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Chapter 5: Complicity in an Internationally Wrongful Act

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1. Introduction

The one-dimensional breach is no longer the dominant feature of the law of international responsibility. Increasingly, the breach of an international obligation is the product of complicity by other states and international organisations that operate in complex and often non-transparent schemes and arrangements. The idea of holding a subject of international law responsible beyond its conduct that amounts to the breach of its own international obligation is relatively recent. It accompanies the maturity of the international community and the gradual move towards a shared responsibility framework in international law.[1] The responsibility for complicity emerges as a tool to promote respect for legality and the rule of law in international relations.[2] It is also an avenue for the injured party to seek redress from those states or international organisations that contribute to the commission of an internationally wrongful act.

This Chapter explores the principles and standards that the International Law Commission (ILC) elaborated in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[3] and Articles 14 and 58 of the Articles on Responsibility of International Organizations (ARIO).[4] These provisions are almost identical in their content. Hence, the analysis will primarily rely on Article 16 of the ARSIWA and will point to the peculiarities in the application of its sister provisions under the ARIO. This Chapter does not address situations of

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[1] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, at 390.

[2] H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011), pp. 50–96.

[3] See Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

[4] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

complicity towards the maintenance of unlawful situations resulting from the commission of serious breaches of peremptory norms.[5]

As in any domestic legal order, the responsibility for complicity plays a vital role as the gatekeeper between lawful and unlawful forms of cooperation. Article 16 of the ARSIWA formulates the criteria for making this distinction as follows:

> *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.

In the *Bosnian Genocide* case, the International Court of Justice (ICJ or Court) held that responsibility for aid or assistance under Article 16 of the ARSIWA is a rule of customary international law.[6] In examining whether Serbia was responsible for complicity in genocide under Article III(e) of the Genocide Convention,[7] the Court looked by analogy into the requirements of Article 16 of the ARSIWA. In doing so, the Court cast doubt on the ordinary meaning of some of the conditions set forth in the text of Article 16.[8]

This Chapter examines the extent to which the provisions on complicity allow for the determination of shared responsibility and equitable allocation of legal consequences. It highlights instances from practice and *opinio juris* to show that the current regime on responsibility for complicity contains more questions than answers.[9] From the perspective of shared responsibility, three overarching aspects of the ILC's codification on complicity will be examined. First, Article 16 of the ARSIWA and its sister provisions in the ARIO cast doubt on basic postulates of the

[5] See the contribution to this volume, Chapter 9, by E.A. Wyler and L.A. Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___. See also in Chapter 2 of this volume, A. Gattini, 'Breach of International Obligations', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ____.
[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, at p. 217, para. 420 (*Bosnian Genocide*).
[7] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, in force 12 January 1951,78 UNTS 277 (Genocide Convention).
[8] *Bosnian Genocide*, n. 6, at p. 113, para. 166 and p. 216, para. 419 et seq.
[9] See e.g. Aust, *Complicity and the Law of State Responsibility*, n. 2, at pp. 97–191; A. Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Zürich: Schulthess, 2007); J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 BYIL 77–131; B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 RBDI 370–80.

modern law of responsibility, including the notion of responsibility without fault. Similarly, the boundaries between responsibility for complicity and cognate concepts such as due diligence and joint and several responsibility are relatively elusive. Second, the requirements for responsibility for complicity, in particular its opposability criterion (i.e. the requirement that the [principal] conduct would be internationally wrongful if committed by the aiding or assisting state or international organisation), undermine the legality function of international responsibility.[10] Third, the current regime on responsibility for complicity leaves little room for the injured party to obtain full reparation for the injury that bears an imprint of complicity. Part of the problem stems from the ILC's failure to provide guidance on the causal standards governing a third party's contribution to an internationally wrongful act.

Section 2 of this Chapter briefly outlines the codification history of responsibility for complicity and its interaction with the treaty norms that prohibit complicity. Section 3 discusses the requirements of responsibility for complicity. It assesses the material and cognitive elements of complicity, and makes an argument against the opposability requirement as an obstacle to a more far-reaching framework of shared responsibility. Section 4 questions the extent to which Article 16 of the ARSIWA and its sister provisions in the ARIO can accommodate concerns of shared responsibility in terms of distribution of responsibility and equitable allocation of legal consequences.

2. The emergence and codification of responsibility for complicity

In 1939, Roberto Ago considered any common consideration of different entities implicated in the same wrongdoing to be inconceivable.[11] Ago's *propos* flowing from a contractual dimension of the law of international responsibility took only a few decades to fall into disrepute.[12] As part of his seventh report to the ILC in 1978, then as a Special Rapporteur, he introduced the following

[10] SFDI, *La responsabilité dans le système international* (Paris: Pedone, 1991), pp. 319–36.
[11] R. Ago, 'Le délit international' (1939) 68 RCADI 415, at 523 ('[c]e qui paraît inconcevable en droit international, c'est toute forme de complicité, de participation, ou de provocation au délit').
[12] See G.I. Tunkin, *Theory of International Law* (Cambridge: Harvard University Press, 1974), p. 403 ('there is no exact indication that the concepts of guilt and complicity are inapplicable to a state as a subject of international law'); N. Ushakov, *Основания Международной Ответственности Государств* (Moscow: International Relations, 1983), pp. 145–54; B. Graefrath and E. Oeser, 'Teilnahmeformen bei der völkerrechtlichen Verantwortlichkeit' (1980) 29 *Staat und Recht* 45–54.

provision:

> *Article 25: Complicity of a State in the internationally wrongful act of another State*
> The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State *constitutes an internationally wrongful act* of the State, which thus *becomes an accessory to the commission of the offence* and incurs international responsibility thereby, *even if the conduct in question would not otherwise be internationally wrongful*.[13]

During the ensuing discussions, Ago stressed that 'the Commission ought to show intellectual courage in dealing with [complicity]'.[14] He was aware that '[t]he rule partook more of the progressive development of international law rather than of its codification, but he believed that, if there was one case in which the Commission should carry out progressive development, it was surely the case [of complicity]'.[15] The rule emerged as a prime example of 'multilateralization, or universalization, of the relations of responsibility'.[16] Codifying this form of responsibility meant moving beyond the monolithic view of the breach.[17] It also meant that international law would regulate the implication of multiple entities in the commission of an internationally wrongful act. The regulation of complicity is a step towards a more transparent global governance and reinforces respect for the rule of law. According to Vaughan Lowe, the notion of complicity 'heralds the extension of legal responsibility into areas where States have previously carried moral responsibility but the law has not clearly rendered them responsible for the acts that they facilitate'.[18]

In Ago's view, complicity was the only real form of participation in an internationally wrongful act.[19] Following criticisms received from states and some ILC members regarding the terminology used by Special Rapporteur Ago, the term 'complicity' mutated into a more neutral notion of

[13] R. Ago, 'Seventh Report on State Responsibility', ILC *Yearbook* 1978/II(1), at 60 (emphasis added).
[14] ILC *Yearbook* 1978/I, at 240, para. 21 (Ago).
[15] Ibid.
[16] L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127–45, at 1127.
[17] ILC *Yearbook* 1999/II(2), at 69, para. 251. Cf. E. Klein, 'Beihilfe zum Völkerrechtsdelikt', in I. von Münch (ed.), *Staatrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochhauer zum 75. Geburtstag am 28. März 1981* (Berlin: Walter de Gruyter, 1981), p. 429.
[18] V. Lowe, *International Law* (Oxford: OUP, 2007), p. 121.
[19] Ago, 'Seventh Report on State Responsibility', n. 13, at 60, para. 76.

providing 'aid or assistance' for an internationally wrongful act.[20] Substantive changes were introduced into former draft Article 27, which was adopted on the first reading of the ARSIWA:

> *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 a breach of an international obligation.[21]

The amendments introduced by the time of the second reading of the ARSIWA affected the scope of the provision and its practical consequences.[22] 'Complicity' in the original draft Article 25 and its successor draft Article 27[23] had a broader scope of application than in the current Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO.[24] Notably, the language of the original draft Articles 25 and then 27 allowed the complicit state to be held responsible in those situations where it was not bound by the same obligation as that breached by the aided or assisted state.[25] At the same time, earlier drafts of the provision contained a stringent cognitive requirement suggesting that the aid or assistance had to be rendered specifically for the commission of an internationally wrongful act. The Commentary to current Article 16 of the ARSIWA still refers to 'complicity', implying its use as a synonym for 'aid or assistance', but the reach of this form of responsibility is clearly distinct from its original meaning in Ago's draft.[26]

The stringency of the conditions set forth in the ARSIWA and ARIO provisions and their Commentaries is to some extent remedied by the fact that several international treaties expressly prohibit complicity.[27] The ILC was aware of this phenomenon, as this form of responsibility

[20] ILC *Yearbook* 1978/I, at 223–41.
[21] Ibid., at 269, para. 2.
[22] J. Crawford, 'Second Report on State Responsibility', ILC *Yearbook* 1999/II(1), at 45–57.
[23] ILC *Yearbook* 1987/II(2), at 102.
[24] Ibid., at 99–105.
[25] Ibid.
[26] ARSIWA Commentary, n. 3, Article 16, para. 11. Cf. *Bosnian Genocide*, n. 6, at p. 216, para. 419. For a continued use of the term 'complicity', see e.g. Quigley, 'Complicity in International Law', n. 9, at 77; Graefrath, 'Complicity in the Law of International Responsibility', n. 9, at 370; Klein, 'Beihilfe zum Völkerrechtsdelikt', n. 17, at 425.
[27] E.g. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, in force 1 March 1999, 2056 UNTS 211, Articles 1(1)(c); Convention on Cluster Munitions, Dublin, 30 May 2008, in force 1 August 2010, 2688 UNTS, Article 1(c); Genocide Convention, n. 7, Article III(e); and Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16, Article 2(5).

effectively leaped the artificial barrier between primary and secondary norms.[28] While the intention of the ILC was mainly to examine the principles of attribution and the consequences of the breach of an international obligation, the ordinary meaning of the terms used in Article 16 of the ARSIWA and its sister provisions in the ARIO implies recognition of the general rule not to aid or assist in the wrongful act of another state.

