RE-EXAMINING INTERNATIONAL RESPONSIBILITY: "COMPLICITY" IN THE CONTEXT OF HUMAN RIGHTS VIOLATIONS

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I. INTRODUCTION

Recent events have focused the attention of international jurists on international responsibility for complicit conduct. Beginning with the question of state responsibility for the 9/11 attacks, the issue of complicity sufficient for attribution has continued to evolve and become more nuanced. More recently, the issue of complicity liability of Council of Europe member states for their alleged assistance in the abduction, detention, and rendition of terror suspects has prompted a re-examination of the secondary rules of the law of state responsibility. At the same time, the jurisprudence of the regional human rights institutions has generated an ever-lowering standard for state responsibility under their respective treaties, eroding to a considerable degree the distinction between negative and positive obligations.

This article examines the interaction of these developments in human rights law, international criminal law, and the law of state responsibility, and will discuss implications for the concept and analytical coherence of international responsibility.

II. THE MEANING OF COMPICLITY

Although the term complicity is commonly used in these contexts, its meaning can vary greatly. Use of the term frequently introduces ambiguity

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because it can refer to different types of conduct with correspondingly different legal implications.

For lawyers, the notion of complicity is first and foremost a domestic criminal law concept—a way of imputing at least partial responsibility for a criminal act to one who assists the principal in carrying it out. More generally, the term may be used to refer to a situation in which a person participates with another in the commission of a wrongful act in a way that entails some degree of responsibility.

The notion of complicity arises in various forms in international law. The use of the term that most directly corresponds to its domestic criminal law analog would be the forms of complicity recognized in international criminal law in the strict sense. As the standards for complicity liability vary among the world’s diverse domestic criminal justice systems, the international criminal courts have developed international rules by synthesizing those diverse standards. The international standards for complicity liability in this context govern individual criminal responsibility for violations of international law. However, the traditional and primary form of responsibility in the international legal system is state responsibility. Can we speak of complicity on the part of states? We frequently do—indeed, the term is used in a variety of contexts. In order to understand its legal meaning, it is essential to parse out the distinctions among the various ways in which the concept is employed.

For example, the concept was invoked in the wake of the September 11, 2001 attacks against the World Trade Center and the Pentagon. Shortly after the attacks, U.S. President George W. Bush said that those who harbor terrorists would be treated as the terrorists themselves. Some saw this as an attempt to invoke the Taliban’s complicity in the attacks as grounds for attributing the conduct of Al-Qaeda to the state of Afghanistan.

Thus, one way in which complicity is sometimes discussed is in the context of attribution. The issue of attribution arises in the context of the so-called secondary or “framework” rules of international law, as reflected in the International Law Commission’s Articles on State Responsibility. The concept of attribution is an important component in the determination of an internationally wrongful act. Since states can only act through individuals,
there needs to be a way to connect the conduct of actors to states. This is achieved by examining the relationship between a state and the individual perpetrators of a given act to see if there is a strong enough link to attribute the perpetrators’ conduct to that state.

Another way in which the term complicity might be used is in determining derivative state responsibility; that is, when one state is derivatively responsible for assisting another state in the commission of an internationally wrongful act. This type of complicity, in the sense of derivative responsibility, is somewhat analogous to attribution, but analytically distinct. Rules of attribution are concerned with the attribution of conduct to a subject of international law (i.e. in this context, a state); they are distinct from the question of responsibility. Rules of derivative responsibility focus on the relationship between a principal and an accomplice (or assistant). Thus, derivative responsibility is generally predicated on the internationally wrongful act (and thus responsibility) of a principal state. As such, it is distinct from the question of attributing the conduct of the agents of one state to another state, which, in itself, says nothing about whether an internationally wrongful act has been committed or whether any state’s international responsibility arises.

Yet another way in which the concept of complicity is employed is in the context of a failure to fulfill a positive obligation; e.g. where a state has a duty to prevent certain conduct. Complicity, even mere acquiescence, by state officials in the carrying out of such conduct would constitute a violation of that state’s positive obligation.

By parsing out the different legal issues to which this term may be applied, it becomes possible to see what standards have developed for each. It is then possible to examine the extent to which these standards are mutually reinforcing, and also the extent to which they have begun to introduce a degree of incoherence into the law of state responsibility.

