

Complicity and its Limits in the Law of International Responsibility

Vladyslav Lanovoy



• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2016

Hart Publishing

An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd Bloomsbury Publishing Plc
Kemp House 50 Bedford Square
Chawley Park London
Cumnor Hill WC1B 3DP
Oxford OX2 9PH UK
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

**HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the
Diana logo are trademarks of Bloomsbury Publishing Plc**

First published 2016

© Vladyslav Lanovoy

Vladyslav Lanovoy has asserted his right under the Copyright, Designs and Patents
Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by
any means, electronic or mechanical, including photocopying, recording, or any information storage or
retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for
loss or damage occasioned to any person acting or refraining from action as a result
of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown
Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary
Copyright ©. This information is reused under the terms of the Open Government Licence v3.0
(<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) excepted where
otherwise stated.

All Eur-lex materials used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998–2015.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-78225-940-4
ePDF: 978-1-78225-937-4
ePub: 978-1-78225-938-1

Library of Congress Cataloging-in-Publication Data

Names: Lanovoy, Vladyslav, author.

Title: Complicity and its limits in the law of international responsibility / Vladyslav Lanovoy.

Description: Oxford ; Portland, Oregon : Hart Publishing, 2016. | Series: Studies in international law ;
volume 59 | Includes bibliographical references and index.

Identifiers: LCCN 2016019864 (print) | LCCN 2016020005 (ebook) |
ISBN 9781782259404 (hardback : alk. paper) | ISBN 9781782259381 (Epub)

Subjects: LCSH: Government liability (International law) | International criminal
law. | Accomplices.

Classification: LCC KZ4080 .L36 2016 (print) | LCC KZ4080 (ebook) | DDC 342.08/8—dc23

LC record available at <https://lcn.loc.gov/2016019864>

Series: Studies in International Law, volume 59

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

1

Introduction

*When Pilate saw that he was getting nowhere,
but that instead an uproar was starting,
he took water and washed his hands in front of the crowd:
'I am innocent of this man's blood', he said.
'It is your responsibility'. (Matthew 27:24)*

I. RESEARCH QUESTION

A VIOLATION OF an international obligation by one actor is often a result of complicity of another. Complicity is a product of the multifaceted ways in which States, international organisations and other actors interact in modern international affairs.¹ States have assisted others in extraordinary rendition, secret detention and torture in the context of the so-called war on terror. Likewise, there have been cases of military aid for the unlawful use of force or aggression, lethal, technical and financial assistance towards the commission of violations of international human rights and humanitarian law, intelligence sharing and placing of military bases for drone attacks in third States, or financing of non-State actors that commit terrorist activities in a third State. There have also been less common allegations of complicity of international organisations or their Member States in violations of international obligations in the context of joint military and peace-keeping operations. It is certain that many more instances have escaped public scrutiny, or will be revealed years after the event.

As Pilate in front of the crowd, an accomplice actor will seek safe haven from responsibility. This comes as no surprise in international law, a decentralised legal order with weak enforcement mechanisms and perennial institutional flaws. States and international organisations are responsible for actions or omissions attributable to them and which constitute a

¹ P Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge, CUP, 2002) preface x ('The globalising of human society is also a globalising of social evil').

2 Introduction

violation of their own obligations.² This principle of independent responsibility is paramount throughout the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on Responsibility of International Organizations (ARIO).³ However, this principle leaves little space for the consideration of how multiple actors may participate in an internationally wrongful act and what their share of responsibility for such participation should be.⁴ Complicity is one of the most common means of participating in an internationally wrongful act.⁵

This book examines the existing legal framework of international responsibility for complicity (aid or assistance) as it applies to States and international organisations.⁶ What are the limits of complicity as a basis of responsibility in general international law? Does the existing legal framework effectively respond to instances of complicity in the internationally wrongful acts? Is it useful to have a general framework on responsibility for complicity when most practical examples of complicity to date appear to be covered by specific primary rules? These are some of the key

² ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) 2 (pt 2) *YBILC* 31, Art 2; ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (2011) 2 (pt 2) *YBILC* 2, Art 3; see also UNGA, 'Res 56/83' (12 December 2001) UN Doc A/RES/56/83, para 3 (taking note of the ARSIWA); UNGA, 'Res 59/35' (2 December 2004) UN Doc A/RES/59/35, para 1 (commending the ARSIWA 'without prejudice to the question of their adoption or other appropriate action'); UNGA, 'Res 66/100' (9 December 2011) UN Doc A/RES/66/100, para 3 (taking note of the ARIO).

³ The principle derives from an old Latin maxim 'nemo punitur pro alieno delicto' ('No one is to be punished for the crime or wrong of another'). For an early recognition of this principle in international law which has since been affirmed on multiple occasions see, eg *Paula Mendel and others (United States) v Germany* (1926) 7 *RIAA* 372; *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] *PCIJ Ser A/B No 74*, 10, 28; see also J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 1–60.

⁴ On the existing limitations of the framework of international law for a genuine shared responsibility, including between the complicit and principal wrongdoers, see, eg JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale J Intl L* 225; A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan J Intl L* 359; C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in J Crawford et al (eds), *The Law of International Responsibility* (Oxford, OUP, 2010); V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge, CUP, 2014); on the theory and practice of international responsibility see generally J Crawford, *State Responsibility: The General Part* (Cambridge, CUP, 2013).

⁵ ILC, 'ARSIWA' (n 2) 65, para 8 ('the situations covered in Chapter IV [including responsibility for complicity] have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases').

⁶ ILC, 'Report of the International Law Commission on the Work of Its 25th Session (7 May–13 July 1973)' (1973) UN Doc A/9010/Rev 1, reproduced in (1973) 2 *YBILC* 161, 175, para 10 (the term international responsibility covers 'every kind of new relations which may arise, in international law, from the internationally wrongful act').

questions posed in this book which will no doubt continue to generate lively debate in the years to come.