Recently, Olivier Corten questioned whether there is room and need for an independent application of Article 16 of the ARSIWA, as the examples from the practice of complicity fall under a particular primary rule that prohibits such conduct.[29] The general rule on responsibility for complicity would, accordingly, carry only 'une vocation didactique ou symbolique, même s'il ne ferait en théorie que répéter une interdiction déjà présente par ailleurs'.[30] This statement is questionable. Firstly, while the available practice can thus far be linked to a particular treaty norm that prohibits complicity, responsibility for complicity can be incurred in respect of any breach of an international obligation. Secondly, the same conduct may result in a direct violation of a treaty obligation regulating complicity and concurrently facilitate the commission of a parallel breach of another international obligation.[31] Thirdly, most of the primary norms dealing with complicity are directly applicable to states, and not to international organisations. Fourthly, and most importantly, primary regimes merely prohibit states from aiding, assisting, or otherwise facilitating unlawful conduct. They are often silent as to what constitutes complicit conduct, how responsibility for such conduct arises, and what legal consequences it entails. Responsibility for complicity, therefore, lies between primary and secondary norms.

The scope of responsibility for complicity depends on the view one holds of the international legal order. If it is regarded as the reproduction of bundles of bilateral sovereign relations, then complicity's effectiveness as a basis for responsibility is limited, and criteria such as the opposability or intention become justified. If, however, the international legal order today is considered to be concerned with the sanctity of international obligations, the rule of law, and transparency in global governance, then a slightly revised model of responsibility for complicity is appropriate. This Chapter discusses some of the early signs of such a model.

[28] ARSIWA Commentary, n. 3, Article 16, para. 2.
[29] O. Corten, 'La "complicité" dans le droit de la responsabilité internationale' (2011) 57 AFDI 57–84, at 60-67.
[30] Ibid., at 60.
[31] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Further Response to the United States of America Counter-claim submitted by the Islamic Republic of Iran, 24 September 2001, paras. 7.50–1.

3. The constituent elements of responsibility for complicity

The rule on responsibility for complicity garnered considerable support within the ILC and the United Nations (UN) Sixth Legal Committee.[32] However, analysis of the comments reveals varying, if not contradictory, views on the content of responsibility for complicity.[33] For example, while the United States insisted that the provision should expressly refer to the requirement of intent,[34] the Netherlands argued for retention of the actual and constructive standards of knowledge within the provision.[35] Out of around forty states that provided comments, Sweden was, to the best of the author's knowledge, the only state that expressly argued for a limitation that is currently contained in paragraph (b) of Article 16.[36] Germany and Switzerland had objections to the existence of a proper legal basis for the rule on responsibility for complicity, let alone its constituent elements.[37] Serbia raised similar objections in its pleadings in the *Bosnian Genocide* case.[38]

The following section discusses the elements of responsibility for complicity in Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO from the perspective of shared responsibility. First, the material element of complicity will be looked at and the scope of complicity will be distinguished from due diligence and joint or several responsibility. Next, the section addresses the cognitive dimension and the opposability requirement of responsibility for complicity.

3.1 Material element of complicity and its scope

As different forms of complicity proliferate in international affairs, it is crucial to inquire whether these need to be of a specific character, degree, or extent in order to trigger international

[32] Comment by Mali, ILC *Yearbook* 1980/II(1), at 101; Comment by Mexico, ILC *Yearbook* 2001/II(1), at 51; Comment by Japan, ILC *Yearbook* 1999/II(1), at 107; Comments by the United Kingdom and United States, ILC *Yearbook* 1998/II(1) at 129; ILC *Yearbook* 2001/II(1), at 52.
[33] Comments by Denmark on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden, and Denmark) and the Republic of Korea, ILC *Yearbook* 2001/II(1), at 52. See Aust, *Complicity and the Law of State Responsibility*, n. 2, at pp. 169 et seq.
[34] Comment by the United States, ILC *Yearbook* 1998/II(1), at 129.
[35] Comment by the Netherlands, ILC *Yearbook* 2001/II(1), at 52.
[36] Comment by Sweden, ILC *Yearbook* 1981/II(1), at 77. See also subsequent comment by the United States, ILC *Yearbook* 2001/II(1), at 51.
[37] Comment by Germany and Switzerland, ILC *Yearbook* 1998/II(1), at 128.
[38] *Bosnian Genocide*, n. 6, Oral Proceedings, CR 2006/40, at 50–1; CR 2006/43, at 63–5; Jurisdiction, Counter-Memorial of the Federal Republic of Yugoslavia of 22 July 1997, at 336.

responsibility. To borrow the words of the Irish High Court, '[t]he issue of 'participation' [in the alleged wrongdoing] is not a black and white issue. It may well be (…) a matter of 'substance and degree'. [39] Complicity may involve different financial, technical, and military or other contributions.

The usual scenario of complicity arises where state A actively provides military, economic, or technical assistance to state B, at the request of the latter, and with the specific purpose of committing an internationally wrongful act. For example, in the context of the ongoing hostilities in Syria, different states have allegedly been providing ammunitions and other assistance to the Syrian government, which could subsequently be used in the commission of violations of international humanitarian law and human rights law. [40] Other states have struggled in their decision-making on whether or not to arm the opposition movement.[41] Austria, for instance, has referred to Article 16 of the ARSIWA as a basis for potential responsibility if those states were to provide arms to the rebels.[42] The ICJ also used Article 16 of the ARSIWA as a benchmark for evaluating the collaboration between Serbia and the Republika Srpska, technically a non-state entity. The Court found that although Article 16 of the ARSIWA 'concerns a situation characterized by a relationship between two States, [and] is not directly relevant to the present case, it nevertheless merits consideration'.[43]

Other scenarios of complicity may occur where state A provides assistance pursuant to an existing treaty with state B, but knowing that the assistance is no longer being used in accordance with that treaty.[44] Holding states responsible for complicity in these scenarios may be problematic.[45] First, it is uncertain whether a state has the duty to inquire whether its aid or assistance is being diverted

[39] *Edward Horgan v. An Taoiseach and others*, Irish High Court, Application Declaratory Relief, Case No. 3739P (2003), para. 174.
[40] E.g. 'Syria: Who's Backing Who?', The Guardian, 11 October 2012; 'Turkey accuses Russia of supplying Syria with ammunitions', The Guardian, 11 October 2012.
[41] See P.A. Nollkaemper, 'A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition', cross-posted on the *SHARES Blog* and *EJIL Talk*, 17 June 2013. See also e.g. Council of the European Union, 'Council Declaration on Syria', 27 May 2013; 'Sending Missiles to Syrian Rebels, Qatar Muscles In', The New York Times, 29 June 2013; 'US says it will give military aid to Syria rebels', BBC News, 14 June 2013; 'US considers Syria policy as John Kerry seeks ways to help civil war rebels', The Guardian, 12 June 2013; and 'France and Britain Push Syrian Arms', International Herald Tribune, 15 March 2013.
[42] 'Austrian position on arms embargo in Syria', The Guardian, 15 May 2013.
[43] *Bosnian Genocide*, n. 6, at p. 217, para. 420.
[44] See examples of the United States cutting military aid to Indonesia on the occasion of intervention in East Timor and to Turkey after its invasion of Cyprus, cited in Quigley, 'Complicity in International Law', n. 9, at 90.
[45] See also Quigley, ibid., at 123 (on the bill before the United States Senate proposing to reduce aid from the US to Israel because of the amount it spent on civilian settlements in the West Bank and Gaza strip).

from its original purpose as set out in the treaty. States are expected to rely on the good faith commitment of their counterparts.[46] Second, the state continues to be bound to perform its obligation to deliver specific assistance, although it has the right to suspend the operation of that obligation or the treaty as a whole. Such suspension of assistance may avoid the finding of complicity. The same cannot be said about the state that simply protests against the unlawful use of its aid or assistance, while continuing to deliver that same aid or assistance.[47]

