to be kept under review, as the assisting state acquires new information about the acts that it is assisting.

131. Some states and international organizations have designed and published policies for this purpose. The UK, for example, has published guidance on cooperation on intelligence matters, in the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (referred to in short as the 'Consolidated Guidance to Intelligence Officers').²¹³ It has also published guidance on assistance to other states for the purpose of improving capacity to deliver justice and security (the UK's Overseas Security and Justice Assistance (OSJA): Human Rights Guidance).²¹⁴ These documents set out the procedures that the UK government should follow when cooperating with other states in certain sectors, and strategies to help identify and mitigate risks.

132. The UN has a human rights due diligence policy on UN support to non-UN forces,²¹⁵ aimed at ensuring that its assistance complies with international law, particularly IHL and IHRL, pursuant to Article 14 of the ILC's Draft Articles on the Responsibility of International Organizations,²¹⁶

²¹³ HM Government (2010), 'Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees', July 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf (accessed 30 Sep. 2016).

²¹⁴ HM Government (2011), 'Overseas Security and Justice Assistance (OSJA): Human Rights Guidance', updated 28 February 2014, <https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance> (accessed 30 Sep. 2016).

²¹⁵ UNGA (2013), 'Human rights due diligence policy on United Nations support to non-United Nations security forces', 5 March 2013, UN Doc A/67/775.

²¹⁶ Adopted by the ILC in 2011 and submitted to the General Assembly. UNGA (2011), 'Report of the International Law Commission', UN Doc A/66/10; published in the *Yearbook of the International Law Commission* (2011), Vol. II, Part Two.

which mirrors Article 16 of the Articles on State Responsibility. In accordance with the policy, the UN entity concerned must conduct an assessment of the potential risks and benefits involved in providing support. Factors relevant to this assessment include the recipient state's compliance record on international law and its record in taking effective steps to hold perpetrators to account. The policy is more demanding of the UN than are the obligations in the Draft Articles on the Responsibility of International Organizations. It seeks to entrench considerations of human rights compliance into the everyday decision-making processes of UN officials.²¹⁷

133. The strategies that follow draw on guidance already in existence, including the three documents referred to above. They are based around four elements: identification of factual circumstances; identification of risks; strategies to mitigate risks; and the taking of the final decision.

(i) Identification of factual circumstances and legal background

134. Relevant questions in the identification of factual circumstances are likely to include the following:

- Which state is receiving the assistance, which agency within that state, and (if appropriate) which officials?
- What is the nature of the assistance?
- How established is the relationship between the two (or more) states (including relative leverage between these states)?
- By what international laws is the recipient state bound, and what is its understanding of the interpretation of those laws?
- What are the relevant laws, procedures and standards on human rights in the recipient state?
- Are relevant departments, officials and armed forces likely to be trained to take into account the international and domestic law implications of the acts in question?
- What is the recipient state's past practice in this area, including its record of compliance with international law?
- What are the views of other states operating in the environment concerned, in terms of both the record of compliance of the recipient state and the credibility, reliability and track record of assurances from the state concerned?
- Does the recipient state have remedial and accountability mechanisms in place to enable the investigation and remedying of any breaches of international and domestic law to which the assistance could potentially contribute?

²¹⁷ Aust (2015), 'The UN Human Rights Due Diligence Policy', p. 72.

135. In identifying the factual circumstances, a state will need to draw on a range of different source material, including country profiles drawn up by the state's ministry of foreign affairs, reports from embassies, liaison with other states, reports from civil society and from international organizations such as the UN, and media reporting. Considerations of reliability will be relevant in deciding the weight to attach to each of these sources.

136. Situations of armed conflict and counterterrorism often call into play a person's right to life. Where that is the case, a higher degree of due diligence is to be expected than in relation to more minor breaches of international law. For example, in the case of intelligence cooperation on lethal strikes by armed drone, the pre-assessment scrutiny carried out by the assisting state might include, in addition to the points above, ascertaining information on the chain of command and who is responsible at each level; how targets are selected; what battle damage assessments are used;²¹⁸ and how and when collateral damage assessments are conducted.