II. THE DEFINITION OF COMPLICITY IN INTERNATIONAL LAW

Complicity is commonly defined as 'being an accomplice; partnership in an evil action ... state of being complex or involved', whereas an accomplice is 'an associate in guilt, a partner in crime'.⁷ Black's Law Dictionary defines complicity as '[a]ssociation or participation in a criminal act; the act or state of being accomplice'.⁸ However, in international law, the definition of complicity is more complex. According to Jean Salmon, complicity has a tripartite meaning in international law: (i) as a form of international responsibility; (ii) its past use as a mode of attribution of private conduct to the State that has failed to exercise the required degree of vigilance; and (iii) as a form of liability in international criminal law.⁹ A fourth dimension of complicity as an emerging standard of corporate liability could be added to this multi-layered definition in international law.¹⁰

This book focuses on the first dimension of complicity, that is as a form of international responsibility under general international law. Despite their distinct normative functions and foundations, the remaining dimensions of complicity, in particular that of international criminal law, still inform the analysis. This allows a more holistic understanding of the evolution of the concept of responsibility for complicity in general international law, particularly as its elements and criteria of application need

⁷ *The Oxford English Dictionary*, vol 2 (Oxford, Clarendon Press, 1983) 729.

⁸ *Black's Law Dictionary* (4th edn, St Paul, West Publishing, 2011) 140.

⁹ J Salmon, *Dictionnaire de droit international public* (Bruxelles, Bruylant, 2001) 218–29.

¹⁰ See, eg *In re South African Apartheid* (Judgment) [2009] 617 F Supp 2d 228 (SDNY); *Presbyterian Church of Sudan v Talisman Energy Inc* (Judgment) [2005] 374 F Supp 2d 331 (SDNY); *Doe v Unocal* (Judgment) [2002] 395 F 3d 932 (9th Cir 2002); see also International Commission of Jurists, 'Corporate Complicity & Legal Accountability' (Geneva, International Commission of Jurists, 2008); A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, OUP, 2006) 252–63; C Wells and J Elias, 'Catching the Conscience of the Kings: Corporate Player on the International Stage' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford, OUP, 2005); A Clapham and S Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2000) 24 *Hastings Intl & Comp LR* 339; JP Bohoslavsky and V Oppenhaffen, 'Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 *Harvard Human Rights J* 157; JP Bohoslavsky and M Rulli, 'Corporate Complicity and Finance as a "Killing Agent": The Relevance of the Chilean Case' (2010) 8 *JICJ* 829; A Adeyeye, 'Corporate Responsibility in International Law: Which Way to Go' (2007) 11 *Singapore YBIL* 141; A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *JICJ* 899; E Mongelard, 'Corporate Civil Liability for Violations of International Humanitarian Law' (2006) 88 *IRRC* 665; H van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese J Intl L* 43; S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 *Berkeley J Intl L* 451.

4 Introduction

to be refined in practice. An analysis of the operation of responsibility for complicity in general international law may draw upon the experience of the international criminal tribunals, which have dealt with similar concepts in the context of individual criminal liability. However, this book avoids making any direct analogies. In fact, the use of the term 'complicity' in general international law might be questioned at the outset because of its common criminal connotation.¹¹ This was seen as a 'source of ambiguity or misinterpretation' by the ILC, which elected to use the term of 'aid or assistance' in the relevant provisions of the ARSIWA and ARIO in its place.¹² However, the reference to 'complicity' in the relations between subjects of international law and in doctrine abounds, and the terms of 'aid or assistance' and 'complicity' are for the most part used interchangeably.¹³ One may legitimately doubt, however, whether they are synonymous, particularly when comparing the initial rule in 1978 as proposed by the ILC's Special Rapporteur Roberto Ago and that devised under the leadership of Special Rapporteur James Crawford, which became current Article 16 ARSIWA.¹⁴

In sum, complicity is a form of participation in the wrongful act of another State or international organisation. Responsibility for complicity in general international law can thus be defined as responsibility of a State or international organisation for its action or omission, knowingly facilitating the commission of an internationally wrongful act by another actor.

III. RESPONSIBILITY FOR COMPLICITY IN AN INTERNATIONALLY WRONGFUL ACT

Complicity in the wrongful act is a separate trigger of responsibility (*fait générateur*) from the principal wrongful act it facilitates. Accordingly, the complicit actor, whether it is a State or international organisation, is

¹¹ ILC, 'Summary Record of the 1517th Meeting' (13 July 1978), reproduced in (1978) 1 YBILC 228, 229, para 4 (Reuter); ILC, 'Summary Record of the 1518th Meeting' (17 July 1978), reproduced in (1978) 1 YBILC 232, 233, para 3 (Ushakov); *ibid* 234, para 11 (Sahović).

¹² ILC, 'Summary Record of the 1524th Meeting' (24 July 1978), reproduced in (1978) 1 YBILC 269, para 4 (Schwebel).

¹³ ILC, 'ARSIWA' (n 2) 67, para 11 (Art 16 Commentary); see, eg B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 RBDI 370, 372 ('the term complicity so far has been used in international relations in the political field. It has a pejorative connotation and denounces an act as illegal because it is part of another illegal act or in support of a crime. It always designates a form of participation and derives the moral condemnation from the illegality of the principal act').

¹⁴ See ch 3, s III; for a critical analysis of the drafts of the rule that preceded Art 16 ARSIWA see, eg E Klein, 'Beihilfe zum Völkerrechtsdelikt' in I von Münch (ed), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (Berlin, Walter de Gruyter, 1981); J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 *British YBIL* 77; Graefrath (n 13).

responsible not for the act of the principal wrongdoer, but for its own contribution facilitating that same act. However, responsibility for the complicit conduct only accrues once the principal wrongful act is committed. This artificial legal construction of complicity as a separate *fait générateur* of responsibility underlies the relevant provisions of the ARSIWA and ARIO which are reproduced below:

Article 16 ARSIWA

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.

