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Establishing state responsibility in the absence of effective government

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6 State Complicity in Acts Perpetrated by Private Actors

6.1 Introduction: The Need for a Complicity Rule

The preceding chapters of this dissertation have discussed state responsibility for failing to prevent or redress a catalyst act[1] carried out by a non-state actor, and for conduct by a non-state actor that is itself attributable to the state. But can these two categories of law – duties to protect on the one hand, and attribution[2] on the other – accurately capture all the factual situations in which states are involved in a violation of international law? What happens in cases where the state's role goes beyond a 'mere' failure to protect, but falls short of the control required for attribution under the agency principle as understood by the ICJ and ILC?

Examples of such situations abound across decades and continents. To cite but two: in the context of the Bosnian war, noting the complementary objectives of the Army of the Republika Srpska on the one hand, and the Federal Republic of Yugoslavia and the Yugoslav Army on the other, the ICTY's Trial Chamber admitted that 'there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS.'[3] In a different context, the initially self-organized Nigerian vigilante groups fighting Boko Haram have received governmental support in the form of weapons, equipment and training; and not only have these groups cooperated with the military and supplied them

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1 For an explanation of what a catalyst act (or event) is, see Chapter 3, notes 18-21 and accompanying text above.

2 As explained above in Chapter 3, the duty to protect also requires attributing certain conduct to the state, namely the failure to prevent or punish. However, for ease of reference, this chapter will use the terms of 'duty to protect' and 'attribution' as shorthand, with each of them referring to the respective scenarios described in the opening sentence of this chapter.

3 *Prosecutor* v. *Duško Tadić*, ICTY Trial Chamber, Judgment of 7 May 1997, IT-94-1-T, para. 604.

with intelligence, sometimes the two have even been deployed together.[4] Given all the ways in which various state organs have been supporting these vigilante groups, and the fact that the latter's activities have been accompanied by reports of human rights abuses,[5] the question inevitably arises: what degree of responsibility does Nigeria bear for their conduct?

In domestic law, such scenarios would likely be addressed through the concept of complicity. International law, however, has no general rule providing for state responsibility for complicity in the wrongful conduct of non-state actors. Instead, these situations tend to be subsumed under one of the two categories discussed above,[6] inviting starkly different responses. At one end of the spectrum, it appears to be undisputed that in many cases of such complicity, state responsibility can be established on the basis of the state's violation of a duty to protect.[7] At the other end of the spectrum, where the ICTY and regional human rights courts have set such a low threshold for attributing the conduct of private actors as to encompass factual circumstances that are arguably better described as complicity,

4 See e.g. W. Ross, 'Boko Haram crisis: Among the vigilantes of northeast Nigeria', *BBC News*, 3 December 2014, http://www.bbc.co.uk/news/world-africa-30291040; 'Nigerian vigilantes aim to rout Boko Haram', *Al-Jazeera*, 31 May 2014, https://www.aljazeera.com/indepth/features/2014/05/nigerian-vigilantes-aim-rout-boko-haram-2014526123758444854.html; F. Chothia, 'Boko Haram crisis: How have Nigeria's militants become so strong?', *BBC News*, 26 January 2015, http://www.bbc.co.uk/news/world-africa-30933860; ICG Africa Report No. 244, *Watchmen of Lake Chad: Vigilante Groups Fighting Boko Haram*, 23 February 2017, https://www.crisisgroup.org/africa/west-africa/nigeria/244-watchmen-lake-chad-vigilante-groups-fighting-boko-haram, 4-12; N. Shotayo, 'Zamfara Government distributes 850 motorcycle to civilian JTF', *Pulse*, 5 December 2018, https://www.pulse.ng/news/local/zamfara-government-distributes-850-motorcycle-to-civilian-jtf/wlw63rb.

5 Such as recruitment of children, torture and extrajudicial killings: see 'Nigeria's vigilantes take on Boko Haram', *BBC News*, 24 July 2013, http://www.bbc.co.uk/news/world-africa-23409387; HRW, *World Report 2015: Nigeria*, https://www.hrw.org/world-report/2015/country-chapters/nigeria; ICG, *Watchmen of Lake Chad*, 14-16.

6 Cf. E. Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of *De Facto* Organs and Complicity' (2005) 15 *Italian Yearbook of International Law* 111, at 112. Sometimes even both, see e.g. IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis)* v. *Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2013, Series C, No. 270, para. 281; cf. the ambiguity of the *Poggioli Case (Italy* v. *Venezuela)*, 1903, 10 UNRIAA 669, at 689-690.

7 See note 9 and accompanying text below; cf. the text accompanying Chapter 4, note 127 above.

this has been criticized as unduly lowering the threshold for attribution as articulated by the ILC and the ICJ.[8]

Seeking to assuage the fears of those who are concerned that the ICJ's high attribution threshold(s) would allow states to escape responsibility, authors tend to note that even if the state's involvement in the conduct of the private actor falls short of 'effective control' or 'complete dependence', the state can still be held responsible for having violated its duty to protect.[9] However, reliance on duties to protect as a 'fallback' option has two major shortcomings. Firstly, while it can indeed result in establishing the responsibility of the state in many situations, it is unable to capture *all* such scenarios, particularly in an extraterritorial context (this may in fact be the reason why the ICJ relied on the rather novel criterion of 'capacity to influence' to find that Serbia violated its duty to prevent genocide).[10] Admittedly, in such extraterritorial situations, the state may still be held responsible for the role of *its own organs* in violating the duty of non-intervention, as illustrated by the *Nicaragua* case,[11] or in breaching other extraterritorially applicable obligations, such as those under human rights law. But the question of non-intervention may fall outside the scope of the court's jurisdiction, as in *Bosnian Genocide* or at regional human rights courts; or it may be the case that the third state was not directly involved through its organs in the particular event, as in *Catan*. Secondly, even where courts are able to adjudicate on these rules, finding a violation of a duty to protect or the obligation of non-intervention may avoid the state escaping responsibility *completely*, but still falls short of accurately capturing the full extent of the state's involvement. In this regard, it is frequently pointed out that a finding of complicity-based responsibility (including through attribu-

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8 See Savarese, '*De Facto* Organs and Complicity', 120; J. Cerone, 'Re-Examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 *ILSA Journal of International & Comparative Law* 525, at 529-532; M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 194-198; S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493, at 508-511, 517; cf. M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011), 50. See also states' positions on the IACtHR's and ECtHR's jurisprudence, discussed in Section 4.5.3 above. But see generally to the contrary D. Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24 *Leiden Journal of International Law* 989.

9 Cerone, '"Complicity" in the Context of Human Rights Violations', 531-533; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669, at 694. On the limitations and shortcomings of this conceptualization, see Amoroso, 'Complicity as a Criterion of Attribution', 991-992.

10 See Chapter 3, note 110 above.

11 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, paras. 226-282, particularly paras. 239-242.

tion) is significant both for its symbolic weight – due to the moral stigma it carries – and for practical reasons, as it may affect the extent of reparation awarded to the applicant.[12]

Simply put, the existing legal categories cannot adequately capture the phenomenon of state support for private actors who engage in wrongful conduct.[13] Reducing such support to a violation of the state's duty to protect may be uncontroversial, but it amounts to holding the state responsible for something *less* than its actual role. Using such support as a basis for attribution, meanwhile, can result in the state being held responsible for conduct that was not carried out on its behalf. This would contravene the basic principle that 'a State is responsible only for its own conduct',[14] as the state would be found responsible for *more* than 'its own conduct'. At the same time, where it is not possible to establish a violation of the duty to protect, rejecting attribution leads to the state escaping responsibility altogether (unless there is a specific primary rule prohibiting state complicity in the particular type of private conduct).

In order to close this responsibility gap, a general rule prohibiting state complicity in the wrongful conduct of non-state actors should be developed in international law. There is a particularly strong argument to be made for such a rule in the fields of international human rights and humanitarian law, for two reasons. Firstly, these are the areas of law that are already considered applicable to certain types of private actors: IHL is binding on non-state armed groups participating in international or non-international armed conflicts; human rights law is widely regarded as applicable to armed groups and secessionist entities, at least when they effectively control territory.[15] If a state is not permitted to aid or assist another state in violating international law, it would make little sense to allow a state to aid or assist a different actor – a non-state armed group – in violating international

12 See e.g. A. Nollkaemper, in 'Complicity in International Law: Some Lessons from the U.S. Rendition Program' (2015) 109 *Proceedings of the ASIL Annual Meeting* 177, at 180; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford: Hart, 2016), 323-324; N.H.B. Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 *Chinese Journal of International Law* 11, at 33-34. See also Chapter 4, notes 172-173 and accompanying text above on the non-pecuniary damages awarded by the IACtHR, differing significantly depending on whether the violation was of a duty to protect or duty to respect.

13 On what such wrongful conduct would encompass, see notes 52-53 and accompanying text below.

14 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, para. 406.

15 See Section 1.2.3.3 above.

law.[16] Secondly, and just as importantly, a prohibition of complicity could be 'read into' the treaty provisions on states' general obligations to respect and protect human rights,[17] and to 'respect and ensure respect for' IHL.[18] Given that states have not only negative, but also positive obligations of a general scope in these fields of law, a rule against complicity may be seen as implied, simply covering the ground *between* these two types of obligations.[19]

Even so, there is a further – practical – difficulty in bringing such cases to be adjudicated by international courts. In the ILC's construction of complicity, '[t]he wrongfulness of the aid or assistance given by the [assisting state] is dependent, *inter alia*, on the wrongfulness of the conduct of the [principal]',[20] but the existing jurisdictional limitations of human rights courts do not allow holding non-state actors directly responsible.[21]

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16 See ILC, *Draft articles on the responsibility of international organizations, with commentaries*, in: *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, 46 (hereinafter DARIO Commentary), Commentary to Part Two, Chapter IV, para. 1 and especially to Article 14, para. 1, in the same vein. See also Jackson, *Complicity in International Law*, 12-17 on 'the wrongness of complicity'; and Lanovoy, *Complicity and its Limits*, 12, noting that: '[T]he duty not to knowingly facilitate the wrongful act is inherent to the respect of every international obligation […]. No actor should be permitted to knowingly support another in breaching the latter's obligations.' Article 16(b) ARSIWA – which serves as the model for such a complicity rule – requires that the principal's conduct would also be wrongful if committeed by the assisting state. But this is unlikely to pose a problem in international human rights and humanitarian law, where states tend to have more extensive obligations than non-state actors; and, as Special Rapporteur James Crawford notes in *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), at 410, Article 16(b) 'says nothing of the identity of norms or sources', i.e. the principal and the assisting state do not necessarily have to be bound by *the same* obligation.