(ii) Identification of risks

137. A state planning to assist another state should have policies in place to enable it to identify properly the risks of cooperation. Recommended strategies for identifying risk might include:

- Ensuring that guidance is available to officials on the extent to which it is appropriate to provide assistance;²¹⁹
- Training officials to recognize the risks of assistance: legal, political and reputational;
- Ensuring that structures are in place to enable reporting, including a nominated person to report to;
- Ensuring that there is a procedure for concerns to be elevated to ministerial level so that ministers can look at the full complexities and at the legality of the proposed assistance;²²⁰ and
- Keeping detailed records and ensuring transparency within the organization on concerns.²²¹

138. Throughout the procedures above, regular consultation by governments with their legal advisers will be important. A key element of the identification of risk will be a prospective assessment of the likely legality of the recipient state's actions under international law. As part of the assessment of potential responsibility under Article 16, it will be necessary to identify the relevant primary norms that may be breached by the recipient state and to look at the recipient state's interpretation of those norms. As noted above,²²² this may be complex and involve disputed areas of law. It will also be necessary to identify any risk that the assisting state could be directly

²¹⁸ Rogers, C. (2016), 'How should international law deal with doubt in the era of drones and big data?', Just Security blog, 22 February 2016, <https://www.justsecurity.org/29436/ihl-deal-doubt-era-drones-big-data/>. Rogers notes that this might include checking what other sources of intelligence are used to inform the selection of targets, including whether computer-generated data (e.g. on pattern-of-life indicators) and metadata (i.e. data describing data) are used.

²¹⁹ See HM Government (2010), 'Consolidated Guidance to Intelligence Officers', p. 35.

²²⁰ *Ibid.*, p. 45.

²²¹ *Ibid.*, p. 29.

²²² Para 37.

responsible for the breach of primary rules of international law, such as IHL or IHRL, as a result of its assistance.

139. As the factual circumstances surrounding the assistance may be dynamic, any decision to assist will need to be kept under review. What may start with the provision of minor assets may develop into more substantial and sustained assistance. Or the assistance may remain the same (for example, a rolling contract for the provision of jeeps), but the circumstances in which it is provided may change (for example, the breakout of civil war in the recipient state leads to the jeeps being used in armed conflict rather than for law enforcement). The country profiles held by the assisting state will need regular updating, including by taking into account the reports of civil society. If the assisting state receives information suggesting that its assistance is potentially contributing to unlawful acts, it should review the decision to assist.

(iii) Strategies to reduce the risk of assistance in unlawful acts

140. States have various tools at their disposal to help minimize the possibility of their assistance contributing to illegal acts by recipient states. These tools are considered below:

a. Attaching conditions to the provision of assistance

141. The assisting state can make its grant of aid dependent upon the fulfilment of certain conditions by the recipient state. This enables the assisting state to maintain a degree of control over how the assistance is used and to pause or withdraw assistance if conditions are not fulfilled. Conditions will typically be set out in an agreement or memorandum of understanding between the assisting and recipient state.

142. In the context of assistance by certain states to the US's armed drone programme, a number of states have asked for guarantees and developed policies with conditions for the modalities under which their assistance is to be used. For example, in February 2016 it was reported that Italy would allow the US to use an airbase on its territory only under certain conditions.²²³ Under this agreement, Italy will decide whether to authorize drone departures on a case-by-case basis, and only if each mission's aim is to protect personnel on the ground.²²⁴

143. Conditionality is also used by UN forces in their assistance of the armed forces of states. In the context of the UN's stabilization mission, known as MONUC, in the Democratic Republic of the Congo (DRC), Security Council Resolution 1906 provides that:

... the support of MONUC to FARDC [the DRC's armed forces] military operations against foreign and Congolese armed groups is strictly conditioned on FARDC's compliance with IHL, IHRL and refugee law and on effective joint planning of these operations.²²⁵

²²³ Al Arabiya (2016), 'Italy agrees to let anti-ISIS drones depart from Sicily', 23 February 2016, <http://english.alarabiya.net/en/News/middle-east/2016/02/23/Italy-agrees-to-let-anti-ISIS-drones-depart-from-Sicily.html> (accessed 30 Sep. 2016).