Article 41 ARSIWA

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Article 14 ARIO

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

- (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.

Article 42 ARIO

Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

6 Introduction

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Article 58 ARIO

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
 - (a) the 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.
2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

These provisions of ARSIWA and ARIO, which combine elements of codification proper and progressive development of international law, have made an important contribution to the regulation of complicity in the wrongdoing. However, their practical added value remains limited for a host of reasons.

First, several treaties and customary law norms prohibit complicity in specific wrongful acts, including genocide, torture, aggression and the use of certain arms.¹⁵ Thus, complicity in such acts generates direct responsibility under those treaties and customary law norms (and may not require satisfaction of the more stringent material, cognitive and opposability requirements that arise under the ARSIWA and ARIO provisions above). However, some of the treaty obligations expressly prohibiting complicity may not be binding upon international organisations, which in and of itself demonstrates the need for a general norm on responsibility for complicity in the ARIO to fill in the gap.¹⁶ In the words of the International

¹⁵ See, eg Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948; entered into force 12 January 1951) 78 UNTS 277, Art III(e); UNGA, 'Res 3314 (XXIX) (Declaration on Aggression)' (14 December 1974) UN Doc A/RES/3314, Art 3(f); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997; entered into force 1 March 1999) 2056 UNTS 241, Art 1(1)(c).

¹⁶ For the review of arguments made by some international organisations as to the non-applicability of human rights treaties to them see, eg P Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford, OUP, 2005) 9.

Court of Justice (ICJ), '[i]nternational organizations are ... bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.¹⁷ These obligations and their scope may differ from the ones engaged by States.

Second, despite the ILC's efforts, the legal framework for the responsibility of multiple actors in relation to the same internationally wrongful act, or several internationally wrongful acts causing a single injury, is not well-developed in practice. This is evident in the context of the international dispute settlement mechanisms available, which require consent to jurisdiction and the application of the principle of the indispensable third party.¹⁸ Significant structural adjustments are therefore required for the international dispute settlement mechanisms to be able to effectively implement responsibility for complicity in the commission of an internationally wrongful act.

Third, the relevant ARSIWA and ARIIO provisions themselves are not free from criticism. Their content is ambiguous and the contradictions between their text and the ILC's Commentary on them are striking. Further, an analysis of practice and *opinio juris* reveals that these contradictions are not insignificant textual niceties—they affect both the existence and scope of responsibility for complicity.

Fourth, as most instances of international responsibility are settled bilaterally and privately between the injured party and the principal wrongdoer, the injured State or international organisation is not always able or willing to invoke responsibility of accomplice actors due to legal and political considerations. A review of the practice of complicity shows that it is usually the stronger actors in international affairs that provide aid or assistance for the commission of an internationally wrongful act by another. This of course presents a difficult balancing exercise for the injured entity as to the way and forum in which to protest or bring a claim.

Fifth, there is a significant problem of evidence. To establish responsibility for complicity in its current ARSIWA/ARIIO configuration is a daunting task, particularly where the burden would lie exclusively on the injured entity to bring evidence of the knowledge, and even more so *intention* of the aiding or assisting State or international organisation, or to

¹⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 90, para 37.

¹⁸ See *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* (Preliminary Question) [1954] ICJ Rep 19; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90 (in essence, the principle entails that the Court will not adjudicate on a case where it would necessarily have to pronounce on the rights or responsibility of a non-consenting and absent third State).

show that the latter's assistance *significantly* contributed to the commission of the principal wrongful act.

More generally, the limited impact to date of responsibility for complicity is reminiscent of the still prevailing *Zeitgeist* of *Lotus*, a view of international law where no restrictions can be presumed on the unlimited freedom of action of sovereigns.¹⁹ Attributing a greater role to responsibility for complicity could substantially limit that freedom of action for States and international organisations. Conversely, it could reinforce the respect of an international obligation and fulfil the legality function of international responsibility.²⁰

This book questions the effectiveness and utility of responsibility for complicity as codified in the ARSIWA and ARIO and argues for a slightly different normative model. Many elements of this model are matters of interpretation or adjustment in the application of the rules as codified by the ILC. Some, however, such as the questions of intention and opposability, are more fundamental and go to the very object and purpose of responsibility for complicity in international law. It may be premature to consider the model of complicity advanced in this book as *de lege lata*. However, the existing practice and *opinio juris* analysed in this book do show that the ILC's edifice on responsibility for complicity is not free from criticism. It is submitted that the ARSIWA and ARIO provisions fall short of meeting the object and purpose of regulating legal consequences of complicity in international law. An oversight by the ILC? A deliberate choice of States and international organisations? An immature legal system? All of these explanations, separately or in combination, may have prompted the existing framework in the ARSIWA and ARIO and its limits in positive international law.

¹⁹ *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Ser A No 10, 18; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of Judge Bedjaoui 268, 270–71, para 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, Declaration of Judge Simma 478 ff, paras 2 ff (the *Lotus* principle reflects no more than an 'old, tired view of international law'); see generally PM Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 RCADI 9.

²⁰ D Anzilotti, *Cours de droit international*, vol 1 (G Gidel tr, Paris, Sirey, 1929) 523 ('l'action de l'État lésé, tendant à une réparation, se concrétise parfois, en tout ou en partie dans le rétablissement de l'ordre juridique comme tel et parce que tel'; author's translation: 'the action of the injured State seeking to obtain reparation sometimes takes the form, in whole or in part, of the re-establishment of the legal order as such'); PM Dupuy, 'Responsabilité et légalité' in SFDI (ed), *La responsabilité dans le système international: Colloque du Mans* (Paris, Pedone, 1991) 278 ('c'est bien plutôt sur l'idée de restauration qu'il conviendrait d'insister. Il s'agira, en effet, de restaurer la situation matérielle de la victime mais aussi de rétablir la situation juridique existant avant la violation du droit'; author's translation: 'it is rather the idea of restoration that should be emphasised. The idea is not only to restore the material situation of the victim but also the legal situation before the breach').