17 See Jackson, *Complicity in International Law*, 198; on the relevant treaty language, see Section 3.3.3.1 above.

18 See e.g. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31, Article 1; International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd ed., Cambridge: Cambridge University Press, 2016), para. 120: 'One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in Pictet's 1952 Commentary. Developments in customary international law have since confirmed this view.' See also *ibid.*, para. 126, noting that 'according to the ICRC study on customary international humanitarian law, the obligation to respect and ensure respect is not limited to the Geneva Conventions but to the entire body of international humanitarian law binding upon a particular State.'

19 Cf. Jackson, *Complicity in International Law*, 198-199, in respect of human rights treaties.

20 ARSIWA Commentary to Article 16, para. 11.

21 The ICJ faces the same limitations as well; the discussion focuses on human rights courts simply because that is where such cases are much more likely to be brought, given that – unlike the ICJ – they are open to individuals.

Courts thus may not be able to make a finding of wrongfulness regarding the principal's conduct.[22] This means that for the case to proceed, the state's complicity would in a sense have to be 'detached' from the principal's act.[23] Still, in order to hold the state responsible, the court would in any case first need to (and arguably could) identify an impermissible interference with the victim's rights under the relevant convention – in other words, identify *what the state contributed to*. Such situations are not entirely unknown to human rights courts: in cases concerning duties of protection, the state's conduct is likewise assessed in relation to conduct by a private actor or even, in some cases, unknown perpetrators. For instance, in order to conclude that the state has failed in its duty to prevent inhuman and degrading treatment carried out by a private individual (e.g. in the context of domestic violence), the court has to first conclude that the victim has indeed been subjected to inhuman and degrading treatment.[24] Admittedly, the 'detachment' necessary to make such a rule workable in practice is not ideal or unproblematic. But if it could take hold despite these conceptual difficulties, such a 'detached' complicity rule would still preferable to relying on the existing categories, as it could capture the gradation in the state's involvement more accurately and help ensure that states do not escape responsibility.

In light of this, the purpose of this chapter is to shed light on what a rule prohibiting state complicity in the wrongful conduct of non-state actors would entail. To do so, the chapter provides a brief history of the concept of state complicity in the conduct of non-state actors, then examines the main elements of a possible state/non-state complicity rule, drawing on the law governing inter-state complicity. Given that no such state/non-state rule exists as of yet, the aim of this chapter is not to provide an in-depth analysis

22 There are two main obstacles to a finding of wrongfulness: one substantive ('Is the non-state actor bound by the relevant human rights treaty in the first place?'), the other procedural ('Can that non-state actor be a respondent before the court? If not, does a *Monetary Gold*-type rule apply?'). On substance, the difficulty is that non-state actors are not parties to the treaty and their human rights duties may best be seen as customary instead – although the two may coincide. On procedure, the crucial question is to what extent the *Monetary Gold* rule is linked to sovereignty and whether it may also apply to non-sovereign actors with international legal personality. In the *Monetary Gold* case, the ICJ held that it could not proceed with a case in the absence of a third party (Albania), where 'Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision'; see *Monetary Gold Removed from Rome in 1943* (Italy *v.* France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment of 15 June 1954, 1954 ICJ Reports 19, at 32; see also ARSIWA Commentary to Article 16, para. 11.

23 This is likely why Jackson speaks not of a complicity rule as such, but rather of a (non-derivative) duty of non-participation, see *Complicity in International Law*, 128, 198-199.

24 Similarly, in *Bosnian Genocide* – although that was based on a specific primary rule prohibiting complicity – the ICJ established that 'acts of genocide' had been 'committed by members of the VRS in and around Srebrenica from about 13 July 1995' (para. 297) and examined Serbia's possible complicity without (members of) the VRS being party to the proceedings.

of every possible facet of such a rule. Rather, the focus is on how such a rule of complicity would relate to – and be delineated from – responsibility through a duty to protect on the one hand, and attribution on the other. This latter inquiry then leads to the crucial question whether and to what extent – in the absence of a state/non-state complicity rule – complicity can serve as the basis for attribution.

6.2 Between the Duty to Protect and Attribution: A Brief History

The origins of state complicity in the conduct of private actors can be traced back to the law on injuries to aliens. In the late nineteenth and early twentieth century, jurisprudence had frequent (though not universal) recourse to the notion of 'implied complicity' – also known as the 'theory of complicity' or 'condonation theory' – whereby the state's failure to prevent a certain act or punish its perpetrators was deemed to constitute complicity in the catalyst event itself.[25] This approach had a practical effect on determining reparations, which were calculated on the basis of the damage caused by the private actor, rather than the state's own failure to prevent or punish.[26] In other words, while the criteria of this rule were hardly different from those of the duty to protect, the consequences were such as to equate this implied complicity with attribution.[27]

Although the theory of complicity held traction for a while, it was eventually challenged and gradually abandoned. The turning point in this process was the 1925 award in the *Janes* case, where the United States claimed $25,000 on the basis of Mexico's alleged failure to apprehend and punish the private individual who shot and killed Byron Everett Janes, the

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25 See generally e.g. E.M. Borchard, 'Important Decisions of the Mixed Claims Commission United States and Mexico' (1927) 21 *American Journal of International Law* 516; J.L. Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 *British Yearbook of International Law* 42; T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart, 2006), 14-23. For more on the 'theory of complicity', see O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 275-277. *Laura M. B. Janes et al. (U.S.A.)* v. *United Mexican States*, Award of 16 November 1925, 4 UNRIAA 82, para. 19, speaks of '*serious* lack of diligence in apprehending and/or punishing culprits' (emphasis added).

26 See e.g. *Cotesworth and Powell (Great Britain)* v. *Colombia*, Award of 5 November 1875, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been Party* (6 vols., Washington, DC: Government Printing Office, 1898), vol. II, 2050, at 2082.

27 Indeed, the two were so closely intertwined that when Ago examined whether complicity could form a basis for attribution, he drew special attention to the importance of distinguishing between findings on responsibility and damages, see ILC, *Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility (continued)*, 30 June 1972 and 9 April 1973, UN Doc. A/CN.4/264 and Add.1, in: *Yearbook of the International Law Commission*, 1972, vol. II, 71 (hereinafter *Ago's Fourth Report*), para. 67.

superintendent of a mining firm.[28] The US-Mexico General Claims Commission rejected the implied complicity theory, holding that non-punishment could not be equated with approval, and still less with complicity, and 'even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands.'[29] Accordingly, the commission proceeded to award damages in the amount of $12,000 as satisfaction 'for the personal damage caused by the nonapprehension and nonpunishment of the murderer of Janes', rather than the murder itself.[30]

Nonetheless, the Claims Commission did accept that '[a] reasoning based on presumed [i.e. implied] complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so.'[31] The reference to 'some reason constituting [the state's] liability' suggests that complicity could not be presumed in *every* case where the government 'knows of an intended injurious crime [and] might have averted it'. Indeed, such a presumption would have limited the state's responsibility to its own conduct only in cases where it *should have known* of the catalyst event; all other violations of its duties of prevention would have been subsumed under the category of implied complicity. The Commission unfortunately did not elaborate further on what that reason constituting state liability could be, leaving the precise contours of such a prevention-based 'presumed complicity' undefined.

Still, the Commission's reasoning was well received, and even won the praise of supporters of the implied complicity theory, with Edwin Borchard describing the approach in *Janes* as 'useful', 'because it is analytically correct and because it recognizes various degrees of government delinquency'.[32]

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28 *Janes*, paras. 1-4. Becker, *Terrorism and the State*, at 17, describes the case as a 'watershed'. Other case law had also articulated that the state is only responsible only for its own conduct, and not of private individuals; see most notably the case of *British Property in Spanish Morocco*, in the French original *Affaire des biens britanniques au Maroc espagnol* (Espagne *c.* Royaume-Uni), Award of 1 May 1925, 2 UNRIAA 615, at 641-642, 709-710; see also *Ago's Fourth Report*, para. 81, as well as para. 90 on some earlier case law pertaining to 'riots, revolts and disturbances in general'. Nonetheless, *Janes* is singled out here because it was an express rejection of the implied complicity theory.

29 *Janes*, para. 20.

30 *Ibid.*, para. 26.

31 *Ibid.*, para. 20 (emphasis in original).

32 Borchard, 'Important Decisions', 517.

But while the holding in *Janes* was followed in several other cases,[33] paving the way for the gradual abandonment of implied complicity, this recognition of 'various degrees of government delinquency' was not adopted in subsequent jurisprudence. Instead of drawing a distinction between non-prevention and non-punishment, later cases simply framed the issue in terms of the state's duty to protect, with no reference to complicity.[34]

Later on, the issue of state complicity in the conduct of private actors was addressed twice during the ILC's work on state responsibility. The work of the first Special Rapporteur, Francisco García Amador, included a draft article on 'the connivance or complicity of the authorities of the State in the injurious acts of private individuals' – not as a separate form of responsibility, but as an 'aggravating circumstance' for the purposes of determining reparation.[35] He stressed that such connivance or complicity 'is not the same thing as the failure of the authorities to exercise "due diligence"', but rather 'an attitude utterly at variance with that which the competent organs and authorities would be expected to observe'.[36] Although it is not entirely clear what he meant by this, an overall reading of his comments suggests that he envisaged it to be an intentional and/or active role by the state, as opposed to 'manifest negligence in preventing or punishing the injurious acts.'[37] In any event, as the Commission never discussed this report, there was no follow-up on these ideas.[38]

When Roberto Ago took over the role of Special Rapporteur, he looked at the question of complicity anew, and decided to examine whether the state's complicity in the conduct of non-state actors could constitute a sufficient basis for attribution. He had no objections in principle to such a ground for attribution, and even noted that attribution would resolve the

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33 At the US-Mexico Claims Commission, see *George Adams Kennedy (U.S.A.)* v. *United Mexican States*, Award of 6 May 1927, 4 UNRIAA 194, para. 8; *H.G. Venable (U.S.A.)* v. *United Mexican States*, Award of 8 July 1927, 4 UNRIAA 219, paras. 23-24; *Louise O. Canahl (U.S.A.)* v. *United Mexican States*, Award of 15 October 1928, 4 UNRIAA 389, at 391; *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.)* v. *United Mexican States*, Award of 2 April 1929, 4 UNRIAA 440, at 443-444; *Elvira Almaguer (U.S.A.)* v. *United Mexican States*, Award of 13 May 1929, 4 UNRIAA 523, at 529. For cases before other claims commissions, see *Ago's Fourth Report*, paras. 86-89.

