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AIDING AND ASSISTING: THE MENTAL ELEMENT UNDER ARTICLE 16 OF THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY

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Abstract Article 16 of the International Law Commission's Articles on State Responsibility 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. This article clarifies one of those conditions, namely the difficult and contested issue of what degree of knowledge or intent engages the responsibility of an assisting State under Article 16. The article focuses particularly on assistance in armed conflict and counterterrorism situations, which increasingly feature some form of operational or intelligence cooperation between States.

Keywords: Public international law, Article 16, complicity, due diligence, intent, knowledge, State responsibility, wilful blindness.

I. INTRODUCTION

The legal issues surrounding cooperation among States in the fields of armed conflict and counterterrorism are highly topical today. 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.[1] Similar issues arose with regard to States assisting the US in its programme of rendition and the questioning of persons suspected of terrorist acts.[2] 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 (eg in Yemen and Pakistan).[3]

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[1] See G Nolte and H Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law' (2009) 58(1) ICLQ 1–30.

[2] UK Cabinet Office, *The Report of the Detainee Inquiry* (2013) 4–5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267695/The_Report_of_the_Detainee_Inquiry_December_2013.pdf>.

[3] See, for example, J Serle, 'UK Complicity in US Drone Strikes Is 'Inevitable', Emmerson tells Parliament' (Bureau of Investigative Journalism, 5 December 2013) <https://www.thebureauinvestigates.com/2013/12/05/uk-complicity-in-us-drone-strikes-is-inevitable-emmerson-tells-parliament/>.

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The UK's export of arms to Saudi Arabia for possible use in the conflict in Yemen was recently the subject of a judicial review challenge.[4]

The interpretation and application of this area of law are contested in certain critical respects. The International Law Commission (ILC)'s Articles on the Responsibility of States for Internationally Wrongful Acts (the 'Articles on State Responsibility') include Article 16 on the responsibility of States that aid or assist internationally unlawful acts by other States. But there are gaps left by the ILC, and although there is some State practice[5] there is a lack of case law in this area. The literature on the subject is growing,[6] but there remain 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.

This article takes one element of the law on Article 16—the mental element required by the Article if a State is to be regarded as internationally responsible—and seeks to develop a clear analysis of the law with particular regard to its application in situations of armed conflict and counterterrorism. Other rules of international law are also relevant to State-to-State assistance in armed conflict and counterterrorism, including international humanitarian law and international human rights law, but they are beyond the scope of this article.[7] Nor does this article address the question of the individual responsibility of government officials for activities that could amount to the aiding or abetting of war crimes, which may also be relevant on the same facts and will often need to be considered in parallel.

Although both 'assisting' and 'aiding or assisting' are used in the literature, it is not clear that there is any material difference between the two[8] and the term 'assisting' is therefore generally used here. A further terminological use is the general avoidance of the term 'complicity'. It is not a term of art in international law and is primarily associated with international criminal law.[9]

[4] *Campaign Against the Arms Trade v Secretary of State for Business, Innovation and Skills & Others*, CO/1306/2016. The claimants alleged that the sale contravened the Consolidated EU and National Arms Export Licensing Criteria. An intervention by Amnesty International, Human Rights Watch and Rights Watch (UK) also alleged that the sale contravened art 16 of the International Law Commission's Articles on State Responsibility. In a judgment of 10 July 2017, the High Court dismissed the Claimant's claim for judicial review. The claimants have sought leave to appeal.

[5] M Jackson, *Complicity in International Law* (Oxford University Press 2015) 172.

[6] See, for example, H Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011); Jackson (n 5); and V Lanovoy, *Complicity and Its Limits in the Law of Responsibility* (Hart 2016).

[7] For discussion of these other rules and their relationship to art 16, see Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism', (2016) Chatham House Research Paper, ch 3.

[8] See International Law Commission, 'State Responsibility – Comments and Observations Received from Governments' (2001) 53rd session, 52 (UN Doc A/CN.4/515) for the comments of the UK.

[9] See V Lanovoy, 'Complicity in an Internationally Wrongful Act' (2014) SHARES Research Paper 38, 4. Lanovoy notes that Special Rapporteur Roberto Ago used the term 'complicity' but dropped it after criticisms from States and some ILC members.

II. ARTICLE 16 OF THE ARTICLES ON STATE RESPONSIBILITY

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.