²²⁴ *Ibid.*

²²⁵ UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906.

144. Written agreements making assistance conditional upon compliance with IHL are often important in states' assistance to non-state armed groups.²²⁶ These agreements may also require that non-state armed groups agree to investigate and prosecute any violations of IHL.²²⁷

b. Diplomatic assurances

145. States may seek diplomatic assurances from one another in relation to compliance with international law when cooperating in armed conflict and counterterrorism matters. For example, the UK's Consolidated Guidance to Intelligence Officers states that personnel, before interviewing a detainee who is in the custody of another state,

... must consider the standards to which the detainee may have been or may be subject. Personnel should consider obtaining assurances from the relevant liaison service as to the standards that have been or will be applied to address any risk in this regard.²²⁸

146. In *El Masri v Macedonia*, the ECtHR noted not only that Macedonia should have known of the risk that the applicant would be subjected to ill-treatment, but also that it did not seek any assurances from the US authorities to avert the risk of the applicant being ill-treated.²²⁹

147. It is important that the assurances provided are meaningful. The ECtHR has held that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.²³⁰ There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.²³¹ The weight to be given to such assurances will depend on the circumstances in each case.²³²

c. Legal diplomacy and demarches

148. The assisting state may use 'legal diplomacy' in order to understand the recipient state's interpretation of the law. This may include seeking to build common understandings of international law and, where there are differences, to explore whether they can be bridged or managed, for example through the use of conditions, assurances and independent monitoring.²³³ If the state considering assistance has concerns about the recipient state's compliance with international law, it may resort to diplomatic demarches or the pausing or withdrawal of assistance.

d. Vetting and training recipients of assistance

149. Vetting potential recipients of assistance in advance for compliance with international law may help the assisting state to avoid facilitating unlawful acts. This might include consideration of the recipient state's policies and past practices in relation to IHL, including any credible reporting of

²²⁶ Hathaway et al. (2017, forthcoming), 'Ensuring Responsibility', p. 51.

²²⁷ Ibid.

²²⁸ HM Government (2010), 'Consolidated Guidance to Intelligence Officers', p. 8.

²²⁹ *El Masri* case (ECtHR 2012), para 219.

²³⁰ *Othman v UK*, App. No. 8139/09, 17 January 2012, para 187.

²³¹ Ibid.

²³² Ibid.

²³³ See speech of the US Legal Adviser, Brian Egan, to the ASIL conference of 1 April 2016, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>, pp. 10–11 (accessed 30 Sep. 2016).

allegations of breaches of IHL. It might also include an assessment of the level of skill that the recipient state possesses in relation to, for example, the use of specific weapons.²³⁴

150. If it is clear that the recipient state is unaware of the relevant international law, or if there are concerns about lack of compliance with the law, the assisting state may provide training as part of the cooperation on armed conflict or counterterrorism matters. This might involve training on the rules and principles of IHL, and their application to the types of scenarios that are likely to arise in relation to the assistance in question, or it could potentially involve practical training in the use of certain weapons in accordance with IHL.²³⁵ Increasingly, states working with non-state groups will vet and provide training in IHL;²³⁶ NGOs have developed best practice in this regard.²³⁷

e. Confining assistance to particular parts of a state

151. If the assisting state has concerns about particular departments or agencies within a recipient state, it may choose to work only with specific parts of the state concerned. Or it might share some types of information (for example, ‘building block intelligence’, which contributes to a picture of a terrorist group over time), but not others (for example, actionable intelligence, which may be more specific to individuals and thus more capable of giving rise to a breach of international law).²³⁸

f. Monitoring, reporting and follow-up systems

152. An effective reporting and monitoring system enables a state to keep under review the assistance it provides, and to identify and record risks and violations associated with the assistance. Monitoring, where possible carried out by independent third parties, should provide feedback on the use of assistance and the extent to which the recipient state has complied with assurances and conditions attached to assistance. In practice, the extent to which monitoring may be possible will depend on whether there is physical access to the operations in question, which in some cases may be limited on safety or security grounds.²³⁹

153. If monitoring or other follow-up action reveals serious concerns about the compatibility of the actions of the recipient state with international law, the assisting state should conduct further enquiries to establish the nature of the violation and whether it is a one-off incident or a pattern of behaviour. The results of these enquiries can then feed into the ultimate decision as to whether to withhold or withdraw assistance.