34 See the cases cited in *Ago's Fourth Report*, paras. 86-89.

35 ILC, *International Responsibility: Third Report by F.V. García Amador, Special Rapporteur*, 2 January 1958, UN Doc. A/CN.4/111, in: *Yearbook of the International Law Commission*, 1958, vol. II, 47, at 50.

36 *Ibid.*, 54, para. 22.

37 *Ibid*. This is further supported by his description of connivance' as the 'deliberate and intentional failure to prosecute or to punish' (*ibid.*) and his remark that 'complicity depends on the degree of material or effective participation imputable to the authorities' (*ibid.*, para. 23).

38 See ILC, *First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States*, 7 May 1969 and 20 January 1970, UN Doc. A/CN.4/217 and Add.1, in: *Yearbook of the International Law Commission*, 1969, vol. II, 125, paras. 57-77.

problem of private actors lacking international legal personality.[39] In the end, however, given the decline of the 'theory of complicity', international practice did not lend enough support to such a rule, leading Ago to conclude that states can only be held responsible for their own failure to prevent or punish in relation to catalyst events carried out by private actors.[40]

In sum, while the question of state complicity in the conduct of private actors has been raised from time to time in international law, no rule of responsibility has yet been developed to address this issue. Early jurisprudence suggests that a finding of complicity would require something more than a mere failure to prevent or punish, but it is unclear what that additional element would be, making it difficult to determine the possible content of such a rule. These problems are further compounded by the fact that the question of complicity has been strongly intertwined with that of reparation. The most nuanced treatment of complicity and reparations was provided by the *Janes* case, but the distinctions offered in the award were not taken up by later tribunals, and a general rule remains to be formulated.

6.3 Article 16 ARSIWA and Its (Possible) Non-State Analogy

While there is no *general* prohibition on state complicity in wrongful conduct by private actors,[41] there are certain instances where *specific* rules of international law prohibit state/non-state complicity. Such a rule formed (partly) the subject of the 2007 *Bosnian Genocide* case, in which the ICJ had to determine whether Serbia had been complicit in the Srebrenica genocide committed by the Republika Srpska and the VRS.[42] Rather than investigating how (if at all) 'complicity in genocide' is defined within the specific context of the Genocide Convention, the Court immediately turned to the inter-state complicity rule in Article 16 ARSIWA, holding that it saw 'no reason to make any distinction of substance' between the two.[43] In other words, the ICJ essentially equated complicity under the Genocide Convention with complicity as defined by Article 16 ARSIWA.

The ease with which the Court equated state/non-state complicity with Article 16 in a specific context suggests that a possible *general* rule on this subject is also likely to be modeled on the inter-state complicity rule in that

39 *Ago's Fourth Report*, para. 64.

40 *Ibid.*, paras. 61-146, in particular para. 70.

41 On what such wrongful conduct would entail, see notes 52-53 and accompanying text below.

42 *Bosnian Genocide*, paras. 418-424. In fact, Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277, refers to states' duty to prevent and punish genocide (including complicity in genocide); this duty was interpreted by the ICJ to include a prohibition on states themselves to commit (or be complicit in) genocide, see *Bosnian Genocide*, paras. 150-179.

43 *Ibid.*, para. 420.

Article.[44] This analogy is further reinforced by the fact that *state* complicity raises the same issues of (organizational, rather than individual) responsibility, regardless of the identity of the principal actor.[45] This reasoning was also explicitly acknowledged by the ILC in the formulation of Article 58 of the Articles on the Responsibility of International Organizations, concerning state complicity in an internationally wrongful act of an international organization.[46]

With Article 16 ARSIWA as the model, the next step is to examine what the requirements of this Article are for a finding of responsibility for 'aid and assistance', and how these could apply to a state/non-state scenario. Article 16 provides that:

> 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.

This complicity[47] rule captures a relatively recent development of international law, with virtually all of the supporting practice coming from the post-World War II era.[48] Nonetheless, it was proclaimed to be customary law in the *Bosnian Genocide* case by the ICJ.[49]

Admittedly, compared with complicity in the conduct of a state or an international organization, a state/non-state complicity rule faces an additional obstacle: responsibility for complicity is dependent on the commission

44 See Jackson, *Complicity in International Law*, 214-215. The application of Article 16 ARSIWA by analogy to state complicity in the conduct of private actors has also been put forward by A. Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations', in: L. Bomann-Larsen & O. Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004), 50, at 66-68; and R. McCorquodale & P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598, at 611-615.

45 See Crawford, *State Responsibility*, noting at 411 (footnote omitted) that '[i]f, as was noted in *Bosnian Genocide*, ancillary responsibility as between states may be considered a customary norm, there is no reason why the same logic should not apply as between a state and any other actor on the international plane.'

46 DARIO Commentary to Article 58, para. 3; see also Crawford, *State Responsibility*, 411-412.

47 As Special Rapporteur Crawford notes in *State Responsibility*, 399, Article 16 'seeks to regulate *complicity* and is often referred to by this rubric, although the term itself does not appear in order to prevent the drawing of parallels with municipal criminal law.' (Emphasis in original, footnotes omitted.)

48 See e.g. ILC, *Seventh Report on State responsibility by Mr. Roberto Ago, Special Rapporteur*, 29 March, 17 April and 4 July 1978, UN Doc. A/CN.4/307 and Add.1-2, in: *Yearbook of the International Law Commission*, 1978, vol. II, Part One, 31, para. 73; J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *British Yearbook of International Law* 77, 81-107; see also Jackson, *Complicity in International Law*, 150-153.

49 *Bosnian Genocide*, para. 420.

of an internationally wrongful act by the principal actor,[50] for which the latter must be capable of having rights and obligations, i.e. legal personality, under international law. This leads to a rather odd situation: conceptually, complicity is situated *between* duties to protect and attribution in terms of the degree of the state's involvement (and thus the degree of its responsibility), but responsibility for complicity requires that the non-state actor have international legal personality, when neither of the other two bases of responsibility include such a requirement.[51] Yet at the same time, without the capacity to hold rights and obligations, how is it possible to determine *which* non-state conduct states should refrain from aiding or assisting? In general, this problem can be resolved by formulating a rule by recourse to Article 16(b) ARSIWA, requiring the state not to aid or assist any conduct which 'would be internationally wrongful if committed by [the assisting] State'. This would rest on the grounds that 'a State cannot do by another what it cannot do by itself'.[52] Nonetheless, inasmuch as international legal personality remains necessary for state/non-state complicity, for the purposes of the present chapter it is simply noted that states may only be complicit in the conduct of non-state actors *to the extent* that such actors may be capable of holding rights and obligations.[53]

What are the main features of Article 16 ARSIWA, and how would they apply in the context of state complicity in the conduct of non-state actors? As noted above, since no rule of state/non-state complicity is in place as of yet, the following sections focus on determining the outer limits of complicity on either side: the elements which set complicity apart from duties to protect on the one hand, and attribution on the other. As regards duties to protect and complicity, an easy way to distinguish between the two is by limiting complicity to cases of *action*; and inasmuch as the possibility of complicity by omission can (and should) be admitted, this can be distinguished from a violation of a duty to protect through the existence or lack of intent. As for complicity and attribution, the former rests on assistance, the latter on agency. Still, in the absence of a general state/non-state complicity rule, an

50 See ARSIWA Commentary to Article 16, para. 11.

51 In the case of the duty to protect, the conduct of the private actor is merely a 'catalyst' for the state's conduct, and it is only the latter which is adjudged for compliance with international law; as for attribution, the very function of it is to transform the conduct of the private actor into state conduct, i.e. the conduct of an existing international legal person.

52 ARSIWA Commentary to Article 16, para. 6. See also on a more general level Jackson, *Complicity in International Law*, 12-17. This fits particularly well with those explanations of private actors' obligations under international law which trace the legal basis of such obligations to the state's own commitments, see e.g. J.K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443, at 445-449.

53 A discussion of non-state actors' international legal personality is beyond the scope of this dissertation. For a similar approach, see e.g. McCorquodale & Simons, 'Responsibility Beyond Borders', 613-614.

alternative dividing line is offered by the fact that Article 16 ARSIWA does not require the complicit conduct to be an *essential* element in the principal's wrongful act. Accordingly, the dissertation argues that where the state's conduct goes beyond the conditions of Article 16, constituting a *sine qua non* element in the private actor's conduct, it can serve as a basis for attribution.

6.3.1 Distinguishing Complicity from Duties to Protect: The Problem of Complicity by Omission

In seeking to distinguish complicity in genocide from the duty to prevent genocide, the ICJ pointed to two factors underpinning such a distinction in *Bosnian Genocide*. Firstly, the Court noted that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators', concluding that 'while complicity results from commission, violation of the obligation to prevent results from omission'.[54] Secondly, for a finding of complicity, the ICJ required certainty of knowledge 'that genocide was about to be committed or was under way', whereas in the case of the duty to prevent genocide, it was sufficient 'that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.'[55]

Turning to the first of these distinctions, is complicity indeed limited to cases of 'some positive action'? Neither the text of Article 16 ARSIWA, nor the Commentary specifies whether the aid or assistance in question needs to be a positive action or may also be the lack thereof. Arguably, the phrases 'aid or assistance' and 'doing so' may be interpreted as requiring a positive act; but the lack of explicit specification could just as well suggest that complicity may equally take the form of an act or an omission, in line with the general rule articulated in Article 2 ARSIWA.[56] And while the judgment in *Bosnian Genocide* has lent considerable weight to the argument of limiting complicity to positive acts, this continues to be frequently challenged in the literature.[57] More importantly, though, within the context of inter-state complicity, it appears that at least in some cases, the majority of states support the idea that action, rather than omission, is required for

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54 *Bosnian Genocide*, para. 432.

55 *Ibid*.

