1 Introduction

1 The growing role of complicity in international law

This is a book about State responsibility for complicity. It addresses the question whether States which aid or assist other States in the commission of wrongful acts incur responsibility for their support. For a long time, this issue did not receive much attention. This has changed in recent years. The most prominent example of a situation in which complicity played a role is probably the 2003 US-led war on Iraq. While the US and the UK were the main actors in this conflict, they enjoyed support from a 'coalition' of forty-seven States which furnished assistance to varying degrees. In addition, beyond the coalition, there were States such as Germany which officially refused to participate in the attacks, but which nonetheless gave support behind the scenes. How should the contributions of Germany and other European States, which consisted in, for example, the granting of overflight rights or landing and refuelling facilities, be assessed?

Various European States also participated in the programme of so-called 'extraordinary renditions'. This programme involved the transfer of alleged terrorists to third States where they were then subjected to forceful means of interrogation.[1] If two States cooperate directly in the interrogation of a detained individual and violate human rights in so doing, they carry equal responsibility. But is a State that has allowed the transfer of the detainee through its airspace responsible, and, if so, to what extent? And what can be said of a State which more or less regularly receives information from

[1] See Georg Nolte, 'With a Little Help from My Friends', *Frankfurter Allgemeine Zeitung*, 17 December 2005, p. 8.

interrogations in which torture or other degrading treatment have occurred?[2]

While the Iraq war and the programme of 'extraordinary renditions' were the most conspicuous cases in which the issue of helping States arose in the last few years, there are further examples from international practice which show that complicity is an issue of general concern for international law. It played a role, for example, in the 2008 war between Russia and Georgia when Russia accused the US of flying 2,000 Georgian soldiers from Iraq to the theatre of conflict in Georgia.[3] In the 2009 conflict in Sri Lanka, India was accused of assisting Sri Lanka's alleged violations of international humanitarian law.[4] In 2008, States were alarmed about possible responsibility arising out of cooperation in the context of multinational military operations when they negotiated a new international agreement on cluster munitions.[5] The matter of complicity also arose in discussions about the Ilisu Dam, a massive infrastructure project in Turkey. Once completed, the dam was expected to contribute to manifold violations of international law (with respect to the rights of neighbouring States, minority rights and environmental law). The European States which Turkey initially approached for support eventually abandoned the project.[6] The list of examples could be extended. These examples demonstrate the truth of what James Crawford has observed: '[I]n practice States hunt in packs but like to be seen as hunting alone.'[7]

[2] See, on the one hand, European Commission for Democracy Through Law (Venice Commission), 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transfer of Detainees', Opinion No. 363/2005 of 17 March 2006, CDL-AD(2006)009, and, on the other hand, UK House of Lords and House of Commons, Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-Third Report of Session 2008–9, HL Paper 152, HC 230, published on 4 August 2009, para. 27.

[3] 'Russians March into Georgia', *The Guardian*, 11 August 2008, p. 1.

[4] 'India Accused of Complicity in Deaths of Sri Lankan Tamils', *The Times*, 1 June 2009, available at www.timesonline.co.uk/tol/news/world/asia/article6401557.ece (last visited 1 November 2010).

[5] 'Collateral Damage', *The Economist*, 13 December 2008, available at lexisnexis.

[6] On the international legal issues in the case, see Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers – Complicit States, Mixed Messages, and International Law', *International and Comparative Law Quarterly* 58 (2009), pp. 1–30, at pp. 10–12.

[7] James Crawford, 'Responsibility of States and Non-State Actors', Speech at the Biennial Conference of the Japanese Association of International Law, Tokyo, 14 May 2005, manuscript on file with the author, p. 13.

Today, international law provides for the responsibility of States which aid or assist in the commission of internationally wrongful acts. This much is provided for by Article 16 of the International Law Commission's Articles on State Responsibility (ASR):

> 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.[8]

In 2007, the International Court of Justice (ICJ) recognised that this provision reflects customary international law.[9] However, the exact contours of this rule remain unclear. This lack of clarity relates, first of all, to the criteria under which a helping State can be held responsible. What kind of support is required in order to render a State responsible under Article 16 ASR? What need the helping State know? Is it necessary that the helping State somehow wishes to further the ends of the main actor? It is also a difficult matter to determine how responsibility should be divided between the main actor and the complicit State. Furthermore, we need to ask ourselves if the importance of the rule which was violated by the wrongful act to which support was rendered has an influence on the responsibility of the helping State. In other words, is it relevant whether the act for which support is given is a breach of a merely technical norm, for example in international trade law, or is a violation of norms more central to international law such as the prohibition of genocide? We also need to consider how Article 16 ASR relates to other rules within the law of State responsibility. In addition, we will need to consider rules beyond this field of international law. Article 16 ASR is by no means the only rule which addresses conduct in which one State helps another.

