

2.8. Conclusion

An exception to the general prohibition on arms transfers to opposition groups as impermissible acts of force and intervention may exist with respect to support provided to legitimate self-determination movements facing internal state repression. However, as the above analysis demonstrates, the existence of such an exception remains controversial, and strong arguments may also be raised in rebuttal.

3. Aid or Assistance in the commission of an internationally wrongful act (secondary state responsibility)

When the conduct of a state constitutes a breach of an international obligation of that state, the state has committed an international wrong for which it is responsible. Further, another state may be found responsible for *assisting* in the commission of the internationally wrongful act. To determine the circumstances in which a state may be complicit in the internationally wrongful act of another state, it is useful to first consider the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [ILC Draft Articles]³¹. In particular, Article 16 of the ILC Draft Articles establishes state responsibility for 'aiding or assisting' the commission of an internationally wrongful act by another state, where 'knowledge of the circumstances' existed and the act in question would have been wrongful had it been committed directly by the third party state. The *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*³² [ILC Commentaries] clarify the extent of third party state responsibility established by the ILC Draft Articles as follows:

*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.*³³

With respect to the requirement of knowledge of the circumstances establishing the wrongful act, the ILC Commentaries provide further that:

*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 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.*³⁴

The ILC Draft Articles codification of state responsibility for aiding or assisting in the commission of an international wrongful act by another state are not themselves determinative of the issue. The ILC is not a law-making body; its role is to work *towards* the codification and progressive development of the law. The ILC Draft Articles may in future form the basis for negotiating an international treaty on state responsibility; however, they do not yet have any conventional legal status or create any positive obligations for states. The United Nations General Assembly [UNGA] has welcomed the completion of the ILC Draft Articles, annexing them to Resolution 56/83 on 12 December 2001. While this is a significant symbolic step, the UNGA, like the ILC, has no law-making authority. In any event, Resolution 56/83 did

which may lead to some implicit support for use of force by the KLA in its own defence though providing no support for its arming by third states.

³¹ Adopted by the International Law Commission at its fifty-third session (2001). See the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10).

³² Extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2. Available on-line at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf#pagemode=bookmarks).

³³ ILC Commentaries, p. 155. Emphasis added.

³⁴ *Ibid.* Emphasis added.