

not actually *adopt* the ILC Draft Articles as a statement of the UNGA position on the matter of state responsibility. Instead, it simply “[took] note” of the ILC Draft Articles, “commend[ing] them to the attention of Governments *without prejudice to the question of their future adoption or other appropriate action*”.³⁵ Thus, while the principle of secondary state responsibility outlined in Article 16 is compelling, it has not necessarily achieved the status of an international legal obligation. It is not part of conventional (treaty-based) international law. Can we then say whether there is evidence of the acceptance of the broad interpretation of this principle as a matter of customary international law, arising from evidence of state practice and *opinio juris*? The ILC commentaries themselves cite evidence that secondary state responsibility may have achieved this customary status,³⁶ albeit within the substantial limitations imposed by the knowledge requirements established in Article 16 as discussed above.

3.1. *Charter and Customary International Law Prohibitions on the Use of Force: Assisting in the Crime of Aggression*

Applying the doctrine of complicity or of secondary state responsibility to the case of the transfer of arms by a state to another state engaged in unlawful aggression, the transferring state will be internationally responsible for assisting that aggression where the transfer was made in full knowledge of its intended use, and with a view to facilitating the aggression, provided as well that the wrongful act in fact takes place. Although the circumstances of each case will need to be carefully examined to determine if the requisite knowledge and intention are present, shipments of arms over time, in full knowledge of the use to which they are regularly being put, would appear to constitute clear evidence of a “direct link” between the aid or assistance given and the subsequent wrongful conduct.³⁷

3.2. *Restrictions on the use of Conventional Arms arising from International Humanitarian Law (IHL): Assisting Grave Breaches*

International humanitarian law (IHL) is the body of rules which, in wartime, protects people who are not, or are no longer, participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law. Serious violations of humanitarian law include the “grave breaches” identified in all four Geneva Conventions, applicable in international armed conflict, which include willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; unlawful deportation or transfer of a protected person and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly³⁸ and those identified in common article 3 to the conventions, applicable in internal conflicts. These violations include: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages of personal dignity, in particular humiliating and degrading treatment, and the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. The term is also capable of a more expansive interpretation, covering

³⁵ Emphasis added.

³⁶ For example, the ILC Commentaries conclude that “[s]tate 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.” This conclusion is based upon controversies arising over, *inter alia*, Iranian allegations that the United Kingdom [UK] provided chemical weapons to Iraq in 1984, similar concerns over Sudanese support for Iraqi chemical weapons production in the late 1990s, as well as concern over the use of UK air bases by the United States to launch attacks on Libya in 1986. See, for e.g., ILC Commentaries p. 157.

³⁷ In *Nicaragua vs. the USA* the International Court of Justice quoted the definition of aggression annexed to General Assembly Resolution 3314 (XXIX) “as expressing customary law in this respect”. (See *Nicaragua supra* at paras 187-201). Article 3 enumerates a non-exhaustive list of acts that qualify as acts of aggression including “(f) [t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.” Note also that the ILC Commentaries to Article 16 state that the prohibition on the non-use of 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. (See ILC Commentaries, *supra*, Article 16, paragraph 8, p. 158.)

³⁸ Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions of 1949.