The ICJ identified responsibility for complicity as it has been set out in Article 16 ARSIWA as a rule of customary international law.²¹ However, this book calls for analytical caution and a distinction to be drawn between the underlying principle of responsibility for complicity (which is, in the author's view, the limit of what has been recognised by the ICJ) and the constituent elements of responsibility for complicity.²² While the principle finds overwhelming approval among subjects of international law, the constituent elements of responsibility do not find the same level of support in the existing practice and *opinio juris*.

IV. THE TREATMENT OF RESPONSIBILITY FOR COMPLICITY IN DOCTRINE

In the last decade, three monographs have been published on the subject of complicity in international law, two in the course of preparation of this book. This shows not only the growing interest in the subject, but also its complexity and importance in modern international affairs. Andreas Felder's monograph focuses on the analysis of Articles 16 and 41 of the ARSIWA, arguing that some of its conditions need to be clarified, including the scope of its cognitive requirement which should cover constructive knowledge.²³ Helmut Aust's monograph provides an impressive survey of State practice in respect of complicity, which the present monograph builds upon. Through the theoretical lenses of the rule of law and the doctrine of abuse of rights, Aust concludes that the rule of responsibility for complicity as set out in Article 16 ARSIWA is part of customary international law, at the same time acknowledging the existence of a 'diverse network of rules on complicity' which may have a different scope of application.²⁴ Most recently, Miles Jackson focuses his monograph on complicity in international criminal law and the law of State responsibility,

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 217, para 420.

²² *ibid*; for a recent analysis of the Court's methodology in identifying customary international law rules see S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *EJIL* 417; see also S Villalpando, 'On the International Court of Justice and the Determination of Rules of Law' (2013) 26 *LJIL* 243, 247–48 (suggesting that we may be 'victims of a normative Ponzi scheme' because of the way the Court and the Commission take each other's work as absolute proof of customary international law); A Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 *ICLQ* 681; for methodological premises of identifying rules of positive international law see R Ago, 'Droit positif et droit international' (1957) 3 *AFDI* 14.

²³ A Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Zürich, Schulthess, 2007).

²⁴ HP Aust, *Complicity and the Law of State Responsibility* (Cambridge, CUP, 2011).

making a normative claim of complicity as a purely derivative form of responsibility. Jackson also criticises the use of complicity as a mode of attribution of conduct in international law.²⁵

This book aims to reposition the academic debate from the *normative source* of the rule(s) on responsibility for complicity to their *utility* and *effectiveness* in practice. The author's analysis extends beyond the realm of inter-State relations grappling with how this form of responsibility applies in the context of international organisations. Moreover, the fact that complicity under the law of international responsibility has a distinctive character does not mean that the application of complicity in other fields, such as international criminal law, can be ignored.²⁶ Likewise, collaboration with non-State actors and the alarming threat now facing international peace and security, as the recent attacks by the Islamic State of Iraq and the Levant (ISIL) demonstrate, demand an investigation of whether complicity could fill the gaps in the existing rules of attribution of conduct under the law of international responsibility.²⁷

V. THE MODEL(S) OF RESPONSIBILITY FOR COMPLICITY

Complicity in the commission of an internationally wrongful act is typically described as a form of ancillary, derivative or indirect responsibility.²⁸ While there may be nuanced differences between these adjectives, they all base the responsibility for complicity upon the actual commission of the principal wrongful act. At a technical level, it is easy to understand why complicity is derivative, as the responsibility for the accomplice arises *after* the commission of the wrongful act by the principal. However, the qualification of responsibility for complicity as ancillary, derivative or indirect may be regarded as undermining the sanctity of an international obligation, and the legal system as a whole.

First, the qualification of responsibility for complicity as derivative diminishes the reprimand associated with it. However, as a matter of principle, there is nothing less reprehensible of complicity than of the principal wrongdoing it occasions. Second, this qualification fosters the idea of responsibility as a purely remedial mechanism, dependent on the commission of the principal wrongful act, and allowing for the responsibility

²⁵ M Jackson, *Complicity in International Law* (Oxford, OUP, 2015).

²⁶ See *ibid*; cf A Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford, OUP, 2009).

²⁷ *Bosnia Genocide (Merits)* (n 21) 217, para 420; ARSIWA (n 2) 65, para 7 ('the idea of the implication of one State in the conduct of another is analogous to problems of attribution').

²⁸ See, eg Crawford, *State Responsibility: The General Part* (n 4); Jackson (n 25); V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Japanese J Intl L & Diplomacy* 1.

of the accomplice to be a mere afterthought. Third, while complicity is indeed derivative at the level of the origins of responsibility (ie triggering or *fait générateur*), it would be misleading to qualify the content of responsibility for complicity (ie the legal consequences) as derivative. This may result in an undue burden of reparation on weaker principal actors and the provision of a safe haven for stronger complicit actors.

Complicity in the internationally wrongful act should rather be conceived of as a form of shared responsibility, involving a factual relationship of at least two conducts and three actors.²⁹ The advantage of framing complicity as a form of shared responsibility is to avoid the diminished reprimand attached to complicit conduct vis-à-vis the principal wrongful act. Moreover, the theoretical construction of complicity as a form of shared responsibility permits a more balanced approach to the allocation of responsibility between the accomplice and the principal. It also enhances the prospects for the injured State or international organisation to seek reparation from both the principal and the accomplice.

More generally, responsibility for complicity is a conceptually rare and complex object of analysis for a host of reasons. First, responsibility for complicity contains elements of primary and secondary norms, appearing as a structural or *meta-rule* in the legal order.³⁰ Second, complicity puts into question the objective character of responsibility through its cognitive requirement. Third, it raises complex issues regarding the nature of obligations in international law, and the legal interests of the international community in their observance. The phenomenon of complicity in a wrongful act makes it 'more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected'.³¹

The right to cooperate with other States, international organisations or non-State actors by providing aid or assistance must be limited by a

²⁹ Nollkaemper and Jacobs (n 4) 396; see also Lanovoy (n 4).