154. In the context of the US administration’s provision of intelligence information and other assistance to foreign governments engaged in military strikes to shoot down civil aircraft, the US Office of Legal Counsel advised in 1994 that there should be an agreement between the US and each relevant foreign government.²⁴⁰ Such agreements should ‘establish mechanisms by which USG

²³⁴ For further discussion on vetting, see Finucane, B. (2016), ‘Partners and Legal Pitfalls’, 92 *International Legal Studies* 407, p. 426.

²³⁵ *Ibid.*, p. 427.

²³⁶ Hathaway et al. (2017, forthcoming), ‘Ensuring Responsibility’, pp. 49–50.

²³⁷ Mack, M. (2008), *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva: International Committee of the Red Cross, https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (accessed 30 Sep. 2016).

²³⁸ On this distinction for sharing purposes, see UK Cabinet Office (2013), *The Report of the Detainee Inquiry*, para 4.15.

²³⁹ Finucane (2016), ‘Partners and Legal Pitfalls’, p. 428. Finucane suggests that one option for addressing the challenge of physical access is for the assisting state to embed personnel with the forces of the recipient state, to observe how that state conducts its operations.

²⁴⁰ Dellinger, W. (1994), ‘Opinion of the Office of Legal Counsel on United States Assistance to Countries that Shoot Down Civil Aircraft’, p. 160. For further discussion, see Goodman, R. (2016), ‘The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen’, Just Security blogpost, 1 September 2016, <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/> (accessed 30 Oct. 2016).

personnel would obtain detailed and specific knowledge as to how the USG-provided information and assistance were in fact being used, and thus be able to identify at an operational level any instance of non-compliance with the agreement'. The agreements should also provide for the termination of US administration-supplied information and assistance in the event of material non-compliance.²⁴¹ This advice was given in the context of considering the individual liability of US officials for aiding and abetting under US domestic criminal law. But these measures are equally appropriate in the context of minimizing the risk of state responsibility for assistance in internationally wrongful acts.

(iv) Taking a decision on assistance in light of the above factors

155. Only after identifying the factual circumstances, risks and options for mitigation should a final decision be taken on whether to proceed with the proposed assistance. If, despite conditions, assurances and other strategies for mitigation described above, concerns about the recipient state's compliance with international law persist, the state concerned should withhold assistance (or, in the event that assistance is already being provided, consider withdrawing it). Quite apart from the political and reputational risks involved, to proceed with assistance in the knowledge of non-compliance with international law by the recipient state entails responsibility under international law for the assisting state.

(v) Application of these procedures in practice

156. The ease with which the above strategies can be applied will of course differ according to the circumstances. In the case of assistance to a capacity-building programme in a state – for example, building up the justice and security sectors in a post-conflict situation where there is a solid NGO presence – it may be relatively straightforward for the assisting state to vet and help to train recipients of assistance; to impose conditions on the aid that it provides; to monitor compliance using independent organizations on the ground; and to exert leverage if concerns are raised, in order to improve compliance.

157. In other situations, implementation of these strategies will be more challenging. A recipient state may have reservations on sovereignty grounds about accepting the necessary monitoring. Further, decisions on assistance in the context of armed conflict and counterterrorism may be required at short notice. Technological innovations and the growing array of cooperation arrangements between states may complicate analysis of both the facts and the legality of the principal act. For example, in the context of assistance to a state carrying out lethal strikes by armed drone, intelligence for the strike may be drawn from multiple sources (including perhaps computer-generated data), and decisions about crucial issues such as individuals' combat status will be informed by a web of analysts in real time, making it harder for the assisting state to determine who is responsible for the decision-making in relation to the act in question, and where in that process potential breaches of international law might occur.²⁴²

²⁴¹ Ibid.