[8] Responsibility of States for Internationally Wrongful Acts, annexed to UN Doc. A/RES/56/83 of 12 December 2001.
[9] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, para. 419.

2 The approach of this book

This book aspires to present a coherent and systematic analysis of the problem of State complicity in international law.[10] As a preliminary step, it is necessary to obtain clarity about some conceptual issues. At first sight, Article 16 ASR appears to be a rather technical norm which should lend itself to application without much ado. However, a closer look reveals that Article 16 ASR is a complex provision which sits between various currents of the development of the international legal system. Article 16 ASR is also difficult to reconcile with certain conceptual parameters which underlie the law of State responsibility.

Accordingly, before this book turns to an analysis of customary international law and the interpretation of the rules on complicity, we will need to clear the ground in order to understand better what a major step the recognition of responsibility for complicity is for the international legal system. This conceptual analysis will be effected in two steps.

Following this introductory chapter, Chapter 2 situates complicity within the traditional analytical framework of the contrast between 'bilateralism and community interest'.[11] This framework is initially a tempting conceptualisation for the subject of our study. It offers a narrative which begins with the traditional State-centred positivist international law, characterised pre-eminently by bilateral relationships.[12] Roberto Ago, the most influential international lawyer in the field of

[10] For other studies on the issue of complicity, see the two monographs by Maria Luisa Padelletti, *Pluralità di Stati Nel Fatto Illecito Internazionale* (Milan: Giuffrè, 1990); and Andreas Felder, *Die Beihilfe in der völkerrechtlichen Staatenverantwortlichkeit* (Zurich: Schulthess, 2007); as well as the following articles: Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt', in Ingo von Münch (ed.), *Staatsrecht – Völkerrecht – Europarecht. Festschrift für Hans-Jürgen Schlochauer* (Berlin: de Gruyter, 1981), pp. 425–38; John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', *British Year Book of International Law* 57 (1986), pp. 77–131; Bernhard Graefrath, 'Complicity in the Law of International Responsibility', *Revue Belge de Droit International* 29 (1996), pp. 370–80; Vaughan Lowe, 'Responsibility for the Conduct of Other States', *Kokusaiho Gaiko Zassi* 101 (2002), pp. 1–15; and Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers', pp. 1–30.

[11] Bruno Simma, 'From Bilateralism to Community Interest in International Law', *Recueil des Cours* 250 (1994-VI), pp. 217–384; Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Yoram Dinstein (ed.), *International Law at a Time of Perplexity – Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff, 1989), pp. 821–44.

[12] On the traditional bilateralism of the law of State responsibility, see James Crawford, *International Law as an Open System* (London: Cameron May, 2002), p. 29; Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International

State responsibility in the twentieth century, stated in 1939 that it was exactly this bilateral structure of international law which made it impossible to think of responsibility for complicity.[13] With the advent of a more community-oriented international law after the Second World War, these constraints appeared to have been pushed aside. We will show, however, that this juxtaposition of the old bilateral and the new community-oriented law goes only part of the way towards illuminating the subject of our study: the allegedly bilateralist old law provided, for example, for rules on the conduct of neutral States in times of war,[14] an issue closely related to questions of complicity. And the theories of the new, community-oriented law fail to provide convincing reasons why complicity is no longer to be tolerated in international law. Nonetheless, the dichotomy between the bilateral and the community-oriented sides of the law provides a useful backdrop against which complicity can be analysed.

We will explore a different theoretical perspective in Chapter 3, which focuses on the international rule of law. This challenging notion[15] is particularly relevant for the problem of complicity for a number of reasons. First, we consider the law of State responsibility to be a *conditio sine qua non* for the international rule of law. State responsibility lies at the heart of the international legal system, as this field of law provides for rules which should generally come to apply once a 'primary' rule of international law has been violated – the primary rules being the substantive obligations in international law.[16] Although the distinction between 'primary' and 'secondary' rules is not undisputed in international law,[17] we hold it to be a useful heuristic device to

Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations', *European Journal of International Law* 13 (2002), pp. 1083–98.

[13] Roberto Ago, 'Le délit international', *Recueil des Cours* 68 (1939-II), pp. 415–554, at p. 523.

[14] This holds true for both natural law currents as well as the more positivist tendencies of nineteenth-century international law: see Hugo Grotius, *De jure belli ac pacis libri tres*, translated by Francis W. Kelsey, No. 3 of 'The Classics of International Law', Vol. 2 (Oxford: Clarendon Press, 1925), III, XVII, 3 (p. 786), on the one hand, and John Westlake, *International Law*, Part II, *War* (Cambridge: Cambridge University Press, 1907), pp. 179 *et seq.* on the other.