Complicity can also originate on the basis of cooperation under less formal arrangements or memoranda of understanding between states or inter-agencies.[48] These may allow for a non-scrutinised exchange of intelligence, operational collaboration, common training, and exchanges of technical equipment that is used, for example, for the commission of human rights violations by other states.[49] Less conventional forms of assistance include the provision of export credit guarantees[50] or helping a state to circumvent the requirements of UN Security Council resolutions.[51] In the context of collaboration between states and international organisations, aid or assistance can also take 'the form of providing funds to the organization for its extrabudgetary technical cooperation activities or hosting its headquarters, offices or meetings'.[52]

During the discussion of the provision on responsibility for complicity in the ILC, Paul Reuter suggested excluding remote forms of assistance from the scope of international responsibility.[53] Another member of the ILC, Nikolai Ushakov, was of the view that

[46] *Affaire du Lac Lanoux (France v. Spain)*, Award, (1957) 12 RIAA 281, at 313.
[47] Quigley, 'Complicity in International Law', n. 9, at 124; G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1–30, at 19.
[48] F. Messineo, 'The Abu Omar Case in Italy: 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture Under the UN Torture Convention' (2009) 7 J Int Crim Just 1023–44.
[49] See e.g. *R. v. Hape*, 2007 Supreme Court of Canada 26; *Canada (Justice) v. Khadr*, 2008 Supreme Court of Canada 28; *Amnesty International Canada v. Canada (Chief of the Defence Staff) (F.C.)*, 2008 Federal Court 336; *Amnesty International Canada v. Canada (Chief of the Defence Staff) (F.C.A.)*, 2008 Federal Court of Appeal 401. See also Open Society Foundation, 'Globalizing Torture: CIA Secret Detention and Extraordinary Rendition', February 2013.
[49] *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (ECtHR, 13 December 2012), para. 239.
[50] E.g. Qinghai Project, described in A. Gowlland Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) 72 BYIL 213–53, at 238; Ilisu Dam construction project, described in Aust, *Complicity and the Law of State Responsibility*, n. 2, at pp. 148-9.
[51] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 66, para. 133.
[52] Comment by International Labour Organization, UN Doc A/CN.4/568/Add.1 (2006), at 25.
[53] ILC *Yearbook* 1978/I, at 229, para. 5 (Reuter) ('[Reuter] doubted whether assistance that was materially too remote could be regarded as complicity').

> participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [is] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.[54]

However, Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO do not contain any content-based limitation of complicit conduct. The ILC's Commentaries are silent on the nature of the aid or assistance as such.[55] It follows that whether material, legal, political, or otherwise, the aid or assistance generates responsibility insofar as it can be established that it facilitates or contributes to the commission of the internationally wrongful act by another entity. That being said, the degree and extent of complicity is an important benchmark at the stage of allocation of legal consequences between the aiding or assisting entity and the aided or assisted one.[56]

The degree and extent of complicity are also essential to distinguish it from the scenario of joint responsibility.[57] For instance, Brownlie suggested that assistance in the context of aggression could lead to a finding of joint responsibility:

> The supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles equipment and personnel for the specific purpose of assisting an aggressor, would constitute a joint responsibility.[58]

Brownlie implies that the distinction between assistance as an ancillary or derivative form of responsibility, and assistance as amounting to joint responsibility, is determined by the content of 'assistance' and the intention of the assisting party. These criteria are not conclusive. Contrary to joint responsibility, where the actor itself commits the wrongful act, in the scenario that we are concerned with responsibility follows from knowingly contributing to the wrongful act of another. The complicit conduct may in itself be lawful and the legal consequences only unfold once the principal wrongful act is committed.[59] In theory, the distinction is one of attribution. Whereas in the scenario of joint or several responsibility the act causing the injury is concurrently attributable

[54] ILC *Yearbook* 1978/I, at 239 (Ushakov).
[55] See J. Crawford, *State Responsibility: The General Part* (Cambridge: CUP, 2013), p. 402.
[56] See section 4. See also ILC *Yearbook* 1978/II(2), at 104, para. 20.
[57] Ibid., para. 18.
[58] I. Brownlie, *System of the Law of Nations: State Responsibility Part 1* (Oxford: Clarendon Press 1983), p. 191.
[59] Ago, 'Seventh Report on State Responsibility', n. 13, at 58, para. 72.

to two or more states, in the situation of complicity no attribution of the principal wrongful act to the complicit entity takes place. In practice, however, it may be more difficult to distinguish complicity from a fully-fledged commission of the wrongful act in situations where multiple actors contribute to the commission of the same wrongful act, and in a similar manner. If their joint contributions are each essential for the commission of the wrongful act, they may be held jointly or severally liable.[60] If, however, their contributions only facilitate the commission of the wrongful act but are not its essential conditions, then they may be held responsible for complicity. For instance, in the case of intervention in Iraq, numerous allied states contributed with different military equipment and troops to the Coalition Provisional Authority (CPA), run by the United States and the United Kingdom.[61] Had it been established that the intervention was unlawful, it would have been factually complicated to draw a distinction between complicity and the joint responsibility of those states.

Finally, it is questionable whether the material element of complicity is limited to active conduct or whether it can also consist of omissions. In the *Bosnian Genocide* case, the ICJ ruled that the failure to comply with an obligation to prevent a given event implies behaviour of omission on behalf of the state, whereas complicity consists of an affirmative or positive action.[62] If the scope of Article 16 of the ARSIWA were indeed confined to positive actions, this would replace the general qualification of the internationally wrongful act, which originates either from actions or omissions. In respect of aid or assistance arising out of omissions, Olivier Corten and Pierre Klein questioned the usefulness 'of the notion of complicity, which it appears, can always be substituted with the far more manageable concept of due diligence'.[63] They argued that

[60] Of course, the notion of joint and several responsibility itself is not well-established in international law: see S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law The Iraq War and International Law* (Oxford: Hart Publishing, 2008), pp. 185–230 and Chapter 7 by Pierre d'Argent in this volume, P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[61] See C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law The Iraq War and International Law* (Oxford: Hart Publishing, 2008), pp. 161–183; Talmon, 'A Plurality of Responsible Actors', n. 60, at 185–230.

[62] *Bosnian Genocide*, n. 6, at p. 222, para. 432. See also Crawford, *State Responsibility*, n. 55, pp. 403-405.

[63] O. Corten and P. Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case', in K. Bannelier et al. (eds.), *The ICJ and the Evolution of International Law* (London: Routledge, 2011), p. 332.

> [e]ither the notion of complicity is interpreted as requiring the establishment of a specific intention on the part of the accomplice, and it will therefore be far more convenient to turn to the concept of due diligence, which does not require such an element of intention. Or the notion of complicity is interpreted as not requiring the establishment of such a specific intention, but this notion then appears equivalent to – or could be even said to merge with – the concept of due diligence.[64]

Some reservations are in order in respect of this argument. Certainly, the ICJ ruled that complicity in genocide 'always requires that some positive action has been taken to furnish aid or assistance'.[65] However, it is unclear whether the Court's reasoning meant to extend by implication to Article 16 of the ARSIWA, or whether its validity is confined to complicity in genocide pursuant to Article III(e) of the Genocide Convention.[66] Conceptually, the obligations of due diligence differ from the situations of responsibility for complicity arising out of omissions. Three elements shed light on a thin red line between responsibility for complicity through omission, and responsibility that arises from a failure of due diligence. First, compliance with a due diligence obligation requires some degree of effective control to be exercised, whether legally or illegally, over the territory, from inside or outside its borders.[67] This is not a relevant criterion for determining whether a state has been complicit in an internationally wrongful act. Moreover, depending on the character of the primary norm, the degree of vigilance that is required may vary.[68] Second, if we follow the reasoning of the Court, the 'capacity to influence effectively [the events leading to the breach]' now emerges as an applicable standard for the obligation to prevent,[69] whereas complicity requires 'full knowledge of facts'.[70] Third, while complicity requires actual knowledge of the circumstances of the assisted wrongful act, the failure to fulfil a state's due diligence obligation arises upon constructive knowledge or risk that the breach will

[64] Ibid., at p. 331.
[65] *Bosnian Genocide*, n. 6, at p. 222, para. 432.
[66] ILC *Yearbook* 1978/I, at 270, para. 5 (Schwebel); M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669–94, at 680-4.
[67] *Bosnian Genocide*, n. 6, Oral Proceedings, CR 2006/17, at 43–4, para. 305 (according to Brownlie, extraterritorial application of the Genocide Convention without any limit would render it 'chaotic and extra-legal'). See also A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695–713, at 699.
[68] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, at pp. 31–2, paras. 63 and 67; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, at pp. 226 and 231, paras. 160 and 178; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, at p. 79, para. 197.
[69] *Bosnian Genocide*, n. 6, at p. 221, para. 430; Declaration of Judge Skotnikov, at 10. See also P.-M. Dupuy, 'Crimes sans châtiment ou mission accompli?' (2007) 111 RGDIP 244 (noting 'un usage à éclipses de l'obligation de diligence due').
[70] *Bosnian Genocide*, n. 6, at p. 223, para. 432.

occur.[71]