²⁴² Rogers (2016), 'How should international law deal with doubt'.

III. Transparency

158. Some of the procedures described above require internal transparency – that is, easy access to knowledge within the government department or agency concerned. The procedures are likely to encourage communication through the hierarchy or the chain of command on risks relating to assistance. They also ensure that structures are in place to enable any concerns to be addressed.

159. External transparency is also important. States should give information, as far as they can within the constraints of national security and international relations, to their legislatures and the public about:

- (i) the assistance they provide to other states;
- (ii) the norms applicable to that assistance; and
- (iii) the strategies they use to minimize the risk of complicity in an unlawful act by a recipient state.

160. External transparency encourages states to follow best-practice standards. It enables states to be accountable, in both the political and legal senses, to the outside world. It also increases public confidence in government. This is all the more important in the face of a number of allegations against states of complicity in unlawful actions.²⁴³ Conversely, lack of transparency fosters a lack of confidence in government. For example, the disclosure in 2008 that the US had, contrary to previous statements by ministers, used facilities at Diego Garcia in the course of rendition since 2001 dented public confidence in the UK's ability to exercise control over its sovereign territory. The credibility of US assurances was severely damaged as a result.²⁴⁴

161. There have been increasing calls for greater transparency about the decision-making of states where they cooperate with other states in armed conflict or counterterrorism operations.²⁴⁵ There will be some limits on what can be disclosed in the context of sensitive armed conflict and counterterrorism operations, owing to concerns that disclosure could compromise national security or have a chilling effect on the relationship with the state concerned. There is also a need for private consultations between officials in government, and between governments, so that each party can understand the other's legal rationale for military operations. Such consultations can help to frame the public conversation on some central legal issues.²⁴⁶ But basic information about how states understand the legal framework governing their assistance, and the legal norms underlying the acts that they assist, is unlikely to be so sensitive.

162. In principle, states recognize and often espouse the benefits of transparency.²⁴⁷ There is greater scrutiny of the actions of the executive in this area by parliamentary committees and groups.²⁴⁸ The

²⁴³ See, for example, para 3 above.

²⁴⁴ UK Foreign Affairs Committee (2014), *The Use of Diego Garcia by the United States*, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmfaff/377/37704.htm>, para 13 (accessed 30 Sep. 2016).

²⁴⁵ Jaffer, J. (2016), 'A Less Secret Drone Campaign', Just Security blog, 27 June 2016, <https://www.justsecurity.org/31687/secret-drone-campaign/> (accessed 30 Sep. 2016).

²⁴⁶ Egan (2016), speech to ASIL conference, p. 11.

²⁴⁷ Ibid.

Dutch government consulted with an independent advisory group, the Advisory Committee on Issues of Public International Law (CAVV), on the lawfulness of using armed drones. CAVV then issued a report, including on the issue of assistance to other states in this context,²⁴⁹ to which the Dutch government published a response.²⁵⁰ As noted above, some states have published policies on assistance to other states. These include the UK's Consolidated Guidance to Intelligence Officers, its Overseas Security and Justice Assistance (OSJA): Human Rights Guidance, and the arms export policies of certain Western states.

163. But overall, publicly available information about cooperation between states on armed conflict and counterterrorism operations is fairly limited and formulaic. It is also ad hoc. The UK's Consolidated Guidance to Intelligence Officers was published only as a result of litigation, and much less information is publicly available from other states. The Consolidated Guidance is also limited only to intelligence gathered from detainees. In relation to the sharing of intelligence for lethal strikes, it is unclear what framework applies.²⁵¹

164. Litigation in this area has forced some states to be more transparent, for example by taking a public position on the classification of conflicts, and to disclose certain information or to investigate breaches. In *Nasr and Ghali v Italy*, the ECtHR considered the Italian authorities' reliance on state secrecy in the investigation into the abduction and extrajudicial transfer to Egypt of Abu Omar by CIA agents with the cooperation of Italian officials. The court held that the investigation fell short of compliance with the procedural limb of Article 3 of the ECHR, on the basis that Italy had relied on the state secrecy principle – despite the fact that the information concerned was in the public domain – in order to avoid the conviction of those responsible.²⁵² Following the leaks about the activities of the US National Security Agency by Edward Snowden, a former systems administrator, concerns about the sharing of data between intelligence agencies have led to litigation and resolutions in a variety of forums on these issues.²⁵³ Freedom-of-information requests, public and parliamentary inquiries, citizen journalism and parliamentary questions have also been used to seek greater transparency from governments in this area.

