Complicity
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A. Introduction

1 Complicity (aid or assistance) is a form of knowing involvement of one subject of international law in a breach of an international obligation attributable to another. Complicity, also known as aiding and abetting, is equally a form of individual liability in most domestic legal systems and in international criminal law (Criminal Responsibility, Modes of). This contribution addresses only the responsibility of States and international organizations for complicity in a wrongful act of another State or international organization.

2 The general rule on responsibility for complicity is set out in Art. 16 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (‘ARSIWA’) (State Responsibility). The provision reads as follows:

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 the knowledge of the circumstances of the internationally wrongful act; and

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

3 An equivalent provision holding international organizations responsible for aiding or assisting another State or international organization is contained in Art. 14 of the ILC’s Articles on the Responsibility of International Organizations (‘ARIO’).

4 Other provisions in the ARSIWA and ARIO deal with the more specific situations that may give rise to complicity. For example, Arts 41 (2) ARSIWA and 42 (2) ARIO impose an obligation on States and international organizations, respectively, not to assist in the maintenance of an unlawful situation flowing from the commission of a serious breach of a peremptory norm (Ius cogens). This covers, for instance, any assistance provided for the maintenance of a situation flowing from an unlawful occupation, aggression, genocide or systematic use of torture (Torture, Prohibition of). The elements of aid or assistance in Art. 41 (2) ARSIWA and Art. 42 (2) ARIO are read in connection with the general rule of responsibility for complicity, although the requirement of knowledge in the general rule is unnecessary here ‘as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State’ (ILC Commentary to Art. 41 (2) ARSIWA para. 11). Finally, Art. 58 ARIO deals with the responsibility of States for their complicity in the commission of an internationally wrongful act by an international organization, but excludes cases where Member States act in compliance with the rules of the organization (Art. 58 (2) ARIO).

5 Complicity differs from other forms of indirect responsibility, including direction (Art. 17 ARSIWA), coercion (Art. 18 ARSIWA), circumvention (Arts 17 and 61 ARIO), and joint and several responsibility (Art. 47 ARSIWA). A key distinguishing feature of responsibility for complicity is that it is derivative or ancillary. This means that responsibility for complicity only accrues after the principal wrongful act is committed and the legal consequences (eg reparations) for the aiding or assisting actor are in principle limited to the extent of aid or assistance provided. Crucially, however, once the principal act is committed, complicity in that wrongful act of another becomes an autonomous wrongful act triggering responsibility (ILC Commentary to Art. 16 ARSIWA para. 1).
The ARSIWA and ARIO rules on responsibility for complicity combine elements of codification and progressive development of international law. Art. 16 ARSIWA is a revised version of the earlier draft Art. 27, adopted on first reading in 1996, which contained neither an explicit cognitive element nor the requirement of opposability of the obligation breached (see ILC ‘Report of the International Law Commission on the Work of its 30th session (8 May–28 July 1978)’ 99-105).

Certain States initially objected to the inclusion of the rule on responsibility for complicity because of its alleged lack of basis in positive international law (see eg ILC ‘Comments and Observations Received from Governments’ 128 [Germany and Switzerland]). Some members of the ILC were also initially reluctant to accept the rule on the basis that the rule’s formulation and scope were akin to a substantive or primary rule. This is because otherwise lawful aid or assistance is rendered unlawful by the knowing facilitation of the commission of the principal wrongful act. Thus, Art. 16 imposes a particular standard of conduct on States.

B. Legal Status of the Rules on Responsibility for Complicity

The UN General Assembly took note of the ARSIWA and ARIO in its resolutions 56/83, 59/35, and 66/100, and although it is uncertain whether they will ever become a treaty, many of the ARSIWA provisions have been referred to as reflecting customary international law.

The International Court of Justice (‘ICJ’, ‘the Court’) in Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) 217 para. 420 confirmed that responsibility for complicity as set out in Art. 16 ARSIWA is a rule of customary international law. A similar pronouncement with respect to a former draft Art. 27 (with a slightly different content as mentioned above) had already been made by Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Jurisdiction and Admissibility) (Dissenting Opinion of Judge Schwebel) 608 para. 74.

There are three observations to make in respect of the Court’s judgment in Bosnian Genocide. First, the Court’s jurisdiction was based exclusively in the Genocide Convention, and the extent to which its reliance by analogy on Art. 16 ARSIWA when determining the responsibility of Serbia under Art. III (e) Genocide Convention can be generalized has been the subject of considerable academic debate. Second, the Court did not describe any confirmatory practice or opinio iuris in identifying Art. 16 as a rule of customary international law. Third, while asserting the customary character of the rule in Art. 16 ARSIWA, the Court did not strictly follow its constituent elements. For example, the Court read into Art. 16 ARSIWA the limitation of complicity to ‘some positive action’ and the test of the ‘full knowledge of the facts’, neither of which finds place in either Art. 16 or the ARSIWA Commentaries (Bosnian Genocide para. 432; cf ILC Commentary to Art. 16 ARIO para. 5).