The documented examples of complicity through omission are rare compared to those consisting of positive action. In Ago's view, even in cases where a state concludes a treaty with another state ensuring that it will remain neutral in the event of the latter's act of aggression against a third state, responsibility for complicity would unfold.[72] Indeed, there is no logical objection to accepting that under certain circumstances a mere formal promise may constitute aid or assistance in the sense of Article 16, as long as it contributes to the internationally wrongful act.[73] Likewise, a state may grant explicit authorisation for flights over its territory, but may also simply not object to the use of its airspace, knowing of the ultimate use of aid or assistance for the commission of an internationally wrongful act.[74] Similarly, a state may knowingly fail to inform its officials that sensitive information and intelligence sharing is used by another state for the commission of human rights violations.[75] The measures taken by several states in countering terrorism are instructive as regards instances of complicity by omission.[76] These include authorisations for overflight and landing rights, refuelling facilities for aircraft, placing at the disposal of other states unregulated access to ports and military bases, passive receipt or passage of information extracted under torture,[77] and facilitating the abduction of persons by agents of another state.[78]

Several scholars have questioned the extent to which a vote, or its absence, by a member of an international organisation could amount to aid or assistance in the commission of an

[71] Ibid., at p. 221, para. 431.
[72] ILC *Yearbook* 1978/I, at 240, para. 26 (Ago).
[73] M.L. Padeletti, *Pluralità di Stati nel fatto illecito internazionale* (Milan: Giuffrè Editore, 1990), p. 76; P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), pp. 307–8.
[74] See e.g. 'Iran Supplying Syrian Military via Iraqi Airspace', The New York Times, 4 September 2012. See also Aust, *Complicity and the Law of State Responsibility*, n. 2, at pp. 228–30; and Human Rights First, 'Enablers of the Syrian Conflict: How Targeting Third Parties Can Slow the Atrocities in Syria', March 2013.
[75] S. Borelli, 'Rendition, Torture and Intelligence Cooperation', in H. Born et al. (eds.), *International Intelligence Cooperation and Accountability* (London: Routledge, 2011), pp. 98–123.
[76] M. Scheinin and M. Vermeulen, 'International Law: Human Rights Law and State Responsibility', in H. Born et al. (eds.), *International Intelligence Cooperation and Accountability* (London: Routledge, 2011), pp. 252–274.
[77] United Kingdom House of Lords/House of Commons, Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-third Report of Session 2008-2009, HL Paper 152, HC 230, published on 4 August 2009, para. 38.
[78] D. Marty, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member State: Second Report' (Strasbourg: Council of Europe Parliamentary Assembly, 2007), paras. 11, 39 and 105; UN Human Rights Council, 'Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism', UN Doc. A/HRC/13/42 (2010), at 81–5.

internationally wrongful act.[79] Whether affirmative or negative, the vote is not tangible or physical assistance for the purported wrongful act. Special Rapporteur Giorgio Gaja expressed the view that '[a] distinction between States which vote in favour and the other States would not always be warranted. This would reflect also a policy reason, because giving weight to that distinction could negatively affect the decision-making process in many organizations, because the risk of incurring responsibility would hamper the reaching of consensus'.[80]

Comments originating from a number of states and international organisations led the Special Rapporteur Gaja to conclude that 'the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization'.[81] Unless state conduct goes clearly beyond the rules of the organisation and its decision-making procedures, responsibility for rendering aid or assistance to the internationally wrongful act would not arise.[82] Factors such as 'the size of the membership and the nature of the involvement [of the member state]' may affect the consideration of responsibility.[83] For example, China observed in the Sixth Committee that given that the decisions and actions of an organisation are generally under the control of its members or depend upon their support, those states that vote in favour or that apply such a measure should assume international responsibility.[84] The responsibility could thus vary depending on the evidence of the actual degree of participation in the voting procedures.[85] For example, a state may direct the adoption of a decision that leads to a violation of an international obligation; control the proceedings that lead to the adoption of the decision (for instance, when its representative chairs the meetings or has a

[79] See J.M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Sevilla: Instituto Andaluz de Administración Pública, 2008), pp. 298–312; D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford: OUP, 2005), p. 64; A. Geslin, 'Réflexions sur la répartition de la responsabilité entre l'organisation internationale et ses Etats membres' (2005) 109 RGDIP 539–79.
[80] G. Gaja, 'Fourth Report on Responsibility of International Organizations: Addendum', UN Doc. A/CN.4/564/Add. 2 (2006), at 13, para. 93.
[81] G. Gaja, 'Seventh Report on Responsibility of International Organizations', UN Doc. A/CN.4/610 (2009), at 25, para. 74.
[82] Article 58(2) ARIO, n. 4. See R. Higgins, 'The Legal Consequences for Member Status of Non-fulfilment by International Organizations of their Obligations towards Third Parties: Provisional Report' (1995) 66 AIDI 388–9. Cf. P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant, 1998), p. 485.
[83] ARIO Commentary, n. 4, Article 58, para. 4; P. Palchetti, 'Sulla responsabilità di uno Stato per il voto espresso in seno ad un'organizzazione internazionale' (2012) 2 Riv Dir Int 352–73, at 364 and 368.
[84] Comment by The People's Republic of China, UN Doc. A/C.6/60/SR.11 (2005), para. 53; Comment by Belarus, UN Doc. A/C.6/60/SR.12 (2005), para. 51.
[85] Cortés Martín, *Las Organizaciones Internacionales*, n. 79, at p. 300.

casting vote); exercise a veto in the process leading to a decision that could prevent the commission of the wrongful act; or be part of the minority in the decision-making process by abstaining or voting against the decision.[86] Apart from the last scenario, where the member state has little influence on the decision-making process that leads to the commission of an internationally wrongful act, responsibility for complicity could unfold.

In the *Application of the Interim Accord of 13 September 1995,* the ICJ hinted that this question of degree of contribution could have arisen if Greece's conduct were evaluated in the absence of an express obligation in Article 11 of the Interim Accord.[87] The Court stressed that the question before it was 'not whether the decision taken by NATO at the Bucharest Summit with respect to the Applicant's candidacy was due exclusively, principally, or marginally to the Respondent's objection'.[88] In different factual circumstances, the Court could have considered the degree of contribution of a particular vote or absence thereof towards the commission of the internationally wrongful act. [89]

In sum, the ILC's provisions on responsibility for complicity do not contain a content-based limitation. Any contribution insofar as it is clearly linked to the commission of the principal wrongful act would constitute aid or assistance. This arguably includes omissions. The question of responsibility then revolves around the causal link and the extent to which the specific aid or assistance, whether active or passive, facilitates the commission of an internationally wrongful act. In connection with its material element, responsibility for complicity differs from responsibility arising out of the violation of due diligence obligations, and the situations of joint or several responsibility. While the establishment of responsibility for complicity is technically derivative or ancillary in relation to the principal wrongdoing, it constitutes a separate internationally wrongful act from the principal wrongdoing.[90] In this sense, responsibility for complicity is to a large extent premised on the logic of independent responsibility, and leaves little room for genuine shared responsibility.

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[86] Ibid.
[87] *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece),* Judgment, ICJ Reports 2011, 1, at p. 25, para. 70.
[88] Ibid.
[89] See e.g. 'Statement of Intention by the Republic of Bosnia and Herzegovina to institute legal proceedings against the United Kingdom before the International Court of Justice, issued by the Mission of Bosnia' (1994) 43 ICLQ 714. Cf. *Bosnian Genocide*, n. 6, Provisional Order of 8 April 1993, ICJ Reports 1993, 3, at p. 6, para. 2(m) (where the Court stated that the embargo should be interpreted so as not to preclude the right to self-defence).
[90] ARSIWA Commentary, n. 3, Chapter IV, para. 5.

3.2 The cognitive element of complicity

There is no doubt that states are 'monstres froids, n'ont pas d'âmes et donc pas non plus d'état d'âme'.[91] As Brierly put it, '[states] have no wills except the wills of the individual human beings who direct their affairs'.[92] This holds true in respect of international organisations. Following lengthy discussions, the ILC decided that the place of fault in the domain of international responsibility was limited to settling the extent of legal consequences deriving from an injury.[93] In other words, '[i]n the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention'.[94] However, the provisions on aid or assistance do not fit this logic.