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.[10]

Article 16 is a general rule negotiated by the ILC over a period of nearly 40 years. The Articles on State Responsibility 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.[11] 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.[12] 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.[13]

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 internationally wrongful act. It is therefore an ancillary responsibility, arising simply from the fact that a State facilitated the wrongful act.[14]

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.

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

[11] 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 Articles on State Responsibility should be turned into a Convention (UNGA Res 68/104 of 16 December 2013 on the Responsibility of States for Internationally Wrongful Acts).

[12] J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 408.

[13] *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 (*Bosnian Genocide* case). For detailed analysis of the customary law status of art 16, see Aust (n 6) 97–191.

[14] See ILC Commentary to art 16, paras (1) and (10); and V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Kokusaiho Gaiko Zassi* 11.

(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.

This article focuses on the most difficult and contested element of Article 16, namely condition (iii) above—the question of what constitutes the requisite mental element.[15] Article 16 requires the assisting State to have 'knowledge' of the circumstances of the internationally wrongful act. Paragraph (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. Paragraph (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.

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

III. KNOWLEDGE

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.

Responsibility under Article 16 does not attach unless the act that is assisted turns out, in the event, to be unlawful.[16] 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?

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.[17]

The ILC Commentary to Article 16 indicates that the State in question must be aware of the circumstances *making it wrongful*.[18] While this could be interpreted to support the argument above for mere awareness of the factual circumstances making it unlawful, the

[15] For a fuller analysis of each of the conditions under art 16, see Moynihan (n 7).
[16] The ILC Commentary to art 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).
[17] See, for example, N Melzer, 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare' European Parliament Directorate-General for External Policies of the Union (2013) 38.
[18] ILC Commentary to art 16, para (4).

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.[19] 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.[20] 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'.[21]

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 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.[22] This suggests the need for knowledge of illegality, not just of the facts more generally.[23]

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:

1. 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.
2. While ignorance of the law is generally no excuse,[24] there may be circumstances in which it is genuinely unclear by what law another State is

[19] See Crawford (n 12) 407, citing C Dominicé 'Attribution of conduct to multiple States and the implication of a State in the act of another State', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 286, who refers to the need for 'specific knowledge of … an internationally wrongful act *with a high degree of particularity*' (emphasis added) when referring to the ICJ's decision in the *Bosnian Genocide* case. See also Nolte and Aust (n 1) 12.

[20] Lowe (n 15) 9–10.

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

[22] *Bosnian Genocide* case (n 13): '… 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).

[23] Crawford also takes this reference in the *Bosnian Genocide* case to 'at the least', as quoted in note 22 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 (n 12) 407. See also Dominicé (n 19) 286; Nolte and Aust (n 1) 14; Aust (n 6) 236; cf Jackson (n 5) 160.

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

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.[25]

3. 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 international humanitarian law and international human rights law in the context of detention in a non-international armed conflict is an area of law that is unclear and disputed.[26] 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.

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.[27]

B. What Degree of Knowledge?

It is clear that actual knowledge of the circumstances of the principal wrongful act will meet the knowledge element in Article 16.[28] 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.[29] 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.[30] 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.[31]

[25] 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.

[26] As is reflected in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 1 and [2017] UKSC 2.

[27] Nolte and Aust (n 1) 12.

[28] Crawford (n 12) 406; Jackson (n 5) 161; Lowe (n 14) 10.

[29] Crawford (n 12) 408 refers to 'actual *or near-certain* knowledge' in relation to imputation with intent (emphasis added). Jackson (n 5) 161 argues that 'knowing participation means awareness with something approaching practical certainty as to the circumstances of the principal wrongful act'.

[30] International Law Commission, *Yearbook of the International Law Commission* (1978) Vol 2, Pt II, 111, para 10 (UN Doc A/CN.4/SER.A/1978/Add.1 (Pt 2)). For discussion of this, see J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57(1) BYBIL 113.

[31] Quigley (n 30) 113.

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On the other hand, the negotiating history in the ILC suggests that constructive knowledge (ie 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'.[32] 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.[33] 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.[34] But the ancillary, derivative responsibility for aiding or assisting wrongdoing is distinct from principal or joint responsibility.[35] In the ILC's negotiations, the Netherlands' proposal was not taken up, and other States argued for a stricter requirement of knowledge.[36]

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 least' knowledge,[37] which suggests actual knowledge as a minimum, and thus a higher standard of knowledge than 'should have known'.