³⁰ On the classification of primary/secondary norms in international law see HLA Hart, *The Concept of Law* (2nd edn, Oxford, OUP, 1994); R Ago, 'Second Report on State Responsibility' (1970) UN Doc A/CN.4/233, reproduced in (1970) 2 *YBILC* 177, 178–79, para 7–11; 191, para 41; N Bobbio, 'Nouvelles réflexions sur les normes primaires et secondaires' in N Bobbio (ed), *Études de théorie du droit* (Paris, LGDJ, 1988); J Combacau and D Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 *Netherlands YBIL* 81; E David, 'Primary and Secondary Rules' in J Crawford et al (eds), *The Law of International Responsibility* (Oxford, OUP, 2010); G Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 *RDI* 981; U Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology—The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic J Intl L* 53; A Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System' (1998) 9 *EJIL* 212.

³¹ *Diplomatic and Consular Staff in Tehran (United States v Iran)* (Judgment) [1980] ICJ Rep 3, 42–43, para 92.

clear and accessible legal framework to determine possible 'abuse' of such a right.³² Assuming that international law is designed for the benefit of peoples and not merely to justify the action of the most powerful actors,³³ the duty not to knowingly facilitate the wrongful act is inherent to the respect of every international obligation, whether it is bilateral, multilateral or preemptory. No actor should be permitted to knowingly support another in breaching the latter's obligations. To allow otherwise, as the current structure of the ARSIWA and ARIO rules suggests, would be tantamount to promoting a freelance system of 'contracts to break contracts' in international law.³⁴ In this author's view, there should be no place for such a freelance system in international law.

In assessing the utility and effectiveness of responsibility for complicity in international law, this book addresses several key issues. These can be divided into systemic issues, relating to the role of responsibility for complicity in the legal order, and operational issues, underlying the origins and implementation of responsibility for complicity in practice (in other words, its technical features).

Three systemic issues underlying the role of responsibility for complicity in international law are discussed in this book. First, as the general rule on responsibility for complicity bears resemblance to a primary norm, this poses a fundamental question of whether complicity even belongs to the secondary rules of responsibility in the first place. Second, the 'thin red line' between complicity and the obligations of due diligence raises legitimate questions as to the utility of responsibility for complicity in practice. Can complicity arise from actions and omissions? Does responsibility for complicity have an independent existence parallel to the responsibility that accrues for failure to comply with a specific due diligence obligation? Third, can the framework rule(s) on responsibility for complicity apply to situations of aid or assistance given by a State or international organisation to a non-State actor and, in this sense, complement the existing bases of attribution of conduct?

The book further presents four operational issues that hinder the effectiveness of responsibility for complicity in positive international law. First, the nature, form and degree of aid or assistance required to trigger international responsibility under ARSIWA and ARIO (ie the so-called

³² *Competence of Assembly regarding Admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, Dissenting Opinion of Judge Alvarez 12, 14 ('[t]he general interest, the interests of international society, must constitute the limits of the rights of states and make it possible to determine whether there has been an abuse of these rights').

³³ MR García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Martinus Nijhoff, 1962) 7.

³⁴ H Lauterpacht, 'Contracts to Break Contracts' in E Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht—The Law of Peace*, vol 4 (Cambridge, CUP, 1978) 340–75.

'material' or 'substantive' element) remain evasive. This raises the question of the utility of any contributory threshold (ie whether the accomplice conduct should 'significantly' or 'materially' facilitate the commission of the principal wrongful act), other than a simple factual link between the accomplice conduct and the principal wrongful act. Second, the knowledge and/or intention that the accomplice entity must possess vis-à-vis the circumstances of the principal wrongful act (ie the so-called 'cognitive' or 'subjective' element) raise doubts as to the actual application of this form of responsibility in practice. As States and international organisations can act only through their agents and representatives,³⁵ there is a question as to whether the assessment of the 'cognitive' element, particularly if the requirement of intention is to be retained, is similar to that undertaken in the context of individual criminal responsibility. Third, the requirement that the aiding or assisting State or international organisation has to be bound by the same obligation as the one breached by the aided or assisted State or international organisation (ie the opposability requirement or 'bilateralisation' of complicity so to speak) deprives the rule of much of its practical value. Fourth, what are the causal standards of allocation of legal consequences between the principal and the accomplice? Can an injured party seek reparation either from the principal or the accomplice, or both?

A critical analysis of these *systemic* and *operational* issues contributes to the book's main thesis that the responsibility for aid or assistance as set out in the ARSIWA and ARIO offers a partial but incomplete response to the phenomenon of complicity in international affairs. Evidence for this proposition can primarily be found in the *opinio juris* of States and international organisations and the findings, however scarce, of international and domestic courts and formal inquiries into extraordinary renditions and associated human rights violations. It is submitted that the general rule on the responsibility for complicity under customary international law may have a slightly more expansive scope of application and more flexible conditions than those set forth in the relevant provisions of the ARSIWA and ARIO.³⁶ If the ARSIWA and/or ARIO were to be considered

³⁵ *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Ser B No 6, 22.

³⁶ cf *Bosnia Genocide (Merits)* (n 21) 216–17, paras 419–20; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 98, para 186 ('The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, Dissenting Opinion of Judge Schwebel 558, 608, para 74 (asserting that the former draft Art 27, ie the predecessor of Art 16 ARSIWA, was already part of customary international law at that time; crucially, however, that provision had a much broader scope of application than Art 16 ARSIWA); see ch 3, s III.

in the context of a diplomatic conference, the provisions on responsibility for aid or assistance would be good candidates for revision.³⁷

This book proposes a revised model of responsibility for complicity, which is partially grounded in the existing *opinio juris* and practice and supplemented by the considerations of justice, rule of law and solidarity in the international legal order. The revised model would bring about at least two systemic benefits: (i) it would allow a greater respect for legality where no actor shall contribute to a wrongdoing by another; and (ii) it would provide an avenue for the injured party to obtain reparation not only from the principal wrongdoer but also from those actors operating behind the scenes. Consider a scenario where the injured party does not maintain diplomatic relations with the principal wrongdoer nor has any other avenues to obtain reparation from the principal wrongdoer, including any jurisdictional link to bring proceedings in court or to arbitration. If complicity were to be among the effective causes of the injury, should the injured State not be able to claim reparation directly from the complicit State?

