

**Article 16. Aid or assistance in the commission of an internationally wrongful act**

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:**

**(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

**(b) the act would be internationally wrongful if committed by that State.**

*Commentary*

(1) 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 by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term “by the latter” in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.<sup>[904] 273</sup> Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. 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.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase “knowledge of the circumstances of the internationally wrongful act”. A State providing material

---

<sup>[904] 273</sup> See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (f) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. 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 and the internationally wrongful conduct is actually committed by the aided or assisted State. 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.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.<sup>[905] 274</sup> The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.<sup>[906] 275</sup> In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.<sup>[907] 276</sup>

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory

<sup>[905]</sup> 274 *The New York Times*, 6 March 1984, p. A1.

<sup>[906]</sup> 275 *Ibid.*, 5 March 1984, p. A3.

<sup>[907]</sup> 276 *Ibid.*, 26 August 1998, p. A8.

in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.<sup>[908] 277</sup> Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.<sup>[909] 278</sup> The Libyan Arab Jamahiriya asserted that the United Kingdom “would be held partly responsible” for having “supported and contributed in a direct way” to the raid.<sup>[910]279</sup> The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.<sup>[911] 280</sup> A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the “military attack” as “a violation of the Charter of the United Nations and of international law”, and calling upon all States “to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya”.<sup>[912] 281</sup>

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council<sup>[913] 282</sup> or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.<sup>[914] 283</sup> Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be

---

<sup>[908] 277</sup> For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

<sup>[909] 278</sup> See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

<sup>[910] 279</sup> See the statement of Ambassador Hamed Houdeiry, Libyan People’s Bureau, Paris, *The Times*, 16 April 1986, p. 6.

<sup>[911] 280</sup> Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL, 1986, vol. 57, pp. 637–638.

<sup>[912] 281</sup> General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

<sup>[913] 282</sup> See, e.g., Report by President Clinton, AJIL, vol. 91, No. 4 (October 1997), p. 709.

<sup>[914] 283</sup> Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

concurrently attributed to the assisting and the acting State.<sup>[915] 284</sup> In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness”<sup>[916] 285</sup> of the conduct of another State, in the latter’s absence and without its consent. This is the so-called *Monetary Gold* principle.<sup>[917] 286</sup> That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### WORLD TRADE ORGANIZATION PANEL

#### *Turkey—Restrictions on Imports of Textile and Clothing Products*

In its 1999 report on *Turkey—Restrictions on Imports of Textile and Clothing Products*, the panel, in examining the Turkish argument according to which the measures at issue had been taken by a separate entity (*i.e.* the Turkey-European Communities customs union or the European Communities), concluded that the said measures were attributable to Turkey, since they had been adopted by the Turkish Government or had at least been implemented, applied and monitored by Turkey. In this regard, the panel found that, in any event, “in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC cus-

<sup>[915] 284</sup> For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

<sup>[916] 285</sup> *East Timor* (footnote [48] 54 above), p. 105, para. 35.

<sup>[917] 286</sup> *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 261, para. 55.

toms union”,<sup>[918]</sup> 134 on the basis of the principle reflected in draft article 27 adopted on first reading by the International Law Commission.<sup>[919]</sup> 135 In the report, the panel reproduced a passage of the commentary of the Commission to that provision.<sup>[920]</sup> 136

[A/62/62, para. 85]

#### INTERNATIONAL COURT OF JUSTICE

#### *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*

In its 2007 judgment in the *Genocide* case, the Court, in examining whether the Respondent was responsible for “complicity in genocide” under article III, paragraph (e), of the Genocide Convention, referred to article 16 finally adopted by the International Law Commission in 2001, which it considered as reflecting a customary rule:

In this connection, reference should be made to Article 16 of the ILC’s Articles on State Responsibility, reflecting a customary rule ...

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between ‘complicity in genocide’, within the meaning of Article III, paragraph (e), of the Convention, and the ‘aid or assistance’ of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16—setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for ‘complicity in genocide’ within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”<sup>[921]</sup> 9

[A/62/62/Add.1, para. 5]

<sup>[918]</sup> 134 WTO, Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para. 9.42.

<sup>[919]</sup> 135 This provision was amended and incorporated in article 16 finally adopted by the International Law Commission in 2001. The text of draft article 27 was the following:

#### Article 27

Aid or assistance by a State to another State for the commission of  
an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation. (*Yearbook ... 1996*, vol. II (Part Two), para. 65.)

<sup>[920]</sup> 136 WTO, Panel Report, WT/DS34/R, 31 May 1999, para. 9.43, where the panel quoted a passage taken from paragraph (2) of the commentary to draft article 27 provisionally adopted (*Yearbook ... 1996*, vol. II (Part Two), p. 99).

<sup>[921]</sup> 9 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 420.

## EUROPEAN COURT OF HUMAN RIGHTS

*El-Masri v. The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.<sup>[922] 120</sup>

[A/68/72, para. 87]

*Husayn (Abu Zubaydah) v. Poland*

In *Husayn (Abu Zubaydah) v. Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.<sup>[923] 85</sup>

[A/71/80, para. 68]]

*Al Nashiri v. Poland*

In *Al Nashiri v. Poland*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 as relevant international law.<sup>[924] 125</sup>

[A/71/80, para. 91]

*Big Brother Watch and others v. the United Kingdom*

In *Big Brother Watch and others v. the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).<sup>[925] 80</sup>

[A/74/83, p. 17]]

*Nasr et Ghali v. Italy*

The European Court of Human Rights in *Nasr et Ghali v. Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.<sup>[926] 82</sup>

[A/74/83, p. 17]]

<sup>[922]</sup> <sup>120</sup> See footnote [552] 84 above.

<sup>[923]</sup> <sup>[85]</sup> ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

<sup>[924]</sup> <sup>125</sup> ECHR, Former Fourth Section, Application No. 28761/11, Judgment, 24 July 2014, para. 207.

<sup>[925]</sup> <sup>[80]</sup> ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.]

<sup>[926]</sup> <sup>[82]</sup> ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

## PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* referred to article 16 under “principal legal and other texts”,<sup>[927] 132</sup> and noted that “[a]s the International Court of Justice decided in the Bosnia Genocide Case (2007), Article 16 of the State responsibility articles reflects a rule of customary international law”.<sup>[928] 133</sup>

[A/74/83, p. 25]

## EUROPEAN COURT OF HUMAN RIGHTS

*Big Brother Watch and others v. United Kingdom*

In *Big Brother Watch and others v. United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 16 would be relevant in a case of interception of communications by foreign intelligence services

if the receiving State aided or assisted the foreign intelligence services in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the services, the receiving State was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the receiving State.<sup>[929] 106</sup>

[A/77/74, p. 20]

---

<sup>[927]</sup> <sup>132</sup> PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 3.33.

<sup>[928]</sup> <sup>133</sup> *Ibid.*, para. 9.10.

<sup>[929]</sup> <sup>106</sup> See footnote [517] 63 above, para. 495.