The text of Article 16 of the ARSIWA refers to 'knowledge of the circumstances of the internationally wrongful act' that the aiding or assisting entity must have in order to incur responsibility. By contrast, the ILC's Commentary indicates that the aiding or assisting state incurs responsibility only if it 'intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[95] During the process of elaboration of the ARSIWA and the ARIO, a number of states and international organisations expressed doubts as to the clarity of the requirement of 'knowledge of the circumstances', and that the 'aid be used with the view to the commission of the internationally wrongful act'.[96] The ILC did not elucidate this important aspect in Articles 14 and 58 of the ARIO.[97] Hence the mystery remains as to whether responsibility for complicity as construed by the ILC is not a reminiscence of fault, so diligently assassinated by Anzilotti and

[91] P.-M. Dupuy, 'Faute de l'État et fait internationalement illicite' (1987) 5 DRFTPCJ 51.
[92] J. Brierly, *The Law of Nations*, 6th ed., (Oxford: Clarendon Press, 1963), p. 55.
[93] J. Crawford, 'First Report on State Responsibility', ILC *Yearbook* 1998/II(1), at 27–30, paras. 108–111 and 118. Cf. R. Ago, 'La colpa nell'illecito internazionale', in *Scritti giuridici in onore di Santi Romano*, 3 vols. (Padua: CEDAM, 1940), vol. 3, pp. 177–206.
[94] ARSIWA Commentary, n. 3, Article 2, para. 10; A. Ouedraogo, 'L'évolution du concept de faute dans la théorie de la responsabilité internationale des États' (2008) 21 RQDI 129–66.
[95] ARSIWA Commentary, n. 3, Article 16, para. 5.
[96] See e.g. Comments by the United Kingdom and United States, ILC *Yearbook* 1998/II(1), at 128–129; Comments by Denmark, on behalf of the Nordic Countries (Finland, Iceland, Norway, Sweden, and Denmark), Republic of Korea, United Kingdom, United States, and the Netherlands, all reproduced in ILC *Yearbook* 2001/II(1), at 52.
[97] See G. Gaja, 'Eighth Report on Responsibility of International Organizations', UN Doc. A/CN.4/640 (2011), at 16–18, paras. 45–9 ('[i]n view of these conflicting comments [e.g. the EU and the World Bank suggesting a clear reference to intention whereas Cuba for instance suggested a presumption of knowledge of the circumstances], it seems preferable not to include in the commentary (…) a discussion of the relevance of intention on the part of the assisting or aiding international organization').

hesitantly resurrected by Ago and Arangio-Ruiz.[98] To paraphrase the former ILC member Satya Pal Jagota, the smoke of the cigarette may have left the room, but the ashes remain.[99]

Although the ICJ framed the interpretation of knowledge in the *Bosnian Genocide* case as requiring 'full knowledge of facts' on behalf of Serbia, it is not clear whether the assisting state needs to know of the actual intention of the assisted state in all circumstances, or only where the norm breached requires a particular *mens rea*.[100] It seems that the Court leaned towards the latter:

> There cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.[101]

Helmut Philipp Aust presents the problem in the following way: 'how could it be possible to distinguish between a State which is pursuing its normal course of business and a State which is about to abuse its rights or to render aid or assistance with a view to further the commission of an internationally wrongful act by another State?'[102] Construing intent as one of the conditions for responsibility for complicity is at odds with the general framework of international responsibility of states and international organisations. In this respect, the ILC's Commentary to Article 2 of the ARSIWA is instructive:

> A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by 'fault' one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.[103]

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[98] See Ago, 'Le délit international', n. 11, at 486; A. Gattini, 'La notion de faute à la lumière du projet de convention de la Commission du droit international sur la responsabilité internationale' (1992) 3 EJIL 253–84; G. Perrin, 'Le problème de la faute dans la responsabilité internationale de l'Etat', in *Im Dienst an der Gemeinschaft: Festschrift für Dietrich Schindler zum 65. Geburtstag* (Basel: Verlag Helbing & Lichtenhahn, 1989), pp. 127–36.
[99] A. Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility' (1999) 10 EJIL 397–404, at 397.
[100] *Bosnian Genocide*, n. 6, at p. 222, para. 432.
[101] Ibid.
[102] Aust, *Complicity and the Law of State Responsibility*, n. 2, at p. 83. See also ARSIWA Commentary, n. 3, Article 16, para. 5.
[103] Ibid.

In most cases, it is difficult, if not impossible, to establish that a state did not only know that its assistance would be used for a violation of an international obligation of another state, but that it had been providing assistance for that purpose.[104] The ILC discussed an example of this scenario that occurred in 1958, when Germany allowed US military bases to be set up in its territory.[105] These bases were used to send US aircraft to Lebanon for a military intervention.[106] Ago was of the opinion that this situation would fall within the boundaries of complicity, although it was unlikely that Germany desired the US intervention in Lebanon.[107] Paolo Palchetti has argued that the expression 'with the view to facilitate' as used in the ILC's Commentary to Article 16 of the ARSIWA simply means that the act of aiding and assisting must be *deliberate* in character, without any requirement that the aiding or assisting state be aware of the ultimate purpose of the act that it is assisting.[108] Neither is it necessary to show that the aiding or assisting entity intended for the wrongful act to be committed, nor that it wanted that particular outcome.[109]

If state A sends its drones to state B, the latter being continuously reproached by international organisations and other states for using drones in extrajudicial executions, a foreseeable consequence of such action is that state A cannot invoke its absence of knowledge of the circumstances surrounding the internationally wrongful act. In cases where state A supports state B in the commission of an internationally wrongful act, the assessment of the knowledge of the *circumstances* does not entail the connivance of the content, specific form, or modalities of the wrongful act as such.[110] In line with our example, state A only needs to know the circumstances of the wrongdoing, i.e. that its drones will be used to commit extrajudicial killings by state B. State A need not know that the drones will be used to kill a particular individual or the modalities of such executions. It may also occur that state A provides drones to state B for the lawful purpose of a topographic survey of a remote region. If, then, these drones are unexpectedly used for an unlawful activity, state A bears no responsibility.

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[104] Graefrath, 'Complicity in the Law of International Responsibility', n. 9, at 375. Cf. Crawford, *State Responsibility*, n. 55, at pp. 405-408.
[105] Ago, 'Seventh Report on State Responsibility', n. 13, at 58–9, para. 73.
[106] Ibid.
[107] Ibid.
[108] P. Palchetti, 'State Responsibility for Complicity in Genocide' in P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (Oxford: OUP, 2009), p. 389.
[109] Ibid. See also Quigley, 'Complicity in International Law', n. 9, at 108–17; Padeletti, *Pluralità di Stati nel fatto illecito internazionale*, n. 73, at pp. 226–7. Cf. Graefrath, 'Complicity in the Law of International Responsibility', n. 9, at 375. Cf. ILC *Yearbook* 1999/I, at 68, para. 4 (Economides).
[110] Cf. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, 4; Dissenting Opinion by Judge Azevedo, at pp. 85–6.

The test of 'knowledge of the circumstances of the wrongful act' finds some expression in practice.[111] In 2009, the UN Legal Counsel expressed an opinion regarding the collaboration of the UN Mission in the Democratic Republic of the Congo (MONUC) and the Forces armées de la République démocratique du Congo (FARDC) that supports the knowledge of the circumstances test:

> If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law [international humanitarian law, human rights law and refugee law] and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. (…) MONUC may not lawfully provide logistic or 'service' support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. (…) This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.[112]

Several actions taken with regard to the participation of different states in the conflict in Syria in 2013 may suggest that the *intention* requirement is immaterial, particularly where the pattern of violations is widespread and systematic.[113] For example, in June 2012, a Russian ship taking weaponry to the Syrian regime was not able to proceed to its final destination. It was stopped in the United Kingdom's territorial waters and had to return to Russia after the British insurers Standard Club cancelled the ship's insurance.[114] On that occasion, a Foreign and Commonwealth Office spokesman said

> [w]e are aware of a ship carrying a consignment of refurbished Russian-made attack helicopters heading to Syria. We are working closely with international partners to ensure that we are doing all we can to stop the Syrian regime's ability to slaughter civilians being reinforced through assistance from other countries.[115]

Similarly, Turkey intercepted a Russian plane heading to Syria and allegedly transporting weaponry.[116] Neither the United Kingdom nor Turkey seem to have verified whether Russia

[111] V. Lowe, 'Responsibility for the Conduct of Other States' (2002) JJIL 1–15, at 8.
[112] ARIO Commentary, n. 4, Article 14, para. 6.
[113] Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Doc. A/HRC/24/46 (2013); Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Doc. A/HRC/23/58 (2013); 'Syria: Who's Backing Who?', The Guardian, 11 October 2012; 'Arms Shipments Seen From Sudan to Syria Rebels', The New York Times, 12 August 2013; and 'In Turnabout, Syria Rebels Get Libyan Weapons', The New York Times, 21 June 2013.
[114] 'Russian arms shipment bound for Syria foiled by Britain's insurers', The Guardian, 19 June 2012.
[115] Ibid.

actually intended the shipments to be used by the Syrian regime, and for what specific purposes. These and other reactions by states to prevent complicity in a wrongful act merge legal and policy considerations. Likewise, it is not always clear whether they are premised on the responsibility for complicity or a specific primary rule. For instance, the reactions of the European Union member states to shipments of weaponry to Syria could fall concurrently under the arms trade embargo, but could also be fuelled by considerations of the general rule on the responsibility for aid or assistance.

In the *El-Masri* judgment, the European Court of Human Rights (ECtHR) emphasised that

> the Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they *were aware or ought to have been aware of the risk of that transfer*.[117]

Although the ECtHR does not state it expressly, it seems to rely on Article 16 of the ARSIWA – or on a similar rationale – as a partial basis for Macedonia's responsibility. If this reading of the Court's rationale is correct, then the ECtHR seems to subscribe to a more lenient interpretation of knowledge, whether actual or constructive.