There are substantive and procedural hurdles that complicate how complicit entities are considered in the law of international responsibility and in contemporary dispute settlement more generally. If complicity in the wrongdoing of another were to be construed as giving rise to a genuine independent responsibility from the moment the principal wrongful act materialises, this could circumvent at least some of those hurdles, such as the indispensable third-party principle. Even if the injured party could bring a claim directly against the complicit actor, this would still leave it in a difficult position in showing the extent to which the complicit conduct had facilitated the commission of the principal wrongdoing and the consequent injury. Outside the dispute settlement mechanisms, *ex gratia* payments, satisfaction, or similar arrangements could ensure that the complicit State or international organisation shares the burden of reparation with the principal wrongdoer.³⁸

Finally, a note of caution is welcome. The concept studied in this book is at the juncture between *ethics* and *power*.³⁹ If the power refuses to translate the ethics embodied in the prohibition of complicity into an effective norm,

³⁷ For comments of States, including certain resistance to potential convention-route see UNGA, 'Noting Key Role in International Law, Sixth Committee Delegates Disagrees over "Fate" of Drafts on State Responsibility, Diplomatic Protection' (21 October 2013) UN Doc GA/L/3463; see also J Crawford and S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2008) 54 *ICLQ* 959; LT Pacht, 'The Case for a Convention on State Responsibility' (2014) 83 *Nordic J Intl L* 439.

³⁸ *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, 262, para 56.

³⁹ RJ Dupuy, 'Images de Georges Scelle' (1990) 1 *EJIL* 235, 237 (à la conjonction de l'éthique et du pouvoir').

a revolution with the objective of restoring balance between material ordainment and social necessity might be warranted.⁴⁰ 'Law exists, it is said, to serve a social need'.⁴¹ It is 'a product of political and social forces ... it is dependent on behaviour and ... it is an instrument to meet changing needs and values'.⁴² Its *normativity* lies in the fact that the rules 'must be accepted as a means of independent control that effectively limits the conduct of the entities subject to law'.⁴³ Its *concreteness* goes through incremental responsiveness to changing behaviours of entities subject to the law, their will and interests. However, law is not and should not coalesce with a social need; needs are not an objective criterion for they cannot be separated from what States hold as needs in each moment.⁴⁴ The law must operate independently from the momentary views of its subjects.⁴⁵ Whether the model of responsibility for complicity advocated for in this book adequately meets the above concerns of *normativity* and *concreteness* is a matter to be tested by the social practice of actors operating in international law. For now, responsibility for complicity in its current ILC configuration resembles more a concept of variable content in law.⁴⁶ It is the very reason why complicity is so appealing and, at the same time, a complex and challenging object of analysis.

VI. METHODOLOGY

This book aims to provide a critical and systematic analysis of the role of responsibility for complicity in general international law. It does not provide an exhaustive catalogue of instances where complicity has been invoked in the relations between States and international organisations. First, there would be relatively little value in doing so as it would largely overlap with Helmut Aust's monograph. Rather than listing a catalogue of practice, this book takes stock of instances of practice and *opinio juris* which are most helpful to understanding the limits of responsibility for complicity and to rendering its elements and criteria of application more effective (chapters four, five and six). Second, the review of practice (treaties,

⁴⁰ *ibid* ('l'adéquation entre l'ordonnement matériel et la nécessité sociale'; author's translation: 'the matching of the material order and the social need'); see also P Allott, 'The Concept of International Law' (1999) 10 *EJIL* 31.

⁴¹ *South West Africa (Liberia v South Africa/ Ethiopia v South Africa)* (Second Phase) [1966] ICJ Rep 6, 34, para 49.

⁴² O Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *RCADI* 9, 24.

⁴³ *ibid* 25–26.

⁴⁴ M Koskeniemi, *From Apology to Utopia* (Cambridge, CUP, 2005) 31.

⁴⁵ *ibid*.

⁴⁶ C Perelman and R Vander Elst, *Les notions à contenu variable en droit* (Bruxelles, Bruylant, 1984).

diplomatic correspondence, UN resolutions, international and domestic judgments, commissions of inquiry, etc) undertaken in the preparation of this monograph has shown that there are considerable constraints in generalising the effect of individual incidents where complicity has been invoked without any detailed factual or legal account. These limitations can be grouped in four categories.

First, there are many references to complicity in distinct sources, ranging from official statements and protests by States, the practice of the UN and other regional organisations, and reports by media and non-governmental organisations (NGOs). However, these statements often use the term ‘complicity’ in a non-technical way (with a purely political or foreign policy connotation and without any reference to a legal framework or consequences). In his monograph, Helmut Aust set out a broad review of practice but quite often he had to concede that many statements did not have any real or apparent legal value.⁴⁷

Second, States tend to simply deny allegations and protests denouncing complicity. It is questionable whether these instances can be considered to support the existence of the general rule on responsibility for complicity. In any event, they shed little light on the actual elements of responsibility for complicity, which is the primary focus of this book.