²⁴⁸ For example, see Joint Committee on Human Rights (2016), *The Government's policy on the use of drones for targeted killing*, <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> (accessed 30 Sep. 2016). The UK's All Party Parliamentary Group on Drones is also looking at the use of armed drones, including the issue of UK assistance to other states in this area.

²⁴⁹ Advisory Committee on Issues of Public International Law (CAVV) (2013), *Advisory Report No. 23 on the Lawfulness of using Armed Drones*, The Hague: CAVV, pp. 5–6, [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_\(English_translation_-_final\)_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf) (accessed 30 Sep. 2016).

²⁵⁰ 'Government response to advisory report no. 23 on armed drones by the Advisory Committee on Issues of Public International Law (CAVV)', [http://cms.webbeat.net/ContentSuite/upload/cav/doc/English_translation_of_government_response_to_CAVV_advice_on_armed_drones_-_final\(3\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/English_translation_of_government_response_to_CAVV_advice_on_armed_drones_-_final(3).pdf) (accessed 30 Sep. 2016).

²⁵¹ In the UK, requests for publication of guidance on intelligence matters in such areas have so far been unsuccessful. See exchange of letters between Tom Watson and David Omand, and the FCO, for 'Guidance to Intelligence Officers and Service Personnel applicable to the passing of intelligence relating to individuals who are at risk of targeted lethal strikes outside traditional battlefields', available on the website of the All Party Parliamentary Group on Drones at <http://appgdrones.org.uk/wp-content/uploads/2014/08/Rt-Hon-Philip-Hammond-MP9-FINAL-3.pdf>.

²⁵² App No. 44883/09, 23 February 2016, paras 268–74.

²⁵³ For example, UN General Assembly Resolution 68/167 of 30 June 2014, calling on the Office of the United Nations High Commissioner for Human Rights (OHCHR) to submit and report on these issues, and cases before the ECtHR (e.g. *Big Brother Watch & Others v UK* (App. No. 58170/13) and *Bureau of Investigative Journalism & Alice Ross v UK* (App No 62322/14)).

165. Proactive transparency by states can reduce their risk of being forced to disclose information through litigation.²⁵⁴ Although there is a risk that such decisions may be used against states in legal challenges (the UK's Consolidated Guidance to Intelligence Officers has been the subject of judicial review),²⁵⁵ domestic courts are usually reluctant to second guess foreign policy and national security considerations where it is clear from written policy and procedures that the executive has taken human rights and other international law considerations into account in its decision-making processes.

Information about the applicable legal framework

166. A separate question relates to transparency about the legal framework applicable to the act that is assisted. Without the necessary information, it is not possible for those outside government to assess properly the legality either of the act in question, or of the assistance that contributes to it.

167. Some states in the coalition against ISIS, in their Article 51 notifications to the UN Security Council explaining and justifying their military actions in Syria, have given more explanation than others about the nature of their claims to self-defence. The UK government gave details to parliament in September 2015 about the legal basis for its drone strike in Syria the month before. The US Legal Adviser recently provided some insight into the US administration's understanding of the international legal basis for using force against ISIS, and some of the key rules of IHL that it considers apply.²⁵⁶

168. But there is room to go further. The UK's Joint Committee on Human Rights has called on the UK government to publish its analysis of applicable norms in the context of drone strikes.²⁵⁷ The US administration published an executive order on 1 July 2016, entitled 'United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force'.²⁵⁸ The executive order sets out a number of policies, which include engaging with foreign partners to share and learn best practice for reducing the likelihood of, and responding to, civilian casualties, including through appropriate training and assistance.²⁵⁹ But the document has been criticized for a lack of clarity on the applicable norms.²⁶⁰