Knowledge of the circumstances of the wrongful act thus appears to be a more objective and practical test than the requirement of intent. In ascertaining knowledge of the circumstances of the internationally wrongful act, the following criteria may be relevant: (a) the notoriety of facts where 'the circumstances were such as called for some reaction, within a reasonable time';[118] (b) the special interest of the aiding or assisting state in the region;[119] and (c) the geographical proximity.[120] Other relevant indicators include the existence of legal proceedings involving the state recipient of aid or assistance, or other independent inquiries into the allegations of complicity.[121] The nature of the aid or assistance and of the breach itself, whether instantaneous or continuous in character, may further influence the examination of whether the state or international

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[116] 'Turkey accuses Russia of supplying Syria with ammunitions', The Guardian, 11 October 2012.
[117] *El-Masri*, n. 49, para. 239 (emphasis added).
[118] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, ICJ Reports 1962, 6, at p. 23.
[119] *Fisheries (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, 116, at p. 139.
[120] *Bosnian Genocide*, n. 6, at p. 221, para. 430; *Armed Activities on the Territory of the Congo*, n. 68, at pp. 230–1, paras. 174–80.
[121] *El-Masri*, n. 49, at para. 157; A. Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87 IRRC 467–96, at 470.

organisation knew, or had reasons to know, about the relevant circumstances of the wrongful act. If, for the first act in the chain of continuous breach, one cannot presume that the state knew that it was contributing to the commission of the wrongful act, this assumption is reversed from the moment the violation extends in time and the state fails to suspend its aid or assistance. Furthermore, in situations where violations of *jus cogens* norms are implicated, or where the illegality of particular conduct by the recipient state has been declared prior to the decision by the aiding or assisting state to contribute, the presumption of knowledge is justified.[122]

In this sense, a more lenient approach to the cognitive or subjective element of complicity as compared to the requirement of intention would facilitate the establishment of shared responsibility between multiple actors. To be effective, knowledge of the circumstances of the wrongful act could be proven not only on the basis of material evidence, but also indirect evidence. Unless the substantive norm breached expressly requires the showing of intention, knowledge of the circumstances of the wrongful act is a sufficient standard for triggering the responsibility of the complicit entity.

3.3 The opposability element of the obligation breached

The developments occurring in the law of responsibility – including the more far-reaching rules on invocation and enforcement of responsibility – have reinforced the idea that the international legal order has an interest in the observance of the law. In the past, it was 'perfectly legitimate in international law to regard the idea of the breach of an obligation as the exact equivalent of the idea of impairment of the subjective right of others'.[123] Today, in many areas of international law, the respect for strictly bilateral relations has an impact on third parties, and depends upon their conduct. 'As interaction increases, more bilateral disputes will have peripheral effects'.[124]

[122] Graefrath, 'Complicity in the Law of International Responsibility', n. 9, at 377; Lowe, 'Responsibility for the Conduct of Other States', n. 111, at 14.
[123] R. Ago, 'Second Report on State Responsibility', ILC *Yearbook* 1970/II(1), 192.
[124] M.W. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Cambridge: CUP, 1974), pp. 331–2.

Under Article 34 of the Vienna Convention on the Law of Treaties, a bilateral obligation does not create any duties for third states.[125] Article 16 of the ARSIWA and its sister provisions in the ARIO reproduce this logic. They limit the responsibility to situations where both the aiding or assisting entity, and the aided or assisted entity, are bound by the same international obligation. The original Article 25 and the former draft Article 27 of the ILC's state responsibility project did not contain any such limitation. As we alluded to earlier, only one state specifically requested the ILC to consider bringing such a limitation within the scope of the provision.[126] Special Rapporteur James Crawford convinced the ILC that the rule on responsibility for aid or assistance could not 'be applied to bilateral obligations in an unqualified form':[127]

> Take a case where finance or goods are to be provided pursuant to a treaty by State A to State B, and State A realizes that to comply with the treaty will produce a breach of State B's obligation to State C. Under international law both treaties are presumably valid, although this is without prejudice to the international responsibility of State B. In such circumstances, why should State A be the judge of State B's compliance? If State B insists upon performance of its treaty with State A, is State A entitled to refuse? Yet under [former] Article 27, it would appear that if State A knowingly provides the assistance, it is responsible to State C.[128]

The Special Rapporteur's footnote attached to the preceding comment raises an important issue as to the justification of the opposability requirement:

> It might be argued that State A's intention here is not to injure State C, but rather to comply with State B's obligation. Refined judgments of the 'intention' of States, based on casuistical doctrines such as 'double effect', are not a very secure basis for State responsibility. A broad rule such as that specified in [former] Article 27 [current Article 16] could only work satisfactorily if it were open to the assisting State to justify its assistance, e.g., on the ground of an equally valid moral or legal duty. But to enact a principle of justification would plainly involve legislating in the field of the primary rules of responsibility.[129]

This assertion raises a question about the validity of treaties. Crawford seems to admit that the treaty between state A and state B is valid. If state A concludes another treaty with state C on the

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[125] Vienna Convention on the Law of Treaties, Article 34, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331. See also D.J. Bederman, 'Third Party Rights and Obligations in Treaties', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: OUP, 2012), pp. 328–46.
[126] See e.g. Comment by Sweden, ILC *Yearbook* 1981/II(1), at 77 ('[a]ssuming, for example, that State A, by treaty with State B has undertaken not to increase the size of its navy beyond a certain level, would it be unlawful for a third State to sell warships to State A, if that level is thereby exceeded?').
[127] Crawford, 'Second Report on State Responsibility', n. 22, at 51, para. 186. See also Crawford, *State Responsibility*, n. 55, pp. 409-410.
[128] Ibid.
[129] Ibid., at footnote 360.

agreement that it shall not provide state B with particular assistance, this does not necessarily imply that the initial treaty between state A and state B is invalid. If the validity of both treaties is recognised, then one is faced with the question of conflict of norms. The question is whether, by complying with the terms of the first treaty, i.e. rendering the aid or assistance prescribed therein to state B, state A is not facilitating the commission of the internationally wrongful act against state C. As Reuter explains,

> si le fait illicite réside dans la conclusion du traité (le deuxième en date) on pourrait toujours imaginer que la répartition adéquate soit l'élimination de ce traité; il pourrait en être ainsi si le deuxième était conclu de mauvaise foi et que les circonstances soient telles que l'autre partie à ce traité puisse être considérée comme un complice de la violation de l'obligation déjà souscrite par A, ce qui sera rarement le cas.[130]

The matter could be looked at differently in the context of international responsibility.[131] For example, if state A (a persistent objector to claims to extended security zones at sea)[132] assists state B (which has acquiesced in such claims) to engage in unlawful military activities within the security zone of state C, state A would incur no responsibility under current Article 16 of the ARSIWA.[133] In the author's view, this outcome is unacceptable, given that state A is fully aware that its assistance will contribute to the breach of an obligation binding state B *vis-à-vis* state C.[134] The wrongfulness of state A's conduct derives from the wrongful character of state B's conduct and the knowledge thereof by state A.

In line with the fundamental principle of good faith, the prohibition of the abuse of rights, and the principle that no state should procure injury to the rights of another, it would only be reasonable to attach legal consequences to state A's actions. Article 16(b) of the ARSIWA appears to be a safety valve for an otherwise complicit state or international organisation that can argue that it is bound

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[130] P. Reuter, *Introduction au droit des traités* (Paris: PUF, 1995), p. 99. See also H. Lauterpacht, 'Contract to Breach a Contract', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, The Law of Peace, Parts VII-VIII, 4 vols.* (Cambridge: CUP, 1978), vol. 4, pp. 340–75, at p. 374.

[131] Cf. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision, (1990) 20 RIAA 217, p. 251, para. 75 ('in international law there is no distinction between contractual and tortious responsibility'). See also A. Orakhelashvili, 'Division of Reparation between Responsible Entities', in J. Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), at p. 652.

[132] See N. Klein, *Maritime Security and the Law of the Sea* (Oxford: OUP, 2011), p. 58 ('[s]ecurity or exclusion zones in maritime space are generally accepted for use during armed conflict'). These zones can extend beyond the territorial sea of the coastal state.

[133] Lowe, 'Responsibility for the Conduct of Other States', n. 111, at 7.

[134] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7 at p. 38, para. 47.

by a different rule from the one breached by the principal wrongdoer.[135] Crawford clarifies that what in fact is required by Article 16(b) is not the identity of norms or sources of the obligation, but rather the wrongfulness of the conduct.[136] In his view, '[w]ithout the inclusion of paragraph (b), ARSIWA Article 16 could become a vehicle by which the effects of well-publicized bilateral obligations are given universal extension'.[137]

This strict 'bilateralisation' of complicity in the current Article 16 of the ARSIWA is regrettable.[138] First, the opposability of the obligation on the aiding or assisting state, and on the aided or assisted state, perpetuates a particular vision of reciprocal normativity in international law.[139] Second, it shuts the door to the development or extension of responsibility to wrongdoings committed in collaboration between states and entities other than states, which are rarely if ever bound by the same obligations. It suffices to consider the scenario of the *Kosovo* advisory opinion,[140] and to assume that the 'authors of the declaration of independence' were aided or assisted by third states. Had the ICJ deemed such declaration to be not in conformity with international law, could one raise the question of whether the aiding or assisting states bear responsibility for undermining the sovereignty and territorial integrity of Serbia?