As far as Art. 41 (2) ARSIWA is concerned, the Court recognized the existence of a duty of non-assistance in respect of the maintenance of an unlawful situation flowing from a serious breach of a peremptory norm (ius cogens) (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 [1970] [Advisory Opinion] 54 para. 119; Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory] 200 para. 159; and Jurisdictional Immunities of the State [Germany v Italy: Greece Intervening] 140 para. 93). However, in the Israeli Wall Advisory Opinion, several judges criticized the Court for imposing an obligation of non-assistance on third States in respect of a violation of an obligation erga omnes (Obligations erga omnes) (see
12 There have been numerous instances of complicity in the context of State responsibility and protests by States against such conduct (see Ago ‘Seventh Report on State Responsibility’ 58; Aust 107–91). Most of the existing practice of complicity, and the resulting responsibility, can be traced to primary rules which expressly prohibit complicity in aggression, genocide, torture, or transfer of certain weapons (see eg UNGA Res 2625 [XXV] Principle 1 para. 9; UNGA Res 3314 [XXIX] Annex Art. 3 (f); Art. III (e) Convention on the Prevention and Punishment of the Crime of Genocide; Art. 1 (c) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction; Art. 1 (c) Convention on Cluster Munitions). The UN Security Council has also imposed non-assistance obligations and arms embargoes in its resolutions (see eg UNSC Res 1572 [Ivory Coast]; UNSC Res 217 [Southern Rhodesia]; UNSC Res 276 [Namibia]; UNSC Res 713 [Yugoslavia]).

13 There is, however, comparatively little practice in respect of international organizations, and the rules contained in Arts 14 and 58 ARIO remain largely de lege ferenda. Nevertheless, these rules are of particular relevance to international financial institutions and multinational peacekeeping operations. With the growing number and functions of international organizations, rapid development of the law is expected in this area.

C. Constituent Elements of the Rules on Responsibility for Complicity

14 Several elements need to be satisfied for a finding of responsibility for complicity. First, the principal wrongful act must occur, and the assistance provided must have actually facilitated the commission of that act (ILC Commentary Art. 16 (5) ARSIWA). Second, there are three constituent elements that need to be satisfied for responsibility for complicity to accrue: (1) the material element; (2) the cognitive element; and (3) opposability of the obligation that has been breached.

1. The Material Element

15 The first constituent element of responsibility for complicity deals with the nature and form of aid or assistance. The aid or assistance may range from financial to military, from logistical to administrative. These components include providing → military assistance, financing, providing an essential facility (eg a secret detention site), allowing the use of territory or airspace, sharing intelligence, or cooperating in the unlawful transfers of alleged terrorists (the so-called extraordinary renditions; → Terrorism). Other means of assistance could trigger responsibility, including the circumvention of the mandatory UN → sanctions or the provision of credit and investment guarantees. There have been allegations of complicity of several States in the US-led intervention in Iraq in 2003, the civil war in Libya in 2011, the ongoing atrocities in Syria, and the programme of extraordinary renditions.

16 The ILC did not place any limits on the aid or assistance that would qualify such that it includes acts or omissions, or a combination of both. However, as noted above the ICJ held in the Bosnian Genocide case that complicity necessarily implies a positive action, while an omission would give rise to a violation of → due diligence obligations (Bosnian Genocide para. 432).
The limitation imposed by the Court in the *Bosnian Genocide* case is questionable as a matter of positive international law as well as from a legal policy perspective. There are several cases where a State knowingly fails to object to the use of its territory, intelligence, or personnel, thus facilitating the commission of an internationally wrongful act. These cases could be regarded as falling foul of the general obligation of every State ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’ (*Corfu Channel Case [Merits]* 22) or a specific treaty obligation to prevent or punish. However, this does not impact the possibility of holding States responsible in such circumstances for their complicity by omission. Moreover, responsibility flowing from a failure to comply with a due diligence obligation under a treaty or customary international law requires some form of control over a territory and even where the obligation applies extraterritorially, as in the case of genocide, it must still be demonstrated that the State had the ‘capacity to influence effectively the action of persons likely to commit or committing’ the wrongful act (*Bosnian Genocide* 221 para. 430). In contrast, the responsibility for complicity is triggered without the need to show that the aiding or assisting State or international organization had control or influence over the commission of the principal wrongful act. The only relevant criteria are (i) knowledge of the circumstances of the principal wrongful act and (ii) a link between the aid or assistance provided in the form of omission and the principal wrongful act.