56 See also H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), 226-227.

57 See Crawford, *State Responsibility*, 403-405, affirming the ICJ's position; but see, to the contrary, e.g. Lanovoy, *Complicity and its Limits*, 96-97, 165-185; Jackson, *Complicity in International Law*, 155-157, 210-211; P. Palchetti, 'State Responsibility for Complicity in Genocide', in: P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), 381, at 385-386. Aust, argues in *Complicity*, at 229 that 'complicity through omission may also become relevant if there is already a duty to act incumbent upon the potentially complicit State', but his argument does not sufficiently account for the need to distinguish between the duty to protect and complicity; see Crawford, *State Responsibility*, 404-405, challenging his argument.

complicity.[58] Given this practice, it is likely that a notion of complicity which would include omission would face just as much, if not more, resistance from states in the state/non-state context.

Limiting complicity to positive action offers an easy way of distinguishing it from duties to protect, but excludes the possibility of complicity by omission.[59] Admittedly, most cases of complicity will involve an action by the complicit actor. Still, when it comes to omissions, there is a qualitative difference between an omission resulting from (unintentional) negligence, and a deliberate decision to refrain from action.[60] This difference, however, may be difficult to capture: for instance, inadequate response by the state's armed forces to an armed group operating in its territory and targeting a neighboring state can be seen as simply the failure to take proper action (a violation of the duty of vigilance), but it can also be seen as – at least tacitly – granting use of that territory to the group (complicity by omission).[61] If complicity may also take the form of omission, how can one distinguish between duties to protect and complicity? The examples above already suggest an answer, namely the intent of the complicit state (an issue deliberately left unaddressed by the ICJ in *Bosnian Genocide*), which is closely related to its knowledge of the relevant circumstances (the second distinctive feature cited by the Court).

Probably the single most contentious issue regarding aid or assistance in Article 16 ARSIWA is whether the complicit state must *intend* to aid or assist the principal actor in the commission of the wrongful act, or whether responsibility may also be established on the basis of knowledge. On the one hand, the text of Article 16 appears to provide for two criteria: knowledge and the 'double obligation requirement'.[62] On the other hand, the Commentary explicitly sets *three* criteria for responsibility to be established under the Article.[63] The first and third of these correspond to the text of Article 16. The second one, however, stipulates that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act', and that there can be no finding of responsibility 'unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[64]

58 See Aust, *Complicity*, 209.

59 See Jackson, *Complicity in International Law*, 210: 'The simplicity of the court's approach, though not unappealing, should be resisted.'

60 Cf. the examples cited *ibid.*, at 41 and 156-157 (although the latter refers to refraining from acting in the face of specific knowledge, without discussing intent).

61 See Palchetti, 'Complicity in Genocide', 385-386; cf. S. Sur, 'Sur les « États défaillants »' (2005) 28 *Commentaire* 891.

62 Articles 16(a) and (b) ARSIWA; on the latter requirement, see Jackson, *Complicity in International Law*, 162-167.

63 ARSIWA Commentary to Article 16, para. 3.

64 *Ibid.*, para. 5. Although the Commentary refers to a wrongful *act*, this cannot be seen as evidence of complicity only taking the form of action, not omission. This is simply a shortening of 'internationally wrongful act', and as the Commentary to Article 1 ARSIWA explains at para. 8, 'the term "act" is intended to encompass omissions'.

This discrepancy has been noted by several authors, prompting a variety of responses. Some have attempted to reconcile the Article's text and its Commentary by arguing that the Commentary is meant to indicate a requirement that the complicit state must (generally intend to) aid or assist the receiving state with the knowledge that this aid or assistance will be used for a wrongful purpose, but it need not specifically intend for the wrongful act to happen.[65] The following example may illustrate the difference between the two types of intent. In the case of general intent, it is only required that the state intends to assist a paramilitary group through the provision of weapons – without necessarily intending for those weapons to be used to commit human rights abuses, but with the knowledge that they will in fact be used to do so. In the case of specific intent, it must be shown that the state provided the weapons with the intent that they be used to commit human rights abuses. But even those authors who do mention a *general* intent under this interpretation (and not all of them do) seem to consider it implied in the provision of aid or assistance itself.[66] In much the same conciliatory vein, it has also been suggested that the Commentary's requirement is meant to ensure that the aid or assistance in question constitutes material contribution to the wrongful act.[67] While such interpretations requiring (general intent or at least) knowledge may reasonably explain the use of the term 'with a view to facilitating', it is difficult – if not impossible – to reconcile them with the Commentary's explicit reference to intent 'to facilitate the occurrence of the wrongful *conduct*', as the latter indicates a requirement of *specific* intent.[68] Others have argued for an accommodating interpretation by suggesting that the ILC appears to have 'wanted Article 16 to be interpreted narrowly so that the "knowledge" element turns into a requirement of wrongful intent.'[69] This is similarly difficult to reconcile with the Commentary, though, given the latter's treatment of intent as a condition *additional* to that of knowledge. Yet another group of authors, viewing the discrepancy as an open contradiction, have framed the issue as an either/or question of which instrument should prevail: the Articles themselves, or the Commentary. When faced with such a binary choice,

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65 See Quigley, 'Complicity in International Law', 110. For a more recent articulation of this argument, building on Quigley, see Palchetti, 'Complicity in Genocide', 389-390. See also Milanović, 'State Responsibility for Genocide: A Follow-Up', 683, on the distinction between general and specific intent.

66 See Milanović, 'State Responsibility for Genocide: A Follow-Up', 683; cf. Palchetti, 'Complicity in Genocide', 389-390, who is not as explicit on this issue, but could be read the same way. Quigley, 'Complicity in International Law', 110, does not explicitly mention general intent, focusing on knowledge instead.

67 A. Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87(859) *International Review of the Red Cross* 467, at 471; the required degree of contribution is addressed below in Section 6.3.2.

68 ARSIWA Commentary to Article 16, para. 5 (emphasis added); see also *ibid.*, para. 9.

69 G. Nolte & H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1, at 14.

authors favor following the text of the Articles.[70] As Judge – and former ILC Special Rapporteur on the responsibility of international organizations – Giorgio Gaja points out:

> While commentaries are generally helpful in the interpretation of ILC articles, they are not meant to introduce additional rules which have no basis in the article they refer to, nor should they endorse a meaning that is incompatible with the text of the articles. […] As a general rule, giving greater weight to the text of the articles where there are discrepancies with the commentaries reflects the much more detailed attention that the ILC devotes to the adoption of the articles.[71]

As an example of such (asserted) incompatibility and the prevalence of the text of ILC articles over their commentaries, Gaja explicitly cites Article 16 ARSIWA.[72] In sum, whether by means of reconciliation or prevalence, most – though not all – interpretations of the ILC's work support a standard of knowledge (or implied general intent) over (specific) intent.[73]

Perhaps the most prominent argument in favor of an intent requirement is that it helps distinguish between regular international cooperation and complicity in a wrongful act, and doing away with such a requirement would jeopardize such cooperation, as it would prompt states to limit their exposure.[74] Nonetheless, this argument has been contested on the basis that the requirement of knowledge provides sufficient grounds for distinction.[75]

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70 See G. Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2016) 85 *British Yearbook of International Law* 10, at 19-20; Jackson, *Complicity in International Law*, 159-162.

71 Gaja, 'Interpreting Articles', 19-20; cf. Jackson, *Complicity in International Law*, 161: 'As a matter of interpretation, the text itself should be the starting point.'

72 Despite holding that in general the text of the Articles themselves should prevail, Gaja, 'Interpreting Articles', 20, does allow for an exception: where the summary record of the Commission's plenary session shows the ILC adopting the commentary despite being 'aware of a possible discrepancy', he notes that 'this would strengthen the conclusion that the [commentary] prevails'. However, he also goes on to point out that the records indicate no such awareness in the case of Article 16 ARSIWA.

73 In addition to the sources cited above, see generally B. Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue belge de droit international* 370; see also Quigley, 'Complicity in International Law', 108-120; Jackson, *Complicity in International Law*, 159-162, 212-213; Lanovoy, *Complicity and its Limits*, 101-103, 218-240 (based not only on the ILC's work). For a contrary position, see Aust, *Complicity*, 230-249 (although he allows that '[t]he intent standard of Article 16 ASR could be subject to modifications under certain conditions', *ibid.*, 245); as well as C. Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State', in: Crawford, Pellet & Olleson, *The Law of International Responsibility*, 281, at 286, who simply takes the requirement of intent for granted, based partly on the ARSIWA Commentary (without considering the discrepancy with the text of Article 16) and partly on the assumption that the ICJ set such a condition in *Bosnian Genocide*.

74 See Nolte & Aust, 'Equivocal Helpers', 14-15; Aust, *Complicity*, 239.

75 See Jackson, *Complicity in International Law*, 161; Lanovoy, *Complicity and its Limits*, 235.

Views also diverge on what, if any, common or majority position can be distilled from states' comments on the ILC's work.[76]

As for the views articulated in international jurisprudence on this question, all that can be safely said is that none of the cases point unambiguously to a requirement of wrongful intent. The ECtHR's jurisprudence on (inter-state) complicity in the context of so-called 'extraordinary rendition' cases, for example, does not discuss the issue of intent at all. This suggests that the Court either did not consider intent to be a requirement for establishing responsibility, or that the necessary intent was implied.[77] In the *Bosnian Genocide* case at the ICJ, meanwhile, the question of intent was further complicated by the fact that unlike most obligations under international law, the prohibition of genocide requires the existence of *specific* intent to prove a violation: it can only be established that genocide has indeed taken place if it is proven that the perpetrator(s) have acted with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[78] In examining the question whether the complicit state needs to have shared this specific intent in order to be found responsible, the ICJ held that the conduct of organs or persons can only be classified as complicity if 'at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.'[79] In other words, the Court required the complicit actor to *at least* have knowledge of the principal's intent – and as the ICJ found the condition of knowledge unmet, it did not proceed to determine whether the complicit state needed to share the principal's intent, leaving

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76 See Aust, *Complicity*, 237-238, arguing that 'more States wished to have the intent requirement strengthened than weakened' (footnotes omitted); Lanovoy, *Complicity and its Limits*, 235, noting that '[i]t is difficult to strike a balance between knowledge and intent through a simple mathematical equation between the numbers' of states and international organizations favoring intent, knowledge or 'constructive knowledge or deleting any cognitive requirement altogether.'