III. A COMPLICITY SPECTRUM

This section analyzes the various legal issues arising in this context by elaborating a spectrum from the highest level of complicit conduct to the lowest, taking as a case study human rights violations committed by agents of

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5. Although the term “conduct” can refer to both acts and omissions, in the case of omissions the issue of attribution does not directly arise. “As omission is a lack of action, an actor is not required. Hence, the state is essentially in a constant default state of omission. However, in order for an omission to constitute a basis of responsibility, there must be a duty to act. The question of establishing a duty to act will turn on the content of the relevant primary rule. Thus, in these circumstances, the issue of attribution collapses into the content of the primary rule.” See John Cerone, Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations, 39 VAND. J. TRANSNAT’L L. 1447, 1464 (2006).

6. Id. at 1455–56.
one state on the territory of another state. The spectrum envisions at one end, maximal participation by the territorial state, and at the other end, minimal participation with respect to the same principal violations.

A. State Responsibility for violation of negative obligation

Where the link between perpetrators and the assisting state is strong enough to attribute the conduct of the perpetrators to the assisting state, the assisting state becomes a perpetrating state, giving rise to its international responsibility as such. Thus, this participating state bears independent or joint responsibility for breaching the negative obligation to refrain from violating human rights.

The standards for attribution are set forth in Part I, Chapter 2 of the Articles. The first few rules contemplate situations where the actor is, or can be assimilated to, an organ of the state. Thus, the conduct of de jure organs, lent organs, or de facto organs is attributable to the state. In the present context, these would apply only if the perpetrators were under the exclusive control, or in a situation of complete dependence upon, the “assisting state,” which clearly would be more than an assisting state if this were the case.

The next set of attribution rules apply in situations where the actor is not an organ of the state, but is in fact acting on behalf of the state in particular circumstances. These rules focus not on the general status of the actor, but on the particular conduct of the actor in the particular circumstances to determine whether the actor was, in fact, acting on behalf of the state during the relevant period.

The conduct of this type of actor (commonly referred to as a “non-state actor”) may be attributed to a state when the actor “is in fact acting on the..."
instructions of, or under the direction or control of, [a] [s]tate in carrying out
the conduct";13 when the actor is "exercising elements of the governmental
authority in the absence or default of the official authorities";14 when the
conduct is subsequently adopted by a state;15 or when the conduct is that "of an
insurrectional movement [that] becomes the new government of a [s]tate."16

These standards establish a fairly high threshold of state involvement or,
alternatively, de facto state action by non-state actors accompanied by state
authorization or disengagement. Instances of lesser participation by state
organs in the conduct of non-state actors17 are not sufficient to render such
conduct attributable to the state under the traditional rules of attribution.18
While the term complicity could be used to describe situations encompassed by
the above rules, the term usually connotes a lesser degree of involvement. This
would seem to make sense because the common sense understanding of
complicity is that the complicit party is merely assisting and is not the directly
responsible party, as it would be pursuant to a finding of attribution.

However, the jurisprudence of international criminal courts and regional
human rights bodies indicates a trend toward a lowering threshold for
attribution. For example, the Appeals Chamber of the International Criminal
Tribunal for the former Yugoslavia has held that the overall control by a state
of a hierarchically-organized non-state entity may be sufficient to assimilate
that entity to an organ of the controlling state, rendering all of its conduct
attributable to that state.19

The regional human rights institutions have gone even further, stating that
lesser degrees of involvement, even mere acquiescence, would be sufficient to
find the perpetrator’s conduct attributable to the complicit state.20

13. ILC Report, supra note 3, at 47. In the absence of specific instructions, a fairly high degree of
control has been required to attribute the conduct to the state. According to the Commentary on the Articles,
"[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the
conduct complained of was an integral part of that operation. The principle does not extend to conduct which
was only incidentally or peripherally associated with an operation and which escaped from the State’s
direction or control." Id.

14. ILC Report, supra note 3, at 49.

15. Id. at 52. See also United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980
I.C.J. 3, 65, 73, 96 (May 24).

16. ILC Report, supra note 3, at 50.

17. The term "non-state actor" is used here in the relative sense. Thus, agents of a third state who
could not be assimilated to organs of the territorial (in this context, the assisting) state would be regarded as
"non-state actors" vis-a-vis the territorial state.

(holding that provision of training, resources, and logistical support was insufficient for the conduct of the
contras to be attributable to the United States).