An aspect closely connected to the content of aid or assistance is the link that must exist between the complicit conduct and the principal wrongful act for responsibility to be incurred. The text of the relevant ARSIWA and ARIO provisions is silent in this regard. However, the ILC’s commentaries to the ARSIWA and ARIO state that the aid or assistance in question must have ‘significantly facilitated’ the commission of the internationally wrongful act (ILC Commentary to Art. 16 ARSIWA para. 5). The meaning of ‘significantly’ remains to be determined in practice. The comments of States and international organizations are inconclusive on this issue. The ILC’s commentary on an earlier version of the provision referred to the aiding or assisting conduct ‘having materially facilitated’ or ‘made it easier’ for the principal wrongdoer to commit an internationally wrongful act (ILC ‘Report of the International Law Commission on the Work of its 30th Session [8 May–28 July 1978]’ 102–03 para. 14; adopted on first reading in the 1996 Draft Articles). It is unclear whether the reference to ‘significantly’ sets a higher threshold than ‘materially’. However, the ILC also stated in its Commentary that responsibility for complicity will be engaged even though ‘the assistance may have only been an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered’ (ILC Commentary to Art. 16 ARSIWA para. 10).

The discussions that took place within the ILC and the UN Sixth Legal Committee indicate that the requirement that the aid or assistance ‘significantly facilitated’ the principal wrongful act was intended to exclude aid or assistance that is too remote. It is of course a factual assessment that must be made on a case-by-case basis. For example, the provision of dual-use technology could be instrumental or merely incidental to the commission of a wrongful act. Similarly, the placing of a military base at the disposal of an aggressor State may not be significant to a campaign of aggression as a whole, but will nevertheless facilitate it and/or be significant for a separate breach of the prohibition of the use of force in international law. The *International Monetary Fund (IMF)* noted, for example, that given the purposes and function of the organization and in light of the fungible character of financial resources the ‘IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State’ (*Financial Assistance* (ILC ‘Comments and Observations Received from International Organizations’ 22 [IMF]). If the test of ‘significant’, rather than a simple and clear factual connection, is confirmed in subsequent practice of States and international
organizations, the likely result is that the responsibility for complicity would rarely, if ever, be engaged.

20 Finally, courts and tribunals when determining the form and amount of reparation due from the complicit State may need to undertake a separate causal analysis between the aid or assistance and the injury flowing from the commission of the principal wrongful act. This is problematic as the existing causal standards in international law, namely the ‘but for’ or ‘proximate cause’, would not ordinarily capture the complicit conduct. As recognized in the ILC Commentary to Art. 31 ARSIWA, ‘international practice and the decision of international tribunals do not support the reduction or attenuation of reparation for concurrent causes’ (para. 12). Complicity as a concurrent cause would then in principle not attenuate the principal wrongdoer’s obligation of full reparation, which could lead to unfair and inequitable results in practice if recovery were available from the complicit State and the principle wrongdoer.

2. The Cognitive Element

21 A finding of responsibility for complicity requires showing that the aiding or assisting State or international organization provided such aid or assistance with the knowledge of the circumstances of the principal wrongful act. A State or international organization does not assume the risk that its aid or assistance may be subsequently misused. However, if at the moment of granting aid or assistance, it has actual knowledge of the circumstances of the principal wrongful act, and such principal wrongful act is subsequently committed, responsibility for complicity is engaged.

22 The Commission failed to elaborate on the exact standard or degree of knowledge required. The ILC’s Commentary together with the Court’s interpretation of Art. 16 in the Bosnian Genocide case suggest that the general standard is one of actual knowledge. This is not to say that a lower standard of constructive knowledge could not be applicable as this is defined by the content of the primary norm. An example can be found in the recent jurisprudence of the European Court of Human Rights (ECtHR), interpreting Art. 3 ECHR while also taking into account Art. 16 ARSIWA responsibility. Conversely, the Court in the Bosnian Genocide case applied a more stringent ‘full knowledge of the facts’ interpretation of Art. 16 ARSIWA. Moreover, depending on the nature of the primary obligation breached, the requisite knowledge may include the knowledge of the specific intent, as in the case of genocide.