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'.

1. Wilful blindness

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.[38] 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.

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'.[39] 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

[32] Statement of the Netherlands in the International Law Commission, *Yearbook of the International Law Commission* (2001) Vol II(1), 52 (emphasis added). See also the statements of Ustor in the International Law Commission, *Yearbook of the International Law Commission* (1975) Vol I, 48, cited in Crawford (n 12) 406. [33] Lowe (n 14) 10. [34] ibid. [35] ibid 11.

[36] For a discussion of the views of different States during the ILC negotiations on the mental element, see Aust (n 6) 172 and 233–35.

[37] *Bosnian Genocide* case (n 13) [421]; see also discussion in Jackson (n 5) 160.

[38] For example, Jackson (n 5) 54 and 162.

[39] G Williams *'Criminal Law: The General Part'* (Stevens & Sons, London 1961) 159, quoted by Jackson (n 6) 54.

guilty knowledge' of the primary actor's intentions.[40] 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'.[41] 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.

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.[42]

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.

2. A duty to make enquiries?

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?[43]

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'.[44] The obligation to make enquiries is the natural counterpoint of constructive knowledge ('should have known'), not of wilful

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

[41] ibid.

[42] Lowe (n 14) 10 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'; Jackson (n 5) 162; Quigley (n 30) 120 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.

[43] See Jackson (n 5) 162, arguing 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', and suggesting that wilful blindness implies some form of due diligence obligation.

[44] 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, *First Report of the ILA Study Group on Due*

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.[45]

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.[46] 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.[47] 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 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 international human rights law or the obligation to prevent in international humanitarian law.[48]

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 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.

3. A court's approach to knowledge

A court or tribunal will come to a view on the mental element of an assisting State in light of the facts and the evidence. But it is difficult to prove the subjective mental element of

Diligence in International Law (2014) 6–7, quoting T Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 158.

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

[46] The Commentary to art 2 provides that the 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 art 2, instead leaving this to the content of the primary obligation in question (para (3), 82).

[47] A Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2015) 87(859) International Review of the Red Cross 471; ILC Commentary to art 2, para (3), 82 and para (10), 84.

[48] For an example of the application of the due diligence principle under international human rights law in relation to cases on assistance, see *El Masri v Macedonia* (App No 39630/09, 13 December 2012). The European Court of Human Rights held that Macedonia, in its assistance to the US in the ill-treatment of the applicant, had failed to take reasonable steps to avoid a risk of ill-treatment about which it knew or ought to have known. While the court referred to art 16 as a relevant norm of international law in its reasoning (para 97), it ultimately considered the issue of responsibility under the relevant provisions of the ECHR. For further discussion see Moynihan (n 7) paras 102ff.

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.[49] 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.

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.

In the *Corfu Channel* case,[50] 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.[51] A court may even go so far as to 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.[52]

C. Knowledge at What Point in Time?

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.

[49] Quigley (n 30) 111.

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

[51] Aust (n 6) 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 art 47 of the Articles on State Responsibility rather than ancillary responsibility for aid or assistance under art 16; Crawford (n 12) 658. In practice, the distinction is often difficult to draw.

[52] D Bethlehem, 'The Secret Life of International Law' (2012) 1 CJICL 34; Boivin (n 47) 471.

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.

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.[53] 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?

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.

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.

IV. INTENT

A. Is Intent an Element of Article 16?

Whether or not intent is a necessary component of Article 16 is a matter of controversy. Those who argue against the proposition that intent is required,[54] refer to the fact that intent is not mentioned in the article itself, only in the ILC Commentary. The obvious argument is that when a provision that is not in the Articles on State Responsibility appears in the ILC Commentary to the Articles, greater attention should be paid to the text of the articles, unless the discrepancy was discussed in plenary and the provision is

[53] Lanovoy (n 9) 21.

[54] See arguments referred to in Aust (n 6) 236.