169. There is also scope for greater transparency from states about factual information relevant to allegations of breaches of international law in the context of armed conflict and counterterrorism, for example figures on civilian casualties. In July 2016, the US administration released summary information about the number of people it has killed in drone and other strikes outside areas of

²⁵⁴ For example, the American Civil Liberties Union has brought numerous legal challenges in the US to obtain records and the legal basis for the use of lethal force outside conventional war zones and the evidentiary standards used to vet targets. See American Civil Liberties Union (2016), 'Targeted Killing', <https://www.aclu.org/issues/national-security/targeted-killing> (accessed 30 Sep. 2016).

²⁵⁵ *R. (Al Bazzouni) v Prime Minister & Others* [2011] EWHC 2401 (Admin).

²⁵⁶ Egan (2016), speech to the ASIL conference, pp. 3–10.

²⁵⁷ Joint Committee on Human Rights (2016), *The Government's policy on the use of drones for targeted killing*, p. 82.

²⁵⁸ White House (2016), 'Executive Order -- United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force', 1 July 2016, <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures> (accessed 30 Sep. 2016).

²⁵⁹ Section 2(b)(iii).

²⁶⁰ Knuckey, S. (2016), 'The Good and Bad in the US Government's Civilian Casualties Announcement', Just Security blog, 2 July 2016, <https://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement/> (accessed 30 Sep. 2016).

active hostilities.²⁶¹ This transparency has been welcomed, but also criticized in a number of respects, including for not clarifying the methodology used in gathering the data.²⁶²

170. Transparency about factual information and states' views of the applicable legal framework are often interlinked. For example, in order to determine which rules of IHL, if any, apply to a particular situation, it will be necessary to decide whether or not that situation meets the relevant threshold to qualify as an 'armed conflict', and if so whether the conflict is of an international or non-international character. This will require transparency both about the facts surrounding the conflict, and about how the state or states in question interpret and apply the relevant law in that situation.

171. Transparency and accountability after an allegedly unlawful event are also important, as they demonstrate a commitment that the recipient state takes violations of international law seriously and is prepared to remedy them, for example through investigations, inquiries or court action. The above-mentioned US executive order of 1 July 2016 provides that relevant agencies shall review or investigate incidents involving civilian casualties, and take measures to mitigate the likelihood of future incidents of civilian casualties.²⁶³

IV. Would international standards help, and if so, how feasible are they?

172. In some contexts, the strategies above may be most effective when conducted unilaterally. However, where a number of states are assisting another state in the same effort, a common approach to risk management may be beneficial. To approach the matter multilaterally could enable assisting states to share information on the track record of the recipient state, to impose common conditions, and to gather information together on compliance.

173. The field of arms exports provides a good example of multilateral cooperation on aiding and assisting in the context of armed conflict and counterterrorism. The EU Common Position on arms exports, the Arms Export Treaty and the OSCE Principles Governing Conventional Arms Transfers are all examples of political will to develop international controls in this area.

174. But in other fields of assistance, multilateral standards are less developed. There are increasing calls for multilateral cooperation in relation to the assistance provided by some European states to the US armed drone programme (such as the provision of intelligence for use in lethal strikes by armed drone). Christof Heyns, in his capacity as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, called on states and intergovernmental organizations to engage in processes to seek consensus about the correct interpretation and application of the international standards governing the use of armed drones.²⁶⁴ The European Parliament has called for an EU common

²⁶¹ Director of National Intelligence (2016), 'Summary of Information Regarding US Counterterrorism Strikes Outside Areas of Active Hostilities', 1 July 2016, <https://www.dni.gov/index.php/newsroom/reports-and-publications/214-reports-publications-2016/1392-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities> (accessed 30 Sep. 2016).