20. It should be noted, however, that in each of the cases in which these lower standards were
articulated, the facts showed a degree of state involvement far greater than acquiescence.
It could be argued that these institutions are simply not distinguishing between positive and negative obligations. Hence, their establishment of a lower threshold of responsibility does not in itself indicate a divergence from the traditional rules of attribution. For example, the International Covenant on Civil and Political Rights requires state parties to "respect" and to "ensure" the rights contained therein, reflecting both negative and positive obligations.\(^{21}\) The European Convention on Human Rights and Fundamental Freedoms, in contrast, employs only the phrase to "secure" rights, perhaps encouraging a conflation of positive and negative obligations.\(^{22}\) However, the European Court of Human Rights has expressly delineated the positive and negative dimensions of the obligation to "secure" rights. Indeed, there are cases in all three regional systems in which the respective human rights bodies make clear that they are analyzing complicity under the rubric of attribution and not the failure to fulfill a positive obligation.\(^{23}\)

Alternatively, it might be noted that the Articles admit the possibility of a \textit{lex specialis}, where "special rules of international law" may govern,\(^{24}\) and that the human rights institutions are developing such a \textit{lex specialis}. The problem with this rationale is that the human rights bodies have made clear when formulating their standards for attribution that they are drawing upon the general law of state responsibility.\(^{25}\)

The International Court of Justice has resisted this trend toward a lower threshold for attribution.\(^{26}\)

**B. Derivative State Responsibility for violation of negative obligation**

Derivative state responsibility arising from complicit conduct is governed by the rule set forth in article 16 of the Articles.\(^{27}\) That article, titled "Aid or assistance in the commission of an internationally wrongful act," provides:


\(^{22}\) European Convention, \textit{supra} note 7.


\(^{24}\) ILC Report, \textit{supra} note 3, at 140.

\(^{25}\) Ilascu, 40 Eur. Ct. H.R. at 117.


\(^{27}\) ILC Report, \textit{supra} note 3, at 65.
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.\(^{28}\)

According to the International Legal Commission Commentary accompanying the Articles, the assisting state must contribute "with a view to facilitating" the internationally wrongful act.\(^{29}\)

This form of responsibility is derivative of the principal state's responsibility. As such, where the principal is not violating a particular obligation, the assisting state cannot bear derivative responsibility for the violation of that obligation. For example, if the assisting state is a party to the European Convention on Human Rights, but the principal state is not, then the assisting state cannot be said to bear derivative responsibility for violating the European Convention on Human Rights.\(^{30}\)

Can the legal threshold for derivative responsibility be the same as that for state responsibility? It would seem that it could not. Derivative responsibility is a lesser form of responsibility. Common sense would seem to require that the threshold for derivative responsibility be somewhat lower than that for principal responsibility. Thus, it would be absurd to have the same level of involvement that gives rise to derivative responsibility also make the conduct of the perpetrators attributable to the assisting state.

Yet can there be a lower threshold than acquiescence? In light of the Commentary to the Articles, as well as state practice, it is clear that derivative responsibility requires more than acquiescence. Thus, the standard for attribution must necessarily be higher.

In essence, the human rights institutions have gone too far (at least in their formulations) in lowering the threshold for attribution. Ironically, however, they did not have to go that far to achieve the same result (i.e. a finding that the

\(^{28}\) \textit{Id.} \\
\(^{29}\) \textit{See ILC Report, supra note 3, at 66.} \\
\(^{30}\) \textit{See European Convention, supra note 7.} As noted above, the issue of extraterritoriality may also be relevant here. If the principal state is not bound by certain of its human rights obligations while acting outside of its territory, its responsibility cannot arise under those obligations in these circumstances. Thus, ironically, the assisting, territorial state could not bear derivative responsibility, notwithstanding the fact that the human rights violations are occurring on its territory. However, if the conduct of the perpetrators is attributable to the assisting, territorial state, its responsibility would arise as a principal. Further, even if its assistance is not sufficient to give rise to attribution, its responsibility would still arise if the relevant human rights norms entailed positive obligations. \textit{See part C, infra.}
state party was in violation of its obligations under the respective human rights treaties) because each of the human rights treaties they were interpreting imposed positive obligations as well.  