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nonetheless adopted in the Commentary (which was not the case with Article 16).[55] Some have also argued that an intent requirement would make Article 16 unworkable, since it is difficult to prove the intent of a State,[56] and in most cases the assisting State does not actively desire the illegal result, but rather is deliberately indifferent to it.[57]

Others have emphasized the role of the ILC Commentary. Crawford has noted that the Articles on State Responsibility 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.[58] 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.[59]

The negotiating history on the mental element of Article 16 is also relevant. The statements of governments during the many years of negotiation of the draft Articles in the ILC suggest that most States were, perhaps unsurprisingly, more inclined towards the inclusion of an element of intent rather than knowledge alone.[60] 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.[61]

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.[62] But equally there are legal policy arguments the other way: including that an intent requirement would make Article 16 unduly restrictive, undermining the entire purpose of the prohibition on aiding and assisting.[63] The policy arguments go both ways: States should be able to cooperate without being unduly fettered where they have no reason to anticipate the wrongful use of their assistance,[64] but they should not be able to deny their responsibility for assistance in situations in which internationally wrongful acts are manifestly being committed.[65]

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

[55] G Gaya, 'Interpreting Articles Adopted by the International Law Commission' (2015) 86 BYBIL 1.

[56] Quigley (n 30) 11.

[57] M Gibney, K Tomasevski and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 HarvHumRtsJ 294; Quigley (n 30) 111.

[58] Crawford (n 12) 87.

[59] See ILC Commentary to art 14 of the Draft Articles on the Responsibility of International Organizations, para (4) 37.

[60] H Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20(1) JC&SL 69. For discussion of the views of different States on the intent requirement, see Aust (n 6) 172.

[61] Comments of the US Government in the 50th session of the ILC (22 October 1997) UN Doc A/CN.4/488.

[62] See Chinkin quoted in Aust (n 6) 240; and generally Aust at 239ff and 427 on these legal policy arguments. Crawford (n 12) 408; Aust (n 60) 69 and fn 35 quoting Crawford.

[63] Gibney, Tomasevski and Vedsted-Hansen (n 57) 12; K Nahapetian 'Confronting State Complicity in International Law' (2002) 52 ICLQ 108; Quigley (n 30) 111; J Howard, 'Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the US and the Question of East Timor' (2001) 2 Melbourne Journal of International Law 46.

[64] Quigley (n 30) 117.

[65] Crawford (n 12) 408; Nolte and Aust (n 1) 15–16.

contexts.[66] It is therefore important to establish what is meant by intent in the context of Article 16.

B. What is Intent?

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.'[67] 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.'[68] 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.

Analogies between individual responsibility under international criminal law on the one hand and State responsibility under Article 16 on the other should 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.[69]

The definition of intent in Article 30(2) of the Statute to the International Criminal Court (the 'Rome Statute')[70] 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.

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 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'.[71] The second part of sub-paragraph (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

[66] See, for example, E Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 40ff; J Ohlin, 'Targeting and the Concept of Intent' (2013) 35(1) MichJIntlL 79, 82ff.

[67] ILC Commentary to art 16, para (1) (emphasis added).

[68] ibid para (5) (emphasis added).

[69] In the *Bosnian Genocide* case (n 13), the ICJ considered art 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.

[70] Rome Statute of the International Criminal Court, open for signature 17 July 1998, entered into force 1 July 2002; UNTS Vol 2187 No 38544.

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

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, ie awareness that his or her acts 'will' cause the undesired proscribed consequence.[72] This reflects the orthodox standard of intention in English criminal law, which includes knowledge that the consequence was virtually certain to follow.[73]

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', ie acceptance of an outcome that the assisting State knew was virtually certain, without actively desiring it.[74]

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.[75] 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.

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)[76]—that is, 'foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility'[77] and proceeding anyway. This concept does not form part of the definition of intent in Article 30 of the Rome Statute,[78] 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 illegality. But in the case of wilful blindness there is, in addition, a deliberate attempt to avoid knowledge of that illegality.

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.

[72] ibid [359].
[73] J Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press 2016) 193.
[74] See Quigley (n 30) 111ff for discussion of this and other examples of oblique intent.
[75] Crawford (n 12) 408, citing Lowe (n 14) 6–9.
[76] *Prosecutor v Bemba* (n 67) [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.
[77] ibid [363].
[78] ibid [363–69].

V. THE RELATIONSHIP BETWEEN KNOWLEDGE AND INTENT

Knowledge and intent are closely intertwined and, in light of Article 30(2)(b) of the Rome Statute, actual or near-certain knowledge of illegality is effectively a form of intent. In the context of 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.