Third, it is difficult to account for the duplicitous character of complicity, exhibiting elements of both a primary and a secondary norm. In the course of its ARSIWA codification, the ILC collected State practice derivative from specific primary regimes.⁴⁸ This practice consisted of protests against the supply of financial and military aid to a belligerent, the permission of the use of a State’s territory by another State to carry out an armed attack against a third State, the circumvention of sanctions imposed by the UN Security Council (UNSC), and calls by the UN General Assembly (UNGA) to refrain from supplying arms and other assistance to countries with questionable human rights records.⁴⁹ As Nolte and Aust rightly point out this practice raises the question of whether the primary rules referred to are simply exceptions or whether they support the existence of a general rule on responsibility for complicity.⁵⁰ Corten takes the argument a step further claiming that there is no need for a general rule on responsibility

⁴⁷ Aust (n 24) 107–91.

⁴⁸ See R Ago, ‘Seventh Report on State Responsibility’ (1978) UN Doc A/CN.4/307 and Add 1-2 and Corr 1-2, reproduced in (1978) 2 (pt 1) *YBILC* 31; J Crawford, ‘Second Report on State Responsibility’ (1999) UN Doc A/CN.4/498 and Add 1-4, reproduced in (1999) 2 (pt 1) *YBILC* 3, 45–57, paras 159–214.

⁴⁹ ARSIWA (n 2) 66–67, paras 6–9 (Art 16 Commentary); for surveys of practice see Quigley (n 14); ML Padeletti, *Pluralità di Stati nel fatto illecito internazionale* (Milano, Giuffrè, 1990); Felder (n 23) 179–239; Aust (n 24) 107–91; Jackson (n 25) 125–75.

⁵⁰ G Nolte and HP Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’ (2009) 58 *ICLQ* 1, 5.

for complicity when virtually every example of complicity falls under the realm of the existing primary rule (ie aggression, genocide, apartheid, terrorism financing, arms control conventions, etc).⁵¹

The full extent of interactions between all areas of international law that contain express prohibitions of complicity and the general rules provided in the ARSIWA and ARIO is beyond the scope of this book. A few examples of such areas, namely in the context of the use of force and various arms control treaties that prohibit expressly complicity, show the cross-fertilisation between the general rule on responsibility for complicity and these primary regimes. This, however, does not dissipate the question raised by Corten about the need and function of the rules on responsibility for complicity.⁵² In this author's view, so long as the ARSIWA and ARIO provisions are interpreted as requiring intent and opposability of the principal obligation breached, the effectiveness of responsibility for complicity will indeed remain extremely limited. It would leave us in a paradoxical scenario where the so-called secondary norm on responsibility for complicity would require much higher standards than the treaty obligations to which States have adhered. At the same time, this may be simply a reflection of the subjects' will to prohibit complicity in certain breaches of international law, while abiding by a more limited responsibility framework in respect of any other instances of complicit conduct. Moreover, even though complicity is prohibited in different areas of international law, there is little guidance as to what exactly it entails and how responsibility for complicity can be established. It would then be the mission of the general rule of responsibility for complicity to inform a primary rule—ie an unusual situation in international law abiding by a traditional divide between primary and secondary rules.

Fourth, when States protest against alleged complicity in the wrongful act or take action to prevent such complicity, they rarely specify the exact legal basis. Even if there are numerous instances of complicity in the practice of international law, these should not automatically be regarded as undermining the rule on responsibility for complicity nor can they necessarily help to clarify its scope.⁵³ Similarly, protests invoking complicity as a basis of responsibility or actions taken to prevent possible complicity often arise in respect of factual circumstances that ultimately do not result in the commission of an internationally wrongful act. Even if States

⁵¹ O Corten, 'La "complicité" dans le droit de la responsabilité internationale: un concept inutile?' (2011) 58 *AFDI* 57.

⁵² See *ibid*; see also O Corten and P Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case' in K Bannelier, T Christakis and S Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (London, Routledge, 2012).

⁵³ See *Military and Paramilitary Activities (Merits)* (n 36) 108–09, para 207.

and international organisations may err in their legal or factual assessment, their assertions of the risk of complicity as a justification for acting or avoiding to act tend to translate *opinio juris* into practice.

VII. THE ROLE OF RESPONSIBILITY FOR COMPLICITY IN THE INTERNATIONAL LEGAL ORDER

Finally, a word on the normative foundations of this book is in order. The role of responsibility for complicity depends to a large extent on the conception of the international legal order one adopts.⁵⁴ The international legal order today is a complex set of norms, actors, institutions and law-making processes.⁵⁵ Generations of lawyers have advanced opposite claims as to the unity or fragmentation of the international legal order.⁵⁶ Some have even questioned the qualification of international law as a legal order to begin with.⁵⁷ This is not the place to engage with these debates in any

⁵⁴ For a detailed account of the differences of the legal order (rules, functions, institutions and societal basis) from a legal system (rules) see Dupuy (n 19) 59–76; P Reuter, 'Principes de droit international public' (1961) 103 *RCADI* 425, 460; B Cheng, 'Custom: The Future of General State Practice in a Divided World' in RSJ MacDonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Martinus Nijhoff, 1983) 516 (defining international legal order as 'the structure which results from the existence and operation of the international legal system').

⁵⁵ See R Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994) 1 ('International law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct'); J Combacau, 'Le droit international: bric-à-brac ou système?' (1986) 31 *Archives de philosophie de droit* 85; C Rousseau, 'Principes de droit international public' (1958) 93 *RCADI* 369, 389 (arguing that law is also an instrument of social organisation: 'le droit n'est pas seulement un système de règles ou un ensemble de normes. C'est aussi un élément essentiel de l'organisation sociale. Si l'on considère le droit international en tant qu'ordre normatif, la réponse n'est pas douteuse. Le droit international remplit les deux conditions nécessaires et suffisantes pour être considéré comme un système normatif autonome'; author's translation: 'the law is not only a system of rules or a set of norms. It is also an essential element of social organisation. If one considers international law as a normative order, the answer is without doubt. International law satisfies the two conditions which are necessary and sufficient for it to be considered an autonomous normative system').

⁵⁶ See ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682; G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *NYU J Intl L & Pol* 919; J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2003) 25 *Michigan J Intl L* 903.