23 Furthermore, in its Commentaries to the relevant provisions of the ARSIWA and ARIO, the ILC noted that the aid or assistance must be rendered ‘with a view to facilitating the commission of an internationally wrongful act, and must actually do so’ (ILC Commentary to Art. 16 ARSIWA paras 3 and 5). The ILC further clarified that ‘[i]f the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no responsibility’ (ibid para. 4). This has been interpreted in doctrine as imposing a requirement of purpose-based intent. States and international organizations have expressed conflicting views on this issue. Commentators also disagree as to whether intent, in addition to knowledge, is required for the purposes of responsibility for complicity. On the one hand, intent could simply mean a deliberate decision to provide aid or assistance. On the other hand, if intent means desiring a particular outcome to be achieved with the aid or assistance, the scope of potential responsibility for such aid or assistance would be extremely limited, not least because of evidentiary difficulties of proving such intent in practice.
3. Opposability of the Obligation Breached

24 On the second reading of the ARSIWA, the ILC introduced an additional requirement for responsibility for complicity. The obligation breached by the principal with the aid or assistance provided must also apply to the aiding or assisting State or international organization. This requirement is found in paragraph (b) of Art. 16 ARSIWA and Art. 14 ARIO.

25 Although the requirement is justified in cases of breaches of treaties in line with Arts 34 and 35 → Vienna Convention on the Law of Treaties (1969), there are doubts as to its justification in the context of international responsibility generally. The requirement was not introduced because of pressure from States or international organizations. While Sweden first raised the proposal in 1981, other States did not express any strong views on the matter. Further, several States and international organizations objected to a verbatim transposition of the opposability requirement in Art. 16 (b) ARSIWA to Art. 14 (b) ARIO because other than certain customary international law rules, international organizations as separate legal entities are not bound by many of the treaty-based obligations that bind their Member States. It has been argued that the requirement of opposability significantly diminishes the → effectiveness of the ARSIWA and ARIO regime for complicity.

D. Complicity as a Mode of Attribution of Conduct

26 In the Bosnian Genocide case, the ICJ applied Art. 16 ARSIWA to the aid/assistance provided by Serbia to the Army of the Republika Srpska ('VRS'), technically a non-State actor (Bosnian Genocide [Merits] 217 paras 419–420). The Court considered the scope of Art. 16 ARSIWA as ‘not significantly different from’ that of Art. III (e) Genocide Convention (ibid 217 para. 420).

27 The Court appeared to apply Art. 16 ARSIWA as a separate basis for attribution of conduct, in addition to the traditional agency-based test of effective or overall control over non-State actors’ conduct (see ibid 207–11 paras 398–407 reassuring the effective control test as first set out in Military and Paramilitary Activities in and against Nicaragua [Merits] 64 para. 115; cf Prosecutor v Tadić [Judgment] paras 131–137)).

28 Other courts have used complicity as a ground of attribution of conduct, departing from a strict effective control test. For example, the → Inter-American Court of Human Rights (IACtHR) has used a more lenient standard ‘support or toleration of infringement of the rights’ recognized in the → American Convention on Human Rights (1969) to attribute conduct of → non-state actors to the State (see eg Case of the ‘White Van’ [Paniagua Morales et al] v Guatemala [Merits] para. 91; Río Frío Massacre v Colombia paras 48–52; Case of the ‘Mapiripán Massacre’ v Colombia [Merits, Reparations and Costs] paras 107–111 and 120). Similarly, the ECtHR has found ‘military, economic, financial and political support’ from a State to a non-State actor to be sufficient for the purposes of attribution of conduct (see eg Ilaşcu v Moldova and Russia paras 377–394). These could be regarded as → lex specialis attribution criteria to those contained in the ARSIWA. However, the resemblance to Art. 16 ARSIWA is notorious.

29 States have also referred to Art. 16 ARSIWA in respect of aiding or assisting in the commission of internationally wrongful acts by non-State actors. For instance, in its official position on an arms embargo to Syria, Austria has referred to Art. 16 ARSIWA in relation to arms being provided for the Syrian opposition in the commission of → war crimes. Austria stated that ‘[s]hould supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid or assistance in
the commission of such acts’ (see ‘Syria: Austrian Position on Arms Embargo’ [13 May 2013] Section 4).

E. Conclusion

30 The rule that complicity (aid or assistance) in an internationally wrongful act generates responsibility is part and parcel of customary international law. However, the constituent elements of this form of responsibility remain underdeveloped in practice. In its ARSIWA and ARIO provisions, the ILC failed to clarify a number of technical points in relation to the origins (fait générateur) and implementation (mise en œuvre) of responsibility for complicity. Two elements stand out in particular for lack of convincing practice and opinio iuris. These are the requirement of intent and the opposability of the obligation breached. Each of these elements directly affects the scope of responsibility for complicity.

31 In addition, following the ICJ’s Bosnian Genocide judgment, it remains unclear whether complicity could also be regarded as a general rule of attribution of conduct, alongside its original conception as a form of attribution of responsibility. Complicity as a ground of attribution of conduct could supplement the existing agency paradigm in the law of responsibility. An application of the requirements of knowledge of and nexus to the principal conduct by non-State actors would prevent complicity from becoming too broad a rule of attribution of conduct.

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