Likewise, the requirement of opposability makes little sense in Articles 14 and 58 of the ARIO.[141] It is difficult to find examples where the organisation is bound by the same obligation as its member states. Cuba suggested deleting this requirement and ensuring 'the progressive development of a rule establishing that States and international organizations are duty-bound not to facilitate the commission of an act in breach of international law'.[142] The Russian Federation

[135] Aust, *Complicity and the Law of State Responsibility*, n. 2, pp. 264–5.
[136] Crawford, *State Responsibility*, n. 55, at p. 410.
[137] Ibid.
[138] See Crawford, 'Second Report on State Responsibility', n. 22, Annex (providing a brief comparative review on liability for inducing a breach of contract as a civil wrong).
[139] See C. Gutiérrez Espada, *El hecho ilícito internacional* (Madrid: Dykinson S.L., 2005), pp. 215–20; Aust, *Complicity and the Law of State Responsibility*, n. 2, pp. 249–65; ILC *Yearbook* 1999/I, at 68, para. 5 (Economides).
[140] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.
[141] Compare Chapter 2 of this Volume, Gattini, 'Breach of International Obligations', n. 5, p. ___.
[142] Comment by Cuba, UN Doc. A/CN.4/636 (2011), at 16.

criticised this requirement for the reason that 'some actions could be taken only by States and not by international organizations'.[143]

As Lukashuk, a former member of the ILC, rightly noted at the time of the second reading of the ARSIWA, the requirement of opposability is

> a typically private-law approach to responsibility. If an entity, while assisting another entity, breached the obligations stemming from a contract concluded with a third party, it was not considered to be liable. Even in private law, however, such acts were not deemed to be acts of good faith, something that would be all the more unacceptable in public law. The specific nature of international law and international responsibility certainly had to be borne in mind. Many States had pointed that out in the Sixth Committee, stating that the responsibility of States under international law had a sui generis quality and was neither civil nor criminal. It was on that basis that several States, including Israel, had called for the deletion of the provision that the obligation breached must also be binding upon the State that provided assistance.[144]

To accept the regulation of complicity as it appears in the provisions codified by the ILC is to recognise that there is nothing wrong with aiding or assisting a breach of an international obligation by which one is not bound. To use a metaphor, there is nothing wrong with giving the keys to the car without the car itself. This is a dangerous move, not only because it reinforces an overly restrictive notion of responsibility and legal interest, but it also fails to capture the social need of the system as a whole. The proper tests of knowledge and causation avoid opening the floodgates of responsibility for complicity, which was the apparent justification for adding the requirement of opposability in the text of Article 16(b) of the ARSIWA and its sister provisions.

The requirement of opposability is an overly formalistic tool for preserving the bilateralist structure of international responsibility. It creates an additional barrier for complicity to operate as a basis for shared responsibility. This requirement finds no clear support in practice and *opinio juris*, and was heavily criticised during the discussion of the ARIO. Instead of the opposability requirement, a more effective way to regulate the scope of responsibility for complicity would be to clarify its material and cognitive elements and to develop a proper causal analysis.

[143] Comment by the Russian Federation, UN Doc. A/C.6/60/SR.12 (2005), at 11, paras 67–9. See also Comment by Israel, UN Doc. A/C.6/60/SR.16 (2005), at 9, para. 55; Comment by Guatemala, UN Doc. A/C.5/60/SR.12 (2005), at 17, para. 103.
[144] ILC, *Yearbook* 2001/I, at 42, para. 52 (Lukashuk).

4. Distributing responsibility and allocating the legal consequences between the complicit and the principal entity

Complicity stands apart from the standard cause-and-effect analysis, which applies to any given relationship between the wrongful act and the injury.[145] It is unsettled in positive law whether the complicit conduct in a wrongful act of another generates the presumption of shared responsibility, and if so, what its modalities are.[146] This is evident in the contradictions of the ILC on the distribution of responsibility and the allocation of legal consequences between the complicit and the principal wrongdoer.[147] In essence, two causal operations take place in the situation of complicity.[148] First, a causal link must be established between the complicit conduct and the breach of an international obligation by the principal wrongdoer. Second, for the purposes of the implementation of responsibility, the causal link must be shown between the aid or assistance and the injury deriving from the principal wrongful act. It is at this second stage that the injured party will have the onus of showing that the injury, and not only the underlying wrongful act, finds some trace in the complicit conduct.

Regarding the first aspect of causal analysis, Article 16, in line with its Commentary, requires that the aid or assistance 'contributed significantly to' the commission of the internationally wrongful act.[149] The Commentary adopted on the first reading contained the following clarification: 'the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'.[150] At the same time, the ILC

[145] See Ago, 'Le délit international', n. 11, 417 et seq. Cf. Klein, 'Beihilfe zum Völkerrechtsdelikt', n. 17, at 433 (raising concern about the absence of a pre-determined causal standard in cases of complicity in the internationally wrongful act).
[146] See C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in James Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) pp. 281–9; Orakhelashvili, 'Division of Reparation between Responsible Entities', n. 131, at pp. 647–666.
[147] ARSIWA Commentary, n. 3, Article 16, paras. 4 and 10. See also Article 31 ARSIWA, para. 10; G. Arangio-Ruiz, 'Second Report on State Responsibility', ILC *Yearbook* 1989/II(1), at 15, para. 46. See also Chapter 7 in this volume, D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 60.
[148] B. Stern, 'The Obligation to Make Reparation', in J. Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), p. 570.
[149] ARSIWA Commentary, n. 3, Article 16, para. 5. See also section 3.1 above.
[150] ILC *Yearbook* 1978/II(2), at 99.

points out that the aid or assistance need not be essential for the commission of the wrongful act.[151] During the second reading of the ARSIWA, Bruno Simma warned the ILC that

> the substantial or essential element was virtually absent (...) [it] was a real problem, namely, how to be more precise and specific about the interrelationship between the aid provided to the State and the wrongful act it committed. To do so, it was important either to restrict the notion of complicity to the most serious breaches of international law and, in particular, the violation of obligations *erga omnes*, and then to be less restrictive on the link between aid and the wrongful act, or to confine oneself to forms of aid which were essential and then require a causal link between the aid and the wrongful act or, lastly, to emphasize the positive and active nature of the link, i.e., the existence of a specific link between the aid and the wrongful act.[152]

It is questionable whether requiring more than a simple factual link between the complicit conduct and the principal wrongful act is appropriate for the purposes of finding responsibility for complicity. Amidst comments received on the transposition of Article 16's content to the ARIO, the UN Office of Legal Affairs underscored 'the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas, often constitute their core functions'.[153] In this vein, the International Monetary Fund (IMF) argued, for instance, that its programme of assistance can never be 'essential, or contribute significantly, to a particular wrongful conduct of a member State', as it is within the mandate of the organisation to assist its members 'in addressing their balance of payments problems'.[154] The IMF would be unable to supervise the behaviour of the borrowing states even by loan conditionality.[155] This functional justification will not necessarily excuse the *prima facie* responsibility of the organisation. Even if it is part of the mandate of an international organisation to provide aid or assistance, it cannot do so insofar as it knows of the circumstances of the wrongful act of the receiving state. The ILC itself seems to undermine the degree-based approach when stating that the responsibility could unfold even when 'the assistance may have only been an incidental factor in the commission of the primary act, and may have contributed only to a minor

[151] Quigley, 'Complicity in International Law', n. 9, 121–2; Crawford, 'Second Report on State Responsibility', n. 22, at 50, para. 182.
[152] ILC *Yearbook* 1999/I, at 79, para. 41 (Simma).
[153] Comment by UN Office of Legal Affairs, UN Doc. A/CN.4/637/Add.1 (2011), at 19, para. 5.
[154] Comment by IMF, UN Doc. A/CN.4/582 (2007), at 10.
[155] See A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63–77, at 68.

degree, if at all, to the injury suffered'.[156]

This comment by the ILC brings us to the second aspect of causal analysis. This concerns the question of the causal link between the complicit conduct and the injury that flows from the principal wrongful act. Are the existing causal standards adequate to respond to situations of complicity? The ILC's silence in this regard is all the more problematic because it represents some leeway for otherwise complicit states and international organisations to escape their obligation of reparation *vis-à-vis* an injured party.

One uniform test of causation is not known in international law.[157] Most frequently, courts and tribunals, when examining causation, look at its factual and legal facets. In terms of the former, international courts and tribunals generally require the existence of a proximate cause between the breach of an obligation by a state and the injury suffered.[158] This is also known as in-fact causation or an objective criterion of causation.[159] It implies that only those injuries that are in a proximate relationship to the wrongful act lead to reparation.[160] According to the US-German Mixed Claims Commission,

> [i]t matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law cannot consider (…) the 'causes of causes and their impulsions one on another'. Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All

[156] ARSIWA Commentary, n. 3, Article 16, para. 10.
[157] See also Chapter 2 in this volume, Gattini, 'Breach of International Obligations', n. 5 at ___.
[158] F.V. García Amador, 'Sixth Report on State Responsibility', ILC *Yearbook* 1961/II(1), 6; Arangio-Ruiz, 'Second Report on State Responsibility', n. 147, at 12–6, paras. 34-51. See Brownlie, *System of the Law of Nations: State Responsibility*, n. 58, at p. 224; C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987), pp. 33–9.
[159] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprint 2006) (Cambridge: CUP, 1953), p. 245. See also *Guidance Regarding Jus ad Bellum Liability*, Eritrea-Ethiopia Claims Commission, Decision No. 7, (2007) 26 RIAA 1, at pp. 12–5.
[160] *Antippa (the Spyros) case v. Germany*, Case No. 285, (1926) 7 Greco-German Mixed Arbitral Tribunal 23–8. See also Arangio-Ruiz, 'Second Report on State Responsibility', n. 147, at 27–39.

> indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed.[161]

The problem with the application of this reasoning to situations of complicity is that complicit conduct as such is never the proximate cause of the injury. It is always the principal wrongful act that constitutes the proximate cause of the injury. Technically, complicity occasions the harm, rather than causes it. 'In the case of assistance to a wrongful act, the participant would neither cause the principal to act nor would the latter act in consequence of this assistance'.[162] Hence, the central question with respect to linking the complicit conduct to the injury suffered is one of foreseeability (i.e. the legal facet of causal analysis).[163] This is constructed on the assumption that the injury is a logical consequence of an act insofar as it could have been foreseen.[164] For instance, in the *Naulilaa* case, the Arbitral Tribunal resorted to the foreseeability test, holding Germany liable for all the damage that it could have foreseen, even though the link between the unlawful act and the actual damage was not really a 'direct' one.[165] Transposing the rationale of the Tribunal in the *Samoan Claims* case, the complicit entity would be liable for its share of the injury if, at the time of its decision to grant aid or assistance, it could have reasonably foreseen the injury from the principal wrongful act for which it was rendering aid or assistance.[166]

If the entity could have reasonably foreseen the injury from the principal wrongful act for which it was rendering aid or assistance, the question then is whether its share is deducted from the responsibility of the principal state or international organisation. The ILC's Commentary suggests that 'international practice and the decisions of the international tribunals do not support the

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[161] *Administrative Decision No. II*, United States-German Mixed Claims Commission, Award, (1923) 7 RIAA 29.
[162] Aust, *Complicity and the Law of State Responsibility*, n. 2, at p. 212.
[163] See *Houston Contracting Company v. National Iranian Oil Company*, Award, (1988) 20 Iran-US Claims Tribunal Reports 3; *Behring International Inc. v. Iran*, Award, (1991) 27 Iran-US Claims Tribunal Reports 218.
[164] P. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: OUP, 2001), pp. 179 et seq.
[165] *Responsabilité de l'Allemagne à raison de dommages causés dans les colonies portugaises du Sud de l'Afrique*, Award, (1928) 2 RIAA 1011, at 1032-33 (*Naulilaa*). The notion of directness has not disappeared from the causal terminology as applied by the international dispute settlement mechanisms. See different contributions in R.B. Lillich and D.J. Bederman, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (New York: Transnational Publishers, 1998).
[166] Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, n. 159, pp. 249–50 citing 'Joint Report No. II of August 12, 1904' in connection with *Samoan Claims (Germany, Great Britain, United States)*, Award (1902) 9 RIAA 15, at 23–7. See also *Lighthouse Arbitration (France v. Greece)*, Award, (1956) 23 ILR 352; A. Rovine and G. Hanessian, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission', in R.B. Lillich (ed.), *The United Nations Compensation Commission* (New York: Transnational Publishers, 1995), pp. 239 and 247.

reduction or attenuation of reparation for concurrent causes'.[167] Taken literally, this means that complicity – which is best construed as a concomitant, concurrent, or parallel cause – would have no involvement in the reparation due by the principal wrongdoer to an injured party. This could lead to potential issues of double recovery. Holding the principal wrongdoer

> liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the repayment of partial damages, in proportion to the amount of the injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded to be determined on the basis of the criteria of normality [proximate cause] and predictability [foreseeability].[168]

A reduction of reparation due by the principal wrongdoer is appropriate whenever 'an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone'.[169] Hence, the principal wrongdoer must show that a given part of the injury flowing from its wrongful act was due to the contribution of the aiding or assisting entity. This may, however, be difficult to establish where concurrent causes are of the same nature, i.e. different contributors to the wrongdoing provide the same kind of assistance. Assume that states A and B knowingly provide materials designed for environmental pollution to state C, which will construct a dam on the border with state D in breach of its international obligation. If it is impossible to identify whether the materials of state A or state B constituted the necessary or ultimate cause of the internationally wrongful act, then both state A and state B are subject to international responsibility, and any ensuing reparations would have to be split accordingly between state C on the one hand, and states A and B on the other. It follows that the aiding or assisting state will be held responsible 'if on the facts it can be established that its conduct materially contributed to the damage suffered by the [injured state], even if other factors and causal agents also enter into the equation'.[170] To assume otherwise on considerations of lack of proximity to the injury would undermine the *effet utile* of the rule on complicity.

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[167] ARSIWA Commentary, n. 3, Article 31, para. 12. See *United States Diplomatic and Consular Staff in Tehran*, n. 68, at 29–32; *Corfu Channel*, n. 110, Compensation Judgment, ICJ Reports 1949, pp. 244, 250. See also *CME Czech Republic BV (The Netherlands v. The Czech Republic)*, Partial Award, (2001) 9 ICSID Reports 113, at 231, para. 583; UN Compensation Commission, Report and Recommendations made by the Panel of Commissioners Concerning the First Installment of 'F2' Claims, UN Doc. S/AC.26/1999/23 (1999), para. 38.

[168] Arangio-Ruiz, 'Second Report on State Responsibility', n. 147, at 14, para. 44.

[169] ARSIWA Commentary, n. 3, Article 31, para. 13.

[170] Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, n. 164, at p. 188. See also ARSIWA Commentary, n. 3, Article 16, para. 10; A. Tunc (ed.), *International Encyclopedia of Comparative Law*

At a minimum, this lenient causal link is appropriate in situations where the damage is indivisible.[171] Regardless of whether complicit conduct leads to a quantifiable estimate of material damage, it always contributes to a moral damage or legal injury.[172] Satisfaction or guarantees of non-repetition may well be the appropriate form of reparation in these circumstances.[173] Relaxing the stringency of the causal relationship in proportion to the relief sought would ensure that spreading responsibility does not divert it.[174]

5. Conclusion

The constituent elements and standards of responsibility for complicity as formulated in Article 16 of the ARSIWA and Articles 14 and 58 of the ARIO leave a number of theoretical and practical questions unanswered. Considering that 'codification does not necessarily eliminate the possibility of gaps',[175] this Chapter has argued that the ILC's framework constitutes a partial, but incomplete, response to complicit behaviour in international law. To succeed in reducing black sites of non-law in the 21st century, the rule on responsibility for complicity needs to be officially divorced from the *probatio diabolica* of 'intention', extended to cover any action or omission that causally contributes to the wrongful act, and stretched beyond the limited logic of *pacta tertiis* as it operates in the law of treaties. Finally, the ICJ's application of Article 16 of the ARSIWA to the collaboration between states and non-state actors gives rise to new prospects for the rule to remedy the gaps in the existing modes of attribution of conduct.[176]

In terms of the implications of this analysis for shared responsibility, complicity allows different actors that contribute to the same internationally wrongful act to bear responsibility. However, the

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(Leiden: Martinus Nijhoff, 1983), vol. XI Torts, pp. 68–70; H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985).

[171] See *Dix Case*, Award (1903–1905) 9 RIAA 119, at 121. See also Talmon, 'A Plurality of Responsible Actors', n. 60, pp. 217 et seq.; Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit*, n. 9, pp. 277-8.

[172] B. Stern, 'A Plea for 'Reconstruction' of International Responsibility Based on the Notion of Legal Injury', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Boston/Leiden: Martinus Nijhoff, 2005), p. 93.

[173] ARSIWA Commentary, n. 3, Article 16, para. 1; *Ilaşcu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), paras. 484 et seq. See Chapter 7 in this volume, D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 60.

[174] Aust, *Complicity and the Law of State Responsibility*, n. 2, p. 89.

[175] H. Lauterpacht, *The Function of Law in the International Community* (reprint) (Oxford: OUP, 2012), p. 66.

[176] *Bosnian Genocide*, n. 6, para. 419 et seq; Crawford, 'Second Report on State Responsibility', n. 22, para. 165; E. Savarese, 'Complicité de l'Etat dans la perpétration d'actes de génocide: Les notions contiguës et la nature de la norme' (2007) 53 AFDI 280–90, at 285.

modalities for the distribution of responsibility and, even less, the allocation of legal consequences between the complicit and the principal entity, are relatively unclear. The situation becomes even more complex when multiple actors contribute to the commission of the same internationally wrongful act. This Chapter also shows that the application of the existing causal standards to the allocation of legal consequences in the scenarios of complicity might lead to inequitable results. The model of responsibility for complicity, operating without the requirements of intent and opposability, would arguably constitute a more effective mechanism for bringing complicit entities to account. Such a model would also enhance the effectiveness of complicity as a form of shared responsibility in international law. As instances and forms of complicity in the relations between states, international organisations, and non-state actors grow in numbers and complexity, the law will need to catch up with the speed of events.