77 The Court speaks of the 'acquiescence or connivance' of the respondent states, which in the French version of the judgments is rendered as 'l'approbation formelle ou tacite', i.e. *the formal or tacit approval* of the state authorities in question: see ECtHR, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Grand Chamber, Judgment of 13 December 2012, para. 206; ECtHR, *Al Nashiri* v. *Poland*, Application No. 28761/11, Fourth Section, Judgment of 24 July 2014, paras. 452, 517; ECtHR, *Husayn (Abu Zubaydah)* v. *Poland*, Application No. 7511/13, Fourth Section, Judgment of 24 July 2014, paras. 449, 512; ECtHR, *Al Nashiri* v. *Romania*, Application No. 33234/12, First Section, Judgment of 31 May 2018, paras. 594, 676-677; ECtHR, *Abu Zubaydah* v. *Lithuania*, Application No. 46454/11, First Section, Judgment of 31 May 2018, paras. 581, 641-642; see also ECtHR, *Nasr and Ghali* v. *Italy*, Application No. 44883/09, Fourth Section, Judgment of 23 February 2016, para. 241. See also Lanovoy, *Complicity and its Limits*, 225-226, arguing that this case law 'recognises knowledge and not intent as a determinative element of international responsibility for complicity'; Nollkaemper, in 'Complicity in International Law', 180, likewise notes that in this case law: 'Intention is either presumed or outright irrelevant.'

78 Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

79 *Bosnian Genocide*, para. 421.

this question unresolved.[80] Although it has been argued that '[t]he words "at the least" suggest that, as a general rule, more than mere knowledge is required',[81] this cannot be sustained on a plain reading of the judgment, which only established the requirement of knowledge.[82]

In the end, the requirement of intent appears to remain largely unsettled in international law. While the ARSIWA Commentary posits a requirement of specific intent (i.e. that the complicit state must intend for the *particular wrongful conduct* to occur), much of the literature and jurisprudence points to the conclusion that specific intent is not a criterion for establishing complicity.[83] That said, and despite some contrary views expressed in the literature, a *general* intent to aid or assist the principal actor may still be required – the practice so far simply does not seem to point to a clear-cut conclusion in favor of or against this requirement. But inasmuch as cases of complicity by positive action are concerned, even if one proceeds on the assumption that general intent is a criterion, the very act of providing aid or assistance 'with knowledge of the circumstances' will imply – and serve as proof of – the existence of such intent.[84] What exactly does 'knowledge of the circumstances' entail, though? And can the same logic be extended to cases of complicity by omission? In other words, are there cases where the certainty and specificity of knowledge is capable of sufficiently distinguishing between a violation of a duty to protect and complicity?

According to the text of Article 16 ARSIWA, the complicit state must provide the aid or assistance 'with knowledge of the circumstances'. The Commentary does not elaborate on the requisite level of knowledge, but Special Rapporteur James Crawford later confirmed the plain reading of this phrase, i.e. that 'knowledge' does not cover the possibility of 'should have known'. He noted that:

80 Milanović, 'State Responsibility for Genocide: A Follow-Up', 681; Palchetti, 'Complicity in Genocide', 388-389.

81 Nolte & Aust, 'Equivocal Helpers', 14.

82 See also Jackson, *Complicity in International Law*, 160, in the same vein.

83 In light of the unsettled state of the law on this issue, authors tend to argue that such an intent requirement risks rendering the rule unworkable or ineffective, given the difficulties associated with proving such intent (and the fact that states may act out of a multitude of considerations), see Quigley, 'Complicity in International Law', 111; Graefrath, 'Complicity in the Law of International Responsibility', 375; Jackson, *Complicity in International Law*, 161; Lanovoy, *Complicity and its Limits*, 235-237.

84 See note 66 above; cf. Nolte & Aust, 'Equivocal Helpers', 14-15, note 68. It has even been noted in the ILC's work that specific intent may be proved by sufficiently specific knowledge, see ILC, *Second report on State responsibility by Mr. James Crawford, Special Rapporteur*, 17 March, 1 and 30 April, 19 July 1999, UN Doc. A/CN.4/498 and Add.1-4, in: *Yearbook of the International Law Commission*, 1999, vol. II, Part One, 3, para. 171. Cf. Nolte & Aust, 'Equivocal Helpers', at 15, who otherwise argue in favor of a specific intent requirement, but accept that in some cases, 'a lack of intent can be offset by sufficient knowledge', citing the example where 'it is obvious that [the principal state] is systematically violating human rights when repressing its ethnic minorities with the help of' military material supplied by another state.

> Despite the attempts of some states to widen the scope of the mental element to include not only actual but constructive knowledge (i.e. the complicit state *should* have known that it was assisting in the commission of an internationally wrongful act), the wording of [Article 16(a) ARSIWA] is confined to knowledge actually in the possession of the complicit state.[85]

Similarly, the ICJ held that certainty of knowledge that genocide was being or would be committed was one of the two elements which distinguished complicity from the duty to prevent genocide, since proving a violation of the latter only required a showing that Serbia knew, or should have known, '*of the serious danger* that acts of genocide would be committed.'[86] Given the ICJ's equation of the Genocide Convention's complicity provision with aid and assistance as understood in the ARSIWA, this statement can essentially be considered an elaboration of Article 16(a) ARSIWA; and under this approach, two scenarios would be excluded from the scope of complicity, but still covered by a duty to protect. Firstly, the approach of the ILC and the ICJ does not admit the possibility that the state *should have known* that its aid or assistance would be used for the commission of a wrongful act. As the ARSIWA Commentary points out, a state providing aid to another 'does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act'.[87] Given the broad range of activities that states normally engage in, this appears to be a reasonable approach. That said, it has been suggested in the literature that states should act with due diligence under certain circumstances, such as when approving aid or assistance to regimes with widely reported human rights abuses, 'to assure that their support is not used for wrongful ends' – although it has also been acknowledged that this is not yet *lex lata*.[88] The same could be applied within the context of the example above: the state should act with due diligence to ensure that weapons provided to a paramilitary group – widely reported to be committing human rights abuses – are not used for the commission of such abuses. Secondly, according to the ICJ, it is not

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85 Crawford, *State Responsibility*, 406 (emphasis in original, footnote omitted).

86 *Bosnian Genocide*, para. 432.

87 ARSIWA Commentary to Article 16, para. 4.

88 Nolte & Aust, 'Equivocal Helpers', 15; see also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: P. Shiner & A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart, 2008), 185, at 219, noting that '[i]nternational law might develop, *de lege ferenda*, a due diligence standard in this context, or otherwise responsibility for aiding or assisting might remain a very narrow and exceptional basis of responsibility.' Cf. ARSIWA Commentary to Article 16, para. 9, noting that 'the [UN] General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations'; Quigley, 'Complicity in International Law', 119-120. See also *Campaign Against Arms Trade, R (On the Application Of)* v. *The Secretary of State for International Trade*, England and Wales Court of Appeal (Civil Division), 20 June 2019, http://www.bailii.org/ew/cases/EWCA/Civ/2019/1020.html, paras. 138-145, finding the UK's arms supply to Saudi Arabia without assessing past IHL violations to be unlawful.

sufficient for a state to be aware that there is a 'serious danger' that its aid or assistance will be used for the commission of a wrongful act – instead, certainty is required.[89]

Closely related to the issue of certainty is the question of how *specific* the knowledge has to be. As a corollary to its requirement of specific intent, and in line with the general non-assumption of risk by the assisting state, the ARSIWA Commentary appears to require conduct-specific knowledge, noting that in the case of alleged human rights abuses, 'the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.'[90]

Jurisprudence from the ECtHR on extraordinary renditions, meanwhile, offers a somewhat more nuanced view on the required certainty and specificity of knowledge, as illustrated by the *Al Nashiri* and *Husayn (Abu Zubaydah)* cases. On the one hand, the Court established that 'the Polish authorities knew that the CIA [Central Intelligence Agency] used its airport in Szymany and the Stare Kiejkuty military base for the purposes of detaining secretly terrorist suspects captured within the "war on terror" operation by the US authorities.'[91] On the other hand, the ECtHR found it 'unlikely that the Polish officials witnessed or knew exactly what happened inside the facility', since 'the interrogations and, therefore, the torture inflicted on the applicant […] were the exclusive responsibility of the CIA'.[92] However, since ill-treatment and abuse were already widely reported at the time, the ECtHR held that 'Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention'.[93] In other words, having established certainty at the *general* level, the Court found complicity on the part of Poland, even if the Polish authorities did not know for certain the *particular* treatment that the two applicants have been subjected to in these cases.

All in all, it appears that while some certainty of knowledge is required for complicity (but not for duties of protection), certainty of knowledge in and of itself is not sufficient to distinguish between the two forms of

89 *Bosnian Genocide*, para. 432.

90 ARSIWA Commentary to Article 16, para. 9.

91 *Al Nashiri* v. *Poland*, para. 441; *Husayn (Abu Zubaydah)* v. *Poland*, para. 443. See also *Al Nashiri* v. *Romania*, para. 584; *Abu Zubaydah* v. *Lithuania*, para. 572.

92 *Al Nashiri* v. *Poland*, para. 517 (see also para. 441); *Husayn (Abu Zubaydah)* v. *Poland*, para. 512 (see also para. 443). See also *Al Nashiri* v. *Romania*, para. 677 (see also para. 587); *Abu Zubaydah* v. *Lithuania*, para. 642 (see also para. 574).

93 *Al Nashiri* v. *Poland*, para. 442; *Husayn (Abu Zubaydah)* v. *Poland*, para. 444. Cf. *Al Nashiri* v. *Romania*, para. 588, in the same vein as *Abu Zubaydah* v. *Lithuania*, para. 575: 'even if the Lithuanian authorities did not have, or could not have had, complete knowledge of the [High-Value Detainees] Programme, the facts available to them […] enabled them to conjure up a reasonably accurate image of the CIA's activities and, more particularly, the treatment to which the CIA was likely to have subjected their prisoners in Lithuania'.

responsibility. For instance, in the scenario described at the beginning of this section, it may be the case that the state knows of the paramilitary group's activities, and fails to prevent them not because it supports the group, but rather simply due to incompetence or negligence. In such a case, the state would be responsible for failing in its duty to protect, not for being complicit in the acts of the armed group.