Commentators have suggested that where a State has actual or near-certain knowledge of illegality, intent can be 'imputed' to that State.[79] 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.[80]

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.[81] An example may be useful. State A supplies aid to State B for use in building up capacity in State B's justice and home affairs sector and 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. 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. In practice, however, liability is likely to turn as much on whether or not the money made a significant contribution to the wrongful act in question (i.e., on one of the other conditions that needs to be satisfied in order for responsibility to be engaged under Article 16) as on the mental element.

A. Proving the Mental Element

The drafting history of the Articles on State Responsibility underlines 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.')[82] 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.

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.[83] Indeed, the difficulty of establishing intent has led many commentators to

[79] Crawford (n 12) 408; Jackson (n 5) 160. Nolte and Aust (n 1) 15 note that in some cases 'a lack of intent can be offset by sufficient knowledge'. Lowe (n 14) 8 argues that 'As a matter of general principle States must be supposed to intend the foreseeable consequences of their acts.'

[80] Jackson (n 5) 159.

[81] Quigley (n 30) 111; Gibney, Tomasevski and Vedsted-Hansen (n 57) 294.

[82] Commentaries (14) and (18) to draft art 27 in the *Yearbook of the International Law Commission* (1978) Vol II (Pt Two) 99–105.

[83] Quigley (n 30) 111; Lanovoy (n 9) 18; Boivin (n 47) 472.

criticize a standard of intent as unworkable.[84] 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.[85]

VI. IS THE MENTAL THRESHOLD DIFFERENT FOR A BREACH OF A PEREMPTORY NORM?

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. An example is the use of torture 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.

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.[86]

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,[87] although it is not clear whether it represents customary international law.[88] The reference to a 'serious breach' in this context means a gross and systematic failure by the responsible State to fulfil an obligation imposed by a peremptory norm.[89] 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'.[90]

However, Article 41 deals with conduct after the fact, ie 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.

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,

[84] Aust (n 6) 236, quoting (*inter alia*) Quigley (n 30) 111; B Graefrath (1996), 'Complicity in the Law of International Responsibility' (1996) 2 Revue Belge de Droit International 375; Aust (n 6) 68 cites several authors who consider a requirement of intent to be unworkable. See also Nolte and Aust (n 1) 14.

[85] On the relationship between intent and knowledge with standards concerning evidence and proof, see further Aust (n 6) 242–3.

[86] Art 41 of the Articles on State Responsibility (emphasis added).

[87] Nolte and Aust (n 1) 16.

[88] Aust (n 6) 343.

[89] ILC Commentary to art 40 of the Articles on State Responsibility, para (7).

[90] ILC Commentary to art 41, para (11).

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and that the importance of peremptory norms warrants that States should be more careful about the ways in which they cooperate with one another.[91]

VII. CONCLUSION

While the mental element of Article 16 has generated extensive debate as to whether knowledge or intent is the correct standard, the reality may lie somewhere in between. '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 is the assisting State 'should have known' is not sufficient.

'Intent' does not require the assisting State to desire that the unlawful conduct be committed, or 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.

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

Often the situation will be dynamic, and the responsibility of the assisting State will change as the facts, and its level of knowledge, develop. It is therefore incumbent on States to be continually vigilant in ensuring that their assistance, even if given in good faith, does not evolve into complicity in other States' unlawful acts.[92] States have an additional incentive to carry out their due diligence before and during the provision of assistance, as the law on complicity is a growing source of litigation,[93] and is increasingly invoked by parliamentary committees, NGOs and international organizations.

Even beyond the legal position, it is in the interests of assisting States to adopt strategies to help identify and mitigate the risks involved in their assistance, otherwise they will pay at the least a reputational and political price if their assistance contributes to a recipient State carrying out unlawful acts. A Chatham House research paper on 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' makes recommendations for such strategies.[94] It also underlines the need for assisting States to be more transparent in this area, for example by providing basic information about how they understand the legal framework governing their assistance (including the application of Article 16), and the legal norms underlying the acts that they assist.[95] As well as increasing accountability, this will enable States to follow and promote best-practice standards in the application of both Article 16 and the international law on complicity more broadly.

[91] See Aust (n 6) 422.

[92] See Moynihan (n 7) for strategies and recommendations for governments to reduce the risk of assisting in unlawful acts by other States.

[93] For example the judicial review in the UK brought by the Campaign Against the Arms Trade (n 4).

[94] Moynihan (n 7) ch 4: 'Strategies and Recommendations for Governments to Reduce the Risk of Assisting in Unlawful Acts by Other States'.

[95] ibid, paras 158ff.

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