[15] On this notion, see Arthur Watts, 'The International Rule of Law', *German Yearbook of International Law* 36 (1993), pp. 15–45, at p. 16.

[16] Roberto Ago, 'Working Paper on State Responsibility', YBILC 1963, Vol. II, p. 251, at p. 253.

[17] See, e.g., the critique of Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), pp. 80 *et seq.*

understand what the law of State responsibility is, when it intervenes and what it entails.

A second difficult feature of Article 16 ASR is that it does not neatly fit the 'primary'/'secondary' dichotomy. There is general agreement that, before the adoption of the ASR, international law did not provide for a general rule against complicity.[18] Is it then possible to view Article 16 ASR as a secondary rule which does not provide a new international obligation? Without the rule embodied in Article 16 ASR, one might conclude that States would be largely free to help other States violate international law.

Thirdly, even supporters of the 'primary'/'secondary' distinction admit that this distinction has its limits and should not be applied categorically.[19] At this point, the concept of the international rule of law steps in and helps us to understand why a body of secondary rules can include a rule on complicity such as Article 16 ASR. We will develop the notion of the international rule of law in a sense which implies that the law must be capable of solving disputes and providing answers in concrete situations.[20] This relates to the way Hersch Lauterpacht conceived the international legal system to be materially complete.[21] This material completeness need not mean that there are ready-made rules for each and every conceivable factual problem. However, this completeness means that international law should be able to provide answers to the question of the lawfulness of a given conduct. While one way to arrive at this result is to have recourse to the *Lotus* principle, according to which everything which is not expressly forbidden is allowed,[22] it is submitted here that this principle can no longer provide convincing answers in cases where the interests of States clash.[23] It will

[18] ILC Commentary to the Articles on State Responsibility, reprinted in 'Report of the International Law Commission of the 53rd Session', UN Doc. A/56/10, at pp. 131 *et seq.*, Article 16, para. 2 (hereinafter 'ILC Commentary'); Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The International Law of Responsibility* (Oxford: Oxford University Press, 2010), pp. 282–9, at p. 287.

[19] This holds true even for Roberto Ago himself, see his Statement at the 1519th Meeting of the ILC, YBILC 1978, Vol. I, p. 240, para. 27.

[20] Joseph Raz, 'The Rule of Law and Its Virtue', in Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 210–29, at p. 213.

[21] Hersch Lauterpacht, *The Function of Law in the International Community* (Cambridge: Cambridge University Press, 1933), p. 86.

[22] PCIJ, *Lotus*, Judgment, Series A, No. 10, 18.

[23] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, declaration of Judge Simma, paras. 2 *et seq.*

be shown that, without a general rule on complicity, international law would not be able to strike a balance between two legitimate interests. On the one hand, States affected by wrongful acts have the legitimate interest that third States do not contribute to these wrongful acts and thus render the acts even more damaging. On the other hand, we have the interests of third States in knowing when and under what conditions international co-operation turns into complicity.

This connects, fourthly, with the view that the international rule of law does not exhaust itself in the affirmation that States should apply existing law.[24] If this were to be the sole content of the rule of law, it would be an empty notion and would mean rather 'rule *by* law'.[25] Accordingly, we understand the rule of law to mean that States must do more than merely comply with the law in the narrowest possible sense. The example of complicity makes it particularly clear what this entails: the existence of a rule on complicity in the ASR imposes on States 'more' responsibility than would be the case if the matter were considered only in light of the obligations stemming from 'primary' rules. From these considerations, we will not deduce the existence of a clear-cut rule on complicity. We will find, however, that the analysis of the subject of our study from the viewpoint of the international rule of law suggests that there probably *should* be rules on complicity.

We will then test the presumption just established and conduct an analysis of customary international law in Chapter 4. We will find that there is sufficient practice to speak of a general rule against complicity in the law of State responsibility. We will also be able to establish the necessary *opinio juris*.

Following this exercise, we can turn in Chapter 5 to the doctrinal questions we have already briefly mentioned: under what conditions will a helping State incur responsibility under Article 16 ASR? This will involve looking mainly at three issues: what forms of conduct are eligible to trigger responsibility for complicity? What is the requisite subjective element that the aiding State needs to fulfil? And, finally, what are we to make of the criterion included in Article 16(b) ASR that the assisting State needs to be bound itself by the rule the main actor has violated?

[24] See Vaughan Lowe, 'The Iraq Crisis: What Now?', *International and Comparative Law Quarterly* 52 (2003), pp. 859–71, at p. 863.

[25] Brian Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p. 92.