Since certainty of knowledge alone cannot differentiate between complicity and duties to protect, separate recourse to the criterion of intent is necessary to distinguish between the two. After all, intent may have been the element – additional to knowledge – that the US-Mexico General Claims Commission had in mind when talking about complicity in cases 'where a Government knows of an intended injurious crime, might have averted it, but *for some reason constituting its liability* did not do so.'[94] In line with what has been discussed above regarding complicity more broadly (whether by action or omission), such intent arguably need only be general (intent to aid/assist with knowledge of the circumstances) rather than specific (intent for the wrongful act to take place).

In sum, in cases of complicity by action, the positive act of providing aid or assistance will distinguish the conduct from a violation of a duty to protect. Inasmuch as complicity may require a general intent to aid or assist the principal actor, such intent is implied in the positive act of providing aid or assistance when done with knowledge of the circumstances. Furthermore, although the *lex lata* of inter-state complicity does not yet appear to admit this possibility, the law should arguably capture the fact that complicity may also take place by omission. But while intent may be implicit in complicity by action, this is not the case for complicity by omission; and since the state's inaction, even when coupled with knowledge, can be interpreted in multiple ways, intent will be the decisive feature distinguishing complicity from a violation of a duty to protect. As such, the state's intent to aid or assist the principal (non-state) actor, with knowledge of the circumstances, will need to be examined – and established – separately. That said, in practice it is difficult to imagine a situation of complicity by omission where only general – and not specific – intent can be shown. In other words, the requisite intent will likely fulfil both standards, or neither of them.

6.3.2 Distinguishing Complicity from Attribution and the Possibility of Complicity-based Attribution

Having examined how complicity can be distinguished from the duty to protect, the next question is how it can be delineated from attribution, and whether complicity may serve as grounds for attribution in certain circumstances.

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94 *Janes*, para. 20 (first emphasis in original; second added).

Delineating complicity from attribution is an issue that arises most prominently in cases involving attribution based on the factual rationale, given that support, dependence and control may be closely related. State support to an armed group, for instance, can be so extensive as to make the group (maybe even wholly) dependent on the state, which in turn creates at least the potential for control. At the end of the day, however, attribution is based on the concept of agency (i.e. acting on the state's behalf), whereas complicity is based on support ('aid or assistance'). In order to establish agency, the ICJ in *Nicaragua* and *Bosnian Genocide* – and even the ICTY Appeals Chamber in *Tadić* – relied on control as a factor to be proven separately (not merely presupposed based on dependence).[95] The ICJ's tests were formulated in a way that requires such close control over (the conduct of) the private actor as to eliminate any autonomy on the part of the latter; the 'effective control' test was also endorsed by the ILC in effect.[96] In *Tadić*, the Appeals Chamber expressly stated that 'the mere provision of financial assistance or military equipment or training' was not sufficient to establish attribution and required direction and supervision in addition (despite some ambiguity in the formulation of the test *in abstracto*).[97] In light of this jurisprudence, the two bases of responsibility may be delineated as follows: to demonstrate agency, attribution requires a hierarchical relationship of control (with no autonomy for the private actor, in the interpretation of the ICJ), while complicity describes a relationship that does not imply such hierarchy.[98]

But this approach has not been followed by all international courts and tribunals: subsequent jurisprudence from the ICTY, as well as case law from the ECtHR and the IACtHR, appears to base attribution on state support and/or collaboration. Before recounting this jurisprudence, work at the ILC on complicity-based attribution should be summarized briefly. When Ago considered whether state complicity in the conduct of non-state actors could serve as the basis for attribution, he did not see any conceptual objections to such a rule. And while he did not find sufficient state practice to support such a rule in general, he did find one exception, in relation to armed groups based on the territory of the state. In Ago's words, where the government 'encourages and even promotes the organization of such groups, […] provides them with financial assistance, training and weapons, and co-ordinates their activities with those of its own, and so on,' they will be considered as 'act[ing] in concert with, and at the instigation of, the State'.[99] However, while the threshold described by the Special Rapporteur appears to indicate complicity, he labeled these groups as '*de facto* organs'

95 Unlike the ECtHR's possible *presumption* of control, discussed in Section 4.4.4 above.

96 See Section 4.2 above.

97 *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, paras. 137 and 151(ii).

98 See also Savarese, '*De Facto* Organs and Complicity', 120.

99 *Ago's Fourth Report*, para. 136.

of the state,[100] and this ground for attribution eventually developed into Articles 4 and 8 ARSIWA with significantly higher thresholds – at least in the eyes of the ICJ and the ILC.[101]

As noted above, the ICJ's 'effective control' and 'complete dependence' tests ended up going far beyond what Ago had outlined, and even the 'overall control' test as articulated and applied by the ICTY Appeals Chamber in *Tadić* required more than complicity. But the test as formulated and applied subsequently by the ICTY – consisting of '[t]he provision of financial and training assistance, military equipment and operational support' and '[p]articipation in the organisation, coordination or planning of military operations' – is strikingly close to Ago's original formulation.[102] Even more significantly, there have been a number of cases before regional human rights courts in the past two decades where attribution was established on the basis of factual circumstances which are closest to complicity. The IACtHR has found the conduct of paramilitaries attributable to Colombia on the basis of collaboration or coordination with the military, in some cases even highlighting that the paramilitaries in question could not have carried out their operations without state assistance.[103] Meanwhile, the ECtHR's case law on secessionist regimes propped up by third states has attributed the conduct of these regimes to the supporting states on the grounds that the secessionist entities would not be able to survive in the absence of such state support.[104]

In a series of cases, the ECtHR may have even made similar determinations in the inter-state context, although the precise grounds for responsibility – and thus the scope of conduct attributed – is not entirely clear in these judgments.[105] The cases concerned the role of certain European states in the US extraordinary rendition program, and their responsibility in connection with the conduct of CIA agents. In the first of these cases, *El-Masri*, the Court's Grand Chamber stated that:

> 206. The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State [Former Yugoslav Republic of Macedonia, FYROM]. In this connection it emphasises that the acts complained of were carried out in

100 *Ibid*.

101 Even with these higher thresholds, the ICJ noted in *Bosnian Genocide*, para. 419, that 'giving instructions or orders to persons to commit a criminal act' would ordinarily fall under complicity in (certain) domestic systems.

102 *Prosecutor* v. *Dario Kordić and Mario Čerkez*, ICTY Trial Chamber, Judgment of 26 February 2001, IT-95-14/2-T, para. 115.

103 See Section 4.3 above.

104 See Section 4.4 above.

105 See Council of Europe, Steering Committee for Human Rights, *CDDH Report on the place of the European Convention on Human Rights in the European and international legal order*, CDDH(2019)R92Addendum1, 29 November 2019, https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279 (hereinafter CDDH(2019)R92Addendum1), paras. 194-198.

> the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.
>
> […]
>
> 211. The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.[106]

On the one hand, the ECtHR's language finding CIA conduct 'imputable' to the FYROM and holding the state '*directly* responsible for the violation of the applicant's rights' strongly suggests that the conduct of CIA agents was attributed to the FYROM. On the other hand, the reference to the FYROM's failure to take preventive measures suggests that the state was only held responsible for violating its positive obligations through the conduct of its own organs. As for active facilitation and 'acquiescence and connivance', these go beyond the minimum requirements for a violation of a positive obligation,[107] but it is unclear whether they are regarded by the Court as forming the basis for attributing third-state (or private) conduct.[108]

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106 *El-Masri*, paras. 206, 211 (emphasis added; case citations omitted). See also *ibid*., paras. 235, 240-241.

107 See e.g. *Bosnian Genocide*, para. 432; *Ilaşcu and others* v. *Moldova and Russia*, Application No. 48787/99, Grand Chamber, Judgment of 8 July 2004, Partly Dissenting Opinion of Judge Ress, para. 3. See also M. Milanović, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights', 24 September 2019, https://ssrn.com/abstract=3454007, conceptualizing 'acquiescence or connivance' as either an ECHR-specific attribution rule or an ECHR-specific complicity rule.

108 In support of the 'acquiescence or connivance' standard, the ECtHR cited *Ilaşcu*, where it made a similar statement regarding private conduct when discussing *Moldova's* (not Russia's) jurisdiction and potential responsibility, which was held to be restricted to positive obligations in the same context (*El-Masri*, para. 206, citing *Ilaşcu*, para. 318). But the concept can be traced even further back, as the statement in *Ilaşcu* had, in turn, been based on *Cyprus* v. *Turkey*, concerning Turkey's responsibility in connection with (non-TRNC) private conduct in Northern Cyprus (*Ilaşcu*, para. 318, citing ECtHR, *Cyprus* v. *Turkey*, Application No. 25781/94, Grand Chamber, Judgment of 10 May 2001, para. 81). As discussed above (see Chapter 4, notes 211-213), however, the *Cyprus* v. *Turkey* judgment did not specify, either, whether 'acquiescence or connivance' would lead to responsibility through attributing private conduct or through a violation of a positive obligation by the state's own organs. See also Milanović, 'State Acquiescence or Connivance', tracing the origins of 'acquiescence or connivance' in the ECtHR's jurisprudence and noting at 9-10 that '[t]he *El-Masri* Court very much seems to be using the acquiescence or connivance formula as an attribution test, whereas virtually all prior cases employing this terminology and actually applying it to the facts, used it in the analysis of a state failure to fulfil positive substantive or procedural obligations' (as he points out at 6-7, neither in *Ilaşcu*, nor in *Cyprus* v. *Turkey* did the Court in fact apply this test).

Against this backdrop, it is no surprise that *El-Masri* has been the subject of varying interpretations in the literature: many have regarded it as a case of complicity-based attribution,[109] or at least have read the judgment as holding the FYROM responsible not only for the conduct of its own organs but also for the conduct of CIA agents as a result of some other legal construction;[110] others have interpreted it as a breach of a positive obligation.[111]

In subsequent cases against Poland, Lithuania and Romania before ECtHR Chambers, the Court no longer spoke of direct responsibility, but consistently upheld the principle – explicitly relying on *El-Masri* – that 'the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[112] On this basis, it then held that each respondent state 'on account of its "acquiescence and connivance" in the [High-Value Detainees] Programme must be regarded as responsible for the violation of the applicant's rights […] committed on its territory'.[113] In these cases, the Court also pointed out that the program could not have been 'undertaken on [these states'] territory without [their] knowledge and without the necessary authorisation' – in later cases 'authorisation and

109 See e.g. Jackson, *Complicity in International Law*, 193-194; Milanović, 'State Acquiescence or Connivance', 9-12.

110 A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', EJIL: *Talk!*, 24 December 2012, https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis (based on 'acquiescence or connivance'); H. Keller & R. Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2019) *International Journal of Human Rights*, https://doi.org/10.1080/13642987.2019.1600508, at 6-7, appear to suggest that this was done on the basis of positive obligations.