²⁶² See, for example, the analysis by the NGO PAX (2016), 'Obama drone order falls short', 15 July 2016, <http://www.paxforpeace.nl/stay-informed/news/obama-drone-order-falls-short> (accessed 30 Sep. 2016).

²⁶³ Section 2(b)(i).

²⁶⁴ Heyns, C. (2013), 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', 13 September 2013, UN Doc A/68/382.

position on promoting greater transparency and accountability on the part of third countries in the use of armed drones with regard both to the legal basis for their use and to operational responsibility.²⁶⁵ The Council of Europe's Parliamentary Assembly has recommended that, if necessary, the Committee of Ministers should draft guidelines for member states on targeted killings, to reflect the standards in the ECHR.²⁶⁶ But so far European states have tended to adopt a case-by-case approach to assistance.

175. Another area for consideration is cooperation between states on the use of military bases. In general, when a state allows another state to use its military bases, it is unclear what oversight the assisting state has of the legality of operations carried out on or from its own territory. The German government, for example, says that it has 'no reliable information' about what occurs at the large US military base in Ramstein, nor has the US disclosed information on this.²⁶⁷ The NATO Status of Forces Agreement does not require the NATO partner using a base to provide information that would enable the assisting state to monitor compliance.²⁶⁸ National laws are unlikely to provide a requirement to monitor compliance of the activities of the state in question with either national or international law. A multilateral agreement on at least basic standards in this area could help partner states to be better informed of the activities carried out on and from their territory, and thus to oversee their compliance with international law.

V. Recommendations for strategies for assisting states

176. Governments should have procedures in place to enable them to make an informed decision in advance about assistance to be offered to states and non-state actors, including an assessment of the risks involved. These procedures should cover all forms of cooperation, including the use of military assets such as drones and bases, the sharing of intelligence, the provision of weapons, capacity-building and the handling of detainees.

- (i) The procedures should include the identification of the relevant factual circumstances; the identification of risks; strategies to mitigate risks; and, in light of all these, the process for taking the final decision.
- (ii) Strategies that assisting states should draw upon to ensure compliance include attaching conditions to assistance; vetting and training recipients of assistance; and monitoring and following up on any risks identified.
- (iii) Assessment of the risks of assistance should take place at all appropriate points in time, bearing in mind the dynamic circumstances in which cooperation often occurs.

²⁶⁵ European Parliament (2014), Res 2014/2567 of 25 February 2014 on the use of armed drones, para 4.

²⁶⁶ Parliamentary Assembly (2015), Recommendation 2069 (2015), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21747&lang=en> (accessed 30 Sep. 2016).

²⁶⁷ Spiegel Online (2015), 'A War Waged From German Soil: US Ramstein Base Key in Drone Attacks', 22 April 2015, <http://www.spiegel.de/international/germany/ramstein-base-in-germany-a-key-center-in-us-drone-war-a-1029279.html> (accessed 30 Sep. 2016). In relation to the UK, see the advice from Stratford QC, J., and Johnston, T., (2014), 'In the Matter of State Surveillance: Advice', All Party Parliamentary Group on Drones, 29 January 2014, [http://www.brickcourt.co.uk/news-attachments/APPG_Final_\(2\).pdf](http://www.brickcourt.co.uk/news-attachments/APPG_Final_(2).pdf), para 112. ('... the UK government does not appear to know what takes place, with any degree of detail, on those bases. It appears that an RAF liaison officer is assigned to each base ... However, the scope of their duties and powers to review or investigate, if any, are unclear.') The agreements between the US and UK regarding the US base on Diego Garcia do not require the US to provide information that would enable the UK to monitor compliance.

²⁶⁸ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951.

- (iv) States should elaborate the procedures and strategies above in policy guidelines, which should be made public. Where possible, the conditions upon which assistance is granted should also be made public.
- (v) States assisting other states or non-state armed groups should, as far as possible taking into account considerations of national security and international relations, be transparent about both the factual information surrounding their assistance – particularly where allegations of breaches of international law are concerned – and their understanding of the applicable legal framework.
- (vi) States should share and coordinate best practice with other states, following the precedents in the field of arms transfers.

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²⁶⁹ 'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.'

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