⁵⁷ See Hart (n 30) 213–37; see also M Craven, 'Unity, Diversity and the Fragmentation of International Law' (2003) 14 *Finnish YBIL* 3, 7 (arguing that international law could 'be understood in a number of alternative ways none of which necessarily implies anything particularly systemic: as a category description of the professional outlook of those [who] engage with it; as a domain of discourse between significant agents; as an empirical array of practices; or perhaps merely as the vocabulary employed by a community of scholars and practitioners'); P Bourdieu, *The Logic of Practice* (Cambridge, Polity Press, 1990) 53 (introducing the concept of habitus, as the conditioning assumptions which predispose particular outlooks in a society).

detail. However, it is undeniable that today there is some unifying if not unitary structure of international law, which is far from primitive.⁵⁸ Even the greatest apologists of the specialisation trend of international law and the avatars of consent, tend to find comfort in the general international law and its ability to provide a fall back regime, an assurance or appearance of material completeness.⁵⁹ Similarly, the classical problems associated with enforcement do not necessarily question the material completeness of the international legal order.

Against this background of perceived maturity and completeness, there is a paradox in an increasingly interconnected world. On the one hand, most actors refrain from directly violating international law primarily because of economic, diplomatic or political repercussions, and only secondarily owing to considerations of law and justice.⁶⁰ On the other hand, the number and variety of global issues (ranging from climate change to migration and terrorism) allows actors to evade scrutiny and responsibility for their complicit actions and omissions. As such, more powerful actors procure others to undermine the international legal order thereby channelling more effectively their foreign policy interests.

In this context, the law of responsibility plays a residuary yet crucial role, by ensuring the availability of a remedy to the victim, re-establishing the legal situation prior to the breach, and ultimately deterring future

⁵⁸ See, eg Dupuy (n 19); M Virally, *Le droit international en devenir: Essais écrits au fil des ans* (Paris, PUF, 1990) 91–101; MJ Aznar Gómez, 'En torno a la unidad sistémica del derecho internacional' (2007) 59 *Revista Española de Derecho Internacional* 563; N Valticos, 'Pluralité des ordres juridiques internationaux et unité du droit international' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague, Kluwer, 1996); I Brownlie, 'Problems Concerning the Unity of International Law', *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, vol 1 (Milano, Giuffrè, 1987); Craven (n 57); L Barnhoon and K Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (The Hague, Martinus Nijhoff, 1995).

⁵⁹ See, eg *Amoco Int Finance Corp v Iran* (Award) (14 July 1987) 15 Iran-US CTR 189, 222, para 112 ('the rules of customary international law may be useful to fill in possible lacunae of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions'); ILC (n 56) para 137 ('If instead of enhancing the effectiveness of the relevant obligations the regime serves to dilute existing standards ... then the need of a residual application, or a "fall-back" onto the general law of State responsibility may seem called for'); *ibid* para 172 ('None of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded'); B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *EJIL* 483.

⁶⁰ See, eg K Zemanek, 'The Unilateral Enforcement of Obligations' (1987) 32 *ZaöRV* 37, 43; K Zemanek, 'Does the Prospect of Incurring Responsibility Improve the Observance of International Law?' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Martinus Nijhoff, 2005) 128; see also J Brunnée and SJ Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish YBIL* 273; VJ Proulx, *Transnational Terrorism and State Accountability* (Oxford, Hart Publishing, 2012) 14–15.

occurrences of complicity in violations of international law.⁶¹ Hence, the normative agenda of this study is to develop the understanding of responsibility for complicity and its limits in positive international law, and to consider the adjustments necessary to make it an effective and useful tool with a real function in the international legal order. The effectiveness and utility of the rules on responsibility for complicity lie in them being: (i) *predictable* for all the parties involved in either providing or receiving aid or assistance; (ii) *unambiguous* for the party invoking responsibility for complicity and a party defending against a claim of complicity; (iii) *fair* in the sense of not overburdening the extent of responsibility or reparation due from principal and complicit actors; and (iv) *just* for the victim of the violation facilitated by complicity to see that justice is being done.

VIII. STRUCTURE

Chapter two examines complicity through the historical lens of its consolidation as a legal concept in international law and its original bias between individual and collective responsibility. Chapter three reviews the regimes of complicity as a mode of criminal liability of individuals and its codification by the ILC as a form of responsibility of States and international organisations. Chapter four surveys the rules on responsibility for complicity in the codification of the ARSIWA and ARIO, distinguishing complicity from other forms of shared or indirect responsibility, including the responsibility of States in connection with the wrongful act of an international organisation, direction and coercion, circumvention of international obligations, and joint and several responsibility. Chapter five tests each constituent element of responsibility for complicity by reference to examples from practice and *opinio juris*, considering the limits set out in the ARSIWA and ARIO and the need for potential adjustments.

⁶¹ PM Dupuy, 'Le fait générateur de la responsabilité internationale des États' (1984) 188 *RCADI* 9, 21 (arguing that the law shows its degree of effectiveness and integration through its system of responsibility: 'La responsabilité constitue l'épicentre d'un système juridique. La nature des droits, la structure des obligations, la définition des sanctions de leur violation, tout y converge et s'entremêle en des rapports logiques et des relations d'étroite interdépendance. Un droit se dit, avoue ses fondements, trahit ses lacunes, démontre son efficacité et son degré d'intégration à travers son système de responsabilité'; author's translation: 'Responsibility is the epicentre of a legal system. The nature of rights, the structure of obligations, the definition of sanctions for their violation, everything converges and intermingles in the logical connections and closely interdependent relations. A right is recognised, admits its foundations, betrays its shortcomings, demonstrates its effectiveness and degree of integration through its system of responsibility').

Chapter six deals with the content and implementation of responsibility for complicity, including questions of causation and reparation. Chapter seven examines the possibility of construing complicity beyond its original inter-subjects dimension. Finally, chapter eight provides some concluding remarks as to the present function of responsibility for complicity and its prospects for the future.