111 See R. Lawson, 'Notes of the presentation on Theme 1, sub-theme ii – State responsibility and extraterritorial application of the Convention', submitted to the Council of Europe Drafting Group on the Place of the European Convention on Human Rights in the European and International Legal Order, DH-SYSC-II(2018)12, 3 April 2018, https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16808d42ac; cf. CDDH(2019)R92Addendum1, paras. 194-198, noting that it is unclear whether the FYROM was held responsible only for its own conduct or also for the conduct of the US agents. See also Jørgensen in note 115 below.

112 *Al Nashiri* v. *Poland*, para. 452; *Husayn (Abu Zubaydah)* v. *Poland*, para. 449; ECtHR, *Al Nashiri* v. *Romania*, para. 594; ECtHR, *Abu Zubaydah* v. *Lithuania*, para. 581. See also *Nasr and Ghali*, para. 241.

113 *Al Nashiri* v. *Poland*, para. 517; *Husayn (Abu Zubaydah)* v. *Poland*, para. 512; *Al Nashiri* v. *Romania*, para. 677; *Abu Zubaydah* v. *Lithuania*, para. 642.

assistance' – 'being given at the appropriate level of the State authorities.'[114] These judgments suffer from a similar ambiguity as *El-Masri*.[115]

The jurisprudence of the ICTY and the human rights courts on the (apparently) complicity-based attribution of private actors' conduct has been criticized precisely on the grounds that it departs from the concept of agency and the work of the ICJ.[116] Similar concerns have been raised in respect of the ECtHR case law on extraordinary rendition as well.[117]

Against this backdrop, the question arises: *should* complicity serve as the basis for attribution? The answer lies in the relative value placed on two different rationales. On the one hand, attribution is based on the rationale of agency, whereby the conduct of persons or entities is attributable to the state only when they act *on behalf of* the state. This has been proclaimed explicitly by the ILC in the ARSIWA Commentary,[118] and can be traced particularly well in the attribution tests devised by the ICJ, where the non-state actor's lack of autonomy either in general ('complete dependence') or in particular ('effective control') proves that the actor could only have been acting on the state's behalf. While these thresholds may be (and have been) considered excessively high, they ensure that the state is never held responsible for conduct beyond its control. Indeed, much of the criticism facing the jurisprudence of the ICTY and the regional human rights courts is based on the argument that their control tests have stretched this rationale to its breaking point. On the other hand, as highlighted in the introduction to this chapter, state complicity in the conduct of private actors falls into an accountability gap between duties of protection and attribution – with the accompanying rationale that this gap should be closed, particularly given the ease with which states can evade responsibility under the 'complete dependence' and 'effective control' tests. Ideally, this problem would be resolved through the introduction of a (general) rule prohibiting state complicity in the wrongful conduct of non-state actors. Such a rule would help close the accountability

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114 *Al Nashiri* v. *Poland*, para. 441 and *Husayn (Abu Zubaydah)* v. *Poland*, para. 443; *Al Nashiri* v. *Romania*, para. 588 and *Abu Zubaydah* v. *Lithuania*, para. 575. That said, as Nina Jørgensen points out in respect of knowledge, it is not entirely clear whether the Court relies on this as a substantive or evidentiary standard, see Jørgensen, 'Complicity in Torture', 33.

115 See Jackson, *Complicity in International Law*, 194, likewise regarding these cases as instances of complicity-based attribution. But see Milanović, 'State Acquiescence or Connivance', 12-14, arguing that rendition cases after *El-Masri* have been conceptualized as complicity that does not entail attribution; Jørgensen, 'Complicity in Torture', 37, noting in respect of *Al Nashiri* v. *Poland* and *Husayn (Abu Zubaydah)* v. *Poland* that 'it is questionable whether the Court intended to impute the acts of the absent primary perpetrator to the accomplice, contrary to the ordinary rules of attribution under the law of State responsibility.' (It is unclear whether she holds the same view of *El-Masri*.)

116 See note 8 above.

117 Nollkaemper, 'Complicity in International Law', 180: 'The suggestion that complicity functions as a principle for attribution of conduct is problematic.'

118 ARSIWA Commentary to Article 2, para. 5 and to Part One, Chapter II, para. 2.

gap while still ensuring that attribution is limited to cases where agency can be established. But if that is not a possibility, and the only remaining options are the existing categories (i.e. violation of a duty to protect or attribution), these rationales become competing and cannot both be achieved at the same time.

In that case, it is a matter of deciding which of these rationales is more important: ensuring that states' responsibility is limited to conduct they strictly control, or closing the accountability gap? Note that answering this question does not necessarily require a binary response, simply choosing one rationale over the other. Rather, it is a decision regarding what value should be placed on each *vis-à-vis* the other. To put it differently: how much extension of state responsibility can be tolerated in order to narrow the accountability gap? At one end of the spectrum, for supporters of the ICJ's control tests (and their underlying rationale), the answer may be 'none'. At the other end, it may be argued that in order to fully close the gap, *all* instances of complicity should be captured under attribution. And as for any intermediate options, these raise the additional difficulty of where (and how) to draw the dividing line between complicity as such and complicity as the basis for attribution in a way that maintains a clear conceptual distinction between the two.

With these considerations in mind, the dissertation proposes a solution that strikes a balance between the two rationales, delineating complicity from attribution through the degree of contribution made by the assisting state. There appears to be general agreement – including in the Commentary to Article 16 ARSIWA – that for the assisting state to incur responsibility for complicity, the aid or assistance provided has to 'contribute[] significantly' to the wrongful act.[119] However, it is equally accepted that such aid or assistance need not be *essential* for the commission of the act – in other words, it is not a *sine qua non* requirement.[120] Indeed, as the Commentary itself points out, 'where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.'[121] This view also finds support in the literature, with authors noting that in such

119 ARSIWA Commentary to Article 16, para. 5; see also e.g. Jackson, *Complicity in International Law*, 157-158, 211-212.

120 See e.g. Quigley, 'Complicity in International Law', 121-122; Crawford, *State Responsibility*, 402; Aust, *Complicity*, 212-213.

121 ARSIWA Commentary to Article 16, para. 10.

a case, the assisting state would likely cross the threshold to becoming a co-perpetrator.[122]

Could this approach be adapted to state complicity in the conduct of private actors, setting *sine qua non* support as the basis for attribution? Despite the similar terminology, one has to proceed with caution in attempting to answer this question. After all, the Commentary speaks of attribution *of injury*, not of conduct, and affirms that the assisting state is 'not responsible, as such, for the act of the assisted State'.[123] Rather than the assisting state becoming responsible for the conduct of the assisted state (in addition to its own), the assisting and assisted states are considered jointly responsible co-authors of the internationally wrongful act. However, as the Commentary admits, 'this may be a distinction without a difference', since the consequences for the assisting state would be much the same in both cases.[124]

Applying this reasoning to state complicity in the conduct of private actors by analogy,[125] one finds that holding the state responsible for the conduct of the private actor (through attribution) or for its own *sine qua non* contribution to the injurious act would likewise lead to the same consequences.[126] In fact, the IACtHR has already employed similar reasoning in its 2018 *Omeara Carrascal* judgment, even though that reasoning was not restricted to *sine qua non* contributions. Once Colombia had accepted responsibility for violating the duty to *respect* two victims' rights through the active conduct of its own agents who had collaborated with the paramilitaries, the Court no longer deemed it necessary to decide whether the conduct of the paramilitaries themselves was also attributable to the state.[127] In the case of the third victim, whose situation was not covered

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122 A. Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Zürich: Schulthess, 2007), 249, note 643: '[f]alls die Beihilfe eine *conditio sine qua non* darstellt für den Eintritt der Völkerrechtsverletzung, dürfte in den meisten Fällen die Schwelle zur Mittäterschaft überschritten werden'; see also *ibid.*, 251-252. Relying on Felder, see also Aust, *Complicity*, 212-213 in the same vein: 'if the support could be qualified as a *conditio sine qua non*, it is more likely to assume that an independent responsibility of the assisting State would arise in the form of the main authorship of the wrongful act.' Cf. N. Schrijver, 'Regarding "Complicity in the Law of International Responsibility" by Bernhard Graefrath (1996-II): The Evolution of Complicity in International Law' (2015) 48 *Revue belge de droit international* 444, at 448, noting that 'sufficiently significant or essential aid may well transcend into joint responsibility'; Crawford, *State Responsibility*, 402.

123 ARSIWA Commentary to Article 16, para. 10.

124 *Ibid.*

125 The ARSIWA Commentary to Part One, Chapter IV itself notes at para. 7 that 'the idea of the implication of one State in the conduct of another is analogous to problems of attribution'.

126 The term 'consequences' is used here in the sense of Article 28 ARSIWA, setting out the legal consequences of an internationally wrongful act.

127 IACtHR, *Omeara Carrascal* et al. v. *Colombia*, Merits, Reparations and Costs, Judgment of 21 November 2018, Series C, No. 368, paras. 16(a), 19(a), 36; see also the discussion of the case in Section 4.3.2 above.

by Colombia's admission, the Court was likewise firm in holding the state responsible for violating the duty to respect (and not only guarantee) the rights in question.[128] But the IACtHR once again did not clarify whether the state was responsible only for the conduct of its own agents (soldiers and police officers), or also that of the paramilitaries. Nonetheless, the Court treated the case – in respect of all three victims – at least *as if* the conduct of the paramilitary group was attributable to the state, awarding reparations on the same scale as in previous cases where the attribution of paramilitary conduct was well established.[129]

There is one major difference between the two scenarios of complicity as such and complicity as the basis for attribution, though – not in terms of consequences but in terms of hurdles to a finding of responsibility. As noted above, responsibility for complicity is dependent on the principal actor having committed an internationally wrongful act. Given the limitations on the legal personality of private actors, as well as the lack of appropriate international fora to adjudicate these issues, a complicity rule would likely be rendered unworkable in practice. Against this backdrop, there is already some support in the literature for complicity – in its *sine qua non* manifestations or even in general – to serve as a ground for attribution.[130] As mentioned at the beginning of this section, Ago himself noted that complicity-based attribution could circumvent problems associated with non-state actors' lack of legal personality. Granted, attributing the conduct of the private actor to the state based on the latter's complicity – even if its contribution was of a *sine qua non* nature – requires compromising on the principle that the state is only responsible for its own conduct, i.e. conduct carried out on its behalf.[131] But the identity of the consequences of the two scenarios (attribution of conduct *versus* attribution of injury) ensures that the concept of state responsibility is not stretched too far from how it is currently understood under the rules of attribution as conceptualized by the ICJ and the ILC. Furthermore, there is a strong basis to argue from a normative perspective that the state should in any case not be able to escape

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128 *Omeara Carrascal*, para. 188.