In Chapter 6, we will then discuss the legal consequences of complicity. This involves looking at the division of responsibility between the main actor and the helping State as well as the possibilities for bringing complicit States to court. Here, we are faced with particular problems. It is the established case law of the ICJ that the Court cannot adjudicate disputes in the absence of an 'indispensable third party'. Known as the *Monetary Gold* principle,[26] this principle could prevent many cases involving complicity from ever reaching the Court, as establishment of the responsibility of the complicit State necessarily involves passing judgment, albeit implicitly, on the conduct of the main actor.

In Chapter 7, we will also look at the impact of what is frequently called the regime of 'aggravated responsibility'[27] on issues of complicity. Whereas we are sceptical about any reasoning which deduces the existence of a rule against complicity from the concept of *jus cogens*, it is another matter to see how peremptory norms of international law impact upon the legal qualification of specific situations which involve complicity. Articles 40 and 41 ASR provide a special regime for situations which involve 'serious breaches of peremptory norms' under international law. In this chapter, we will see how Article 16 ASR is connected to the rules in this regime such as the special rule against aid or assistance after the fact which is included in Article 41(2) ASR. We will see how obligations of non-assistance connect with the concept of non-recognition in the same provision and the obligation of cooperation to bring serious breaches of peremptory norms to an end under Article 41(1) ASR. We shall also look at the relationship between complicity and the disputed issue of countermeasures in the collective interest (Article 54 ASR). Through an interconnected reading of these different rules and norms, we will show how international law provides for differentiated responses to State complicity depending on the seriousness of the breach of the law in question. Taken together, the rules of the law of State responsibility could make an important contribution to a further normative clarification of the as yet vague and controversial concept of the 'responsibility to protect'.[28] This is owed to the fact that the rules of

[26] ICJ, *Monetary Gold Removed from Rome in 1943*, Judgment, ICJ Rep. 1954, 19, 32; ICJ, *East Timor Case*, Judgment, ICJ Rep. 1995, 90, para. 35.

[27] Antonio Cassese, *International Law*, 2nd edn (Oxford: Oxford University Press, 2005), p. 262.

[28] Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', para. 1.22, available at www.iciss.ca/report-en.asp (last visited 1 November 2010).

the law of State responsibility help to define various thresholds for the enforcement of the community interest in international law.

Finally, we need to consider that international law also provides for special rules on complicity in individual subject areas such as the law of collective security, international humanitarian law and human rights law. Not all of these norms, as we will present in Chapter 8, address the issue of complicity directly. But obligations of prevention such as Article I of the 1948 Genocide Convention[29] or the principle of *non-refoulement* in human rights law may be functional equivalents to the rules on complicity. Although they approach the role of helping States in a different way to Article 16 ASR, in terms of substance they allow complicit States to be held responsible, albeit under a different heading. An example of such an approach can be found in the 2007 ruling of the ICJ in the *Genocide Convention* case. There, the Court could find neither direct responsibility of nor complicity by Serbia with the militia of the Republika Srpska which was directly responsible for the genocide in Srebrenica. The ICJ made use, however, of Article I of the Genocide Convention and its obligation to prevent genocide from occurring. In order to establish the responsibility of Serbia in regard to this obligation, the Court emphasised the level of support given by Serbia (i.e. the Federal Republic of Yugoslavia at the time) to the Republika Srpska.[30] Although the Court was not satisfied that the prerequisites for complicity were met in their own right, Serbia's support for the Republika Srpska played a crucial role in establishing responsibility under a different heading.

3 Clarifications

As this book is about State responsibility, it leaves out of consideration the responsibility of international organisations and other types of non-State actors. It should also be mentioned that the term 'complicity' is not meant to refer to criminal law from which the term originally stems. The term was initially used by the ILC for a first draft of the provision which later became Article 16 ASR.[31] The term was then

[29] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277.
[30] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, paras. 430, 434.
[31] Roberto Ago, 'Seventh Report on State Responsibility', UN Doc. A/CN.4/307 and Add.1–2, YBILC 1978, Vol. II, Part One, p. 31, at p. 60.

abandoned because several members of the Commission considered it to be too close to criminal law. However, this has not prevented international lawyers from continuing to use the term for the situations covered by Article 16 ASR. We will do the same, if only for reasons of convenience in not having to refer each and every time to 'aid or assistance in the commission of an internationally wrongful act'. A further reason why we continue to use the term is that it allows us to describe situations without the necessity of having to determine whether the support in question fulfils the conditions of Article 16 ASR. To speak of a 'complicit State' will therefore not necessarily mean that the State in question incurs responsibility under Article 16 ASR. According to our concept of a diverse network of rules on complicity, the State may also incur responsibility under a different and more specific rule, for example under the Genocide Convention.