C. State Responsibility for failure to fulfill positive obligation

It is well-established that an omission can constitute an internationally wrongful act giving rise to state responsibility whenever a state is under a duty to act. 32 The scope of positive obligations—obligations imposing a duty to act—is determined by primary rules. As noted above, the primary rules set forth in each of the principal human rights treaties entail positive obligations. 33

While the scope of positive obligation varies in accordance with the primary rules, 34 the primary rules of the principal “bill of rights” type treaties 35 were formulated in similar terms, and in any event have been interpreted by their respective judicial and quasi-judicial institutions to impose comparable obligations. These institutions, drawing upon the Law of State Responsibility for Injury to Aliens, have generally settled upon a standard of “due diligence,” while recognizing that the level of conduct actually required by this standard will vary depending upon the right in question, as well as the circumstances of the particular case. 36

One of those circumstances is knowledge that violations are being perpetrated. Whatever the situation before information about violations perpetrated by third parties comes to their attention, the conduct required of states is certainly increased after they are made aware of the relevant facts. Once the state is on notice of human rights violations being committed on its territory, the state must do more; the obligation remains formally the same, but what is required to satisfy the obligation increases.

31. This is true in each case, with the possible exception of situations in which the obligations were being applied vis-a-vis rights holders based outside of the state’s territory. See, e.g., Ilascu v. Mold. & Russ., 40 Eur. Ct. H.R. 46, 116 (2004).

32. See Cerone, supra note 5.


34. The scope of positive obligation is variable. For example, the scope of positive obligations under the ICCPR is different from the scope of positive obligations under the Convention Against Torture. See ICCPR, supra note 21, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113.


And, for the same reasons noted above, the standard for failure to fulfill a positive obligation must be lower than that for attribution of the conduct of the perpetrators to the state, and presumably also lower than that for derivative responsibility for violation of a negative obligation.

IV. INDIVIDUAL RESPONSIBILITY

The international criminal tribunals are developing standards for individual criminal responsibility that in some ways diverge from this framework. Of course, individual criminal responsibility is a different form of responsibility, and need not be governed by the same standards. At the same time, the introduction of lower thresholds of liability may create tension within both systems. For example, where the standard for complicity in international criminal law becomes significantly lower than that in the law of state responsibility, the possibility exists for an individual official to be held criminally responsible for conduct that the state is permitted to undertake.

This, of course, is less of a problem than the internal incoherence that is developing within the law of state responsibility. Once the international criminal tribunals abandoned the “double-decker bus” approach to determinations of individual criminal responsibility, the link to the law of state responsibility was severed.

V. CONCLUSION

The issue of state complicity involves a complex interplay between primary (substantive) and secondary (framework) rules of international law—a distinction which is easily blurred in this context. Part of the conceptual difficulty in analyzing this problem flows from characterizing the issue as one of complicity. The term complicity may be understood to encompass a broad spectrum of conduct, with varying degrees of participation in the principal violation. These different degrees of participation may engage different modes of responsibility.

While one might normally welcome progressive developments in international law that are directed toward enhanced accountability for human rights

37. This is expressly recognized in the Articles on State Responsibility in the form of a “without prejudice” clause. See ILC Report, supra note 3, at 142. (“These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”).

38. For example, see recent submissions of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia Office of the Prosecutor asserting the existence of complicity liability where an official provides aid with awareness of a foreseeable risk that the aid will be used to commit crimes.

39. A traditional approach to determining the existence of individual criminal responsibility was to first determine whether international law had been violated by a state, and then to determine whether that breach gave rise to the criminal responsibility of the individual perpetrator. This approach has not been followed by the international criminal tribunals.
violations, we must be mindful of other possible legal consequences. For example, lowering the threshold for attribution would be particularly problematic if applied in a *jus ad bellum* context. If acquiescence were sufficient for attribution, a state’s acquiescence in an attack committed against another state could render that attack attributable to the acquiescing state, giving rise to a right of self-defense against that state. This is but one of many examples that caution against an expansive interpretation of rules in one context that can be problematic when applied to another.  

International courts need to be more sensitive to these distinctions, and they should pay closer attention to each other to avoid breaking down the system of rules that the codification of the law of state responsibility was intended to achieve. Coherence is not only essential to the legitimacy of this system of rules, it is also an essential foundation for the relatively fragile international judiciary that is its steward.

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40. Another example of this more general phenomenon may be seen in recent developments in the *jus in bello*. The international criminal tribunals have increasingly found prohibitory rules of the law of international armed conflict to be applicable in non-international armed conflict. This has led to claims by states that the authorizations of the law of international armed conflict (e.g. to kill or detain indefinitely enemy combatants) similarly apply to situations of non-international armed conflict, even where such conflict occurs on the territory of another state. The broadened approach to ascertaining the existence of a nexus to armed conflict (for the purpose of prosecuting war crimes) can similarly back-fire (e.g. in determining combatant status).