129 See Section 4.3.4.3 above.

130 See R. Wolfrum & C.E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 592 for *sine qua non* cases; and Amoroso, 'Complicity as a Criterion of Attribution' for complicity in general. Although A.J.J. de Hoogh does not explicitly describe it as complicity, his argument in 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *British Yearbook of International Law* 255, at 290-291, runs along similar lines. See also Lanovoy, *Complicity and its Limits*, 306-329, who argues (in particular at 325-326) in favor of complicity-based attribution in respect of 'de facto territorial authorities' (essentially local *de facto* governments).

131 See also generally the discussion in Jackson, *Complicity in International Law*, 22-26 on culpability and fair labelling.

(or reduce) responsibility for the consequences of something that would not have happened had it not been for that state's contribution. For instance, where paramilitaries commit human rights abuses which could not have taken place without support from the Colombian military, the state's role is much closer to commission than failure to prevent the abuses – and this should be reflected in the extent of the state's responsibility.

By logical extension of the above proposal, aid or assistance that falls below the *sine qua non* threshold should not be able to serve as a basis for attribution. In such cases, it would arguably be stretching the concept of attribution to hold the state responsible for a private actor's conduct that would have taken place regardless of the state's assistance – even if the latter's contribution was significant.[132] This applies *a fortiori* to aid or assistance that cannot be described as significant, as this would result in attributing the conduct of private actors to the state in circumstances that do not even meet the requirements for complicity. In the same vein, it is generally difficult to see attribution being based on 'acquiescence' or 'tolerance' – this is reminiscent of the implied complicity theory in the jurisprudence on injuries to aliens, which was abandoned in international law nearly a century ago. That said, in line with what has been discussed in the previous section and the current one, acquiescence or tolerance can serve as a basis for attribution under two conditions: (1) these terms must denote a *deliberate* omission (in order to constitute complicity); and (2) that deliberate omission must constitute a *sine qua non* contribution to the conduct of the private actor.

In sum, limiting complicity-based attribution to cases where the state's aid or assistance constitutes a *sine qua non* contribution to the act will ensure, on the one hand, a workable rule that goes some way in closing the accountability gap, and on the other hand, that the scope of state responsibility is not unduly extended.

But even with a *sine qua non* threshold applied, there is one major difference between the approaches of the IACtHR and the ECtHR to complicity-based attribution. While the former examines attribution at the level

132 This is all the more so as there appears to be some uncertainty in the ARSIWA Commentary to Article 16 as to the necessary minimum degree of contribution. Despite laying down the requirement of significant contribution in para. 5, the Commentary subsequently contrasts cases of *sine qua non* assistance with instances where 'the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered.' (*Ibid.*, para. 10.) This assessment is difficult to reconcile with the idea of a significant contribution – in fact, it has even been argued on the basis of this apparent contradiction that neither the text of, nor the Commentary to Article 16 identifies a minimum threshold for complicity: Felder, *Die Beihilfe im Recht*, 250. See also Crawford, *State Responsibility*, 403, noting the inconsistency, but resolving it in favor of a significant contribution based on the ILC's subsequent affirmation in the context of the Articles on the Responsibility of International Organizations.

of conduct, the latter does so at the level of the actor.[133] Accordingly, the requirement of knowledge is likely to be met in the case law of the IACtHR (as the Court requires collaboration in the particular circumstances); but this is not the case in the ECtHR's jurisprudence. While a general intent on the part of Turkey/Russia/Armenia to assist the TRNC/MRT/NKR can easily be established through the various forms of support provided, there is no evidence that the third states knew of the specific human rights violations committed by the secessionist entities. With the criterion of knowledge unmet, the ECtHR's approach cannot fit into the conceptual structure of complicity – nor, as a result, that of complicity-based attribution.[134] Accordingly, this approach should be seen as *lex specialis* that lies outside the framework of the ARSIWA.[135]

6.4 Concluding Remarks

As noted by Miles Jackson: 'Complicity is a particular way of contributing to wrongdoing. In reflecting this, legal systems should hold accomplices responsible for their own contribution to the principal's wrong, rather than for the wrong of their principal.'[136] To this one may add that accomplices should be held responsible for the full extent of their contribution, not only their lack of effort in preventing or redressing the principal's wrong. In other words, the state should be responsible exactly for what it has done: not less, not more. Following these considerations, neither duties to protect, nor attribution are able to accurately capture state complicity in the conduct of non-state actors.

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133 See Sections 4.3 and 4.4 above. The establishment of what exactly is a *sine qua non* contribution in a particular case can raise further difficulties in the inter-state context: for instance, although the ECtHR found that the CIA could not have carried out its actions in Romania without the latter's authorization and assistance, there were in total more than 50 states around the world involved in the US rendition program; see Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013, https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf. It thus stands to reason that the US could have relied on the (likewise indispensable) assistance of a different country. However, as Felder argues in *Die Beihilfe im Recht*, 251, regarding complicity more generally, the existence of such alternative scenarios should not enable those that did in fact provide assistance to avoid responsibility. Furthermore, such problems are much less likely to arise in the state/non-state context, where the extent of private actors' international relations are significantly more limited – for instance, in the absence of support from Russia, it would be difficult to imagine what other state would step in to sustain the MRT.

134 To fit into that framework, one eventual possibility could be to rely on the third states' continued support with knowledge of repeated human rights abuses by the secessionist entities – but as mentioned above at note 88 and accompanying text, this is not yet *lex lata* even in the inter-state context.

135 On the viability of a *lex specialis* argument, see Section 4.5.3 above.

136 Jackson, *Complicity in International Law*, 31.

Unfortunately, in international law, a general rule of complicity is a relatively recent development even in the inter-state context, and it is yet to exist in the state/non-state context. This difficulty is further compounded by the fact that such complicity would require the non-state actor to have international legal personality – an issue which continues to be highly contentious. Nonetheless, given the rapid ascent of inter-state complicity, the increasing acceptance of some non-state actors' international legal personality with at least a limited set of rights and obligations, as well as the inadequacy of the existing legal categories for capturing certain types of state involvement, a state/non-state complicity rule should arguably be developed. There are particularly strong arguments for such a rule in the fields of human rights and IHL, even if the existing jurisdictional limitations of courts may give rise to additional hurdles.

How could such a potential state/non-state complicity rule be delineated from the violation of a duty to protect on the one hand, and the attribution of a private actor's conduct on the other? As duties of protection are violated by omission (including by insufficient action), complicity can easily be distinguished from such a violation where it takes the form of an action. The real difficulty is differentiating between the two in cases of complicity by omission. Although complicity by omission is not currently recognized as *lex lata* even in the inter-state context, many in the literature continue to challenge this stance. This continued challenge shows that the qualitative difference between a state which – due to, for instance, incompetence – fails to prevent or redress a catalyst event and one which knowingly refrains from action in order to assist the private actor provides a strong argument for admitting the category of complicity by omission in international law. In order to capture this qualitative difference and distinguish between complicity by omission and a violation of a duty to protect, one must have recourse to the requirement of (general) intent to assist the private actor. At the same time, complicity by omission – like complicity by action – arguably does not require specific intent, i.e. intent for the particular wrongful act to happen, although in practice it would be difficult to show general but not specific intent in such cases. As regards the distinction between state complicity in the conduct of a private actor and attributing that conduct to the state, the crucial difference is that attribution requires the private actor to have acted on the state's behalf (which, in turn, is operationalized through control), whereas complicity merely requires the state to have assisted the private actor.

Ideally, complicity and attribution would each be captured by the corresponding legal basis for responsibility under international law. But given the difficulties surrounding a potential rule of state/non-state complicity, the question arises whether complicity may instead serve as a basis for attribution until such a state/non-state complicity rule develops. Special Rapporteur Ago did not have any objections to complicity-based attribution in principle; in fact, he specifically pointed out that complicity-based attribution would remedy the problem of non-state actors' lack of international

legal personality. His conclusion that complicity could not serve as a basis for attribution was based simply on the lack of practice. Accordingly, the past few decades' jurisprudence at the IACtHR may be capable of starting to change that assessment, at least inasmuch as it has been accompanied by state acceptance as evidenced by the formulation of pleadings in subsequent cases.[137] Furthermore, from a conceptual point of view, such a complicity-based attribution rule could fit into the ARSIWA framework in the case of a *sine qua non* contribution by the state to the act of the principal (private) actor. Such a *sine qua non* contribution goes beyond the minimum requirement of complicity, and would in any case result in the same legal consequences in terms of reparation, regardless of whether the state's role would be classified as complicity or as warranting attribution of the private actor's conduct, paving the way for complicity-based attribution.

That said, the ECtHR's jurisprudence provides an interesting conundrum. Despite some ambiguity as to the role of control, the Court's sole evidentiary focus on support puts this approach closer to complicity than attribution. Yet at the same time, as the relationship between the secessionist entities and the third states is examined at the level of the actor, rather than the conduct, it does not meet the knowledge requirement of complicity in the first place. As a result, it cannot be properly regarded as an instance of complicity-based attribution, either. This is not to say that the concept at the heart of this case law is not compelling. Quite the contrary: the ECtHR's underlying logic – that if it was not for the third state's (continued) support, the secessionist entity would not exist and could not inflict human rights abuses – makes for a powerful argument in favor of finding the third state responsible. Such responsibility, however, would lie outside the ARSIWA's conceptual framework, unless the secessionist regime's level of dependence is seen as giving rise to a presumption of control. In other words, the basis of responsibility would have to be attribution based on control, rather than complicity, in order to fit into the ARSIWA framework.

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137 That said, since that jurisprudence relates almost exclusively to Colombia, which is then also the only state that appears to have accepted the IACtHR's approach, no far-reaching conclusions can be drawn from this yet.