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3 2019-2020

LUISS
Academy

LUISS Guido Carli / Premio tesi d'eccellenza
Working paper n. 3/2019-2020
Publication date: november 2021
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© 2021 Valentina Coli
ISBN 9788861057517

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LUISS University Press – Pola Srl
Viale Pola 12, 00198 Roma
Tel. 06 85225485
e-mail lup@luiss.it
www.luissuniversitypress.it

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Complicity in the commission of internationally wrongful acts: a new perspective in the law of State responsibility

Valentina Coli

Abstract

In light of the ongoing conversation on complicity in international law, this paper explores the relevant legislative provisions on the topic, both at a national and an international level. After describing the main elements of complicity, the paper goes on to explore its application in state practice with a focus on military assistance and exportation of weapons to belligerent States. The paper concludes by discussing the possible application of the concept of complicity to multinational enterprises when they act in conjunction with States.

1. The concept of complicity in international law

Complicity is essentially a form of knowing involvement of an international law actor in the wrongful act that can be attributed to another.[1] The concept of complicity originates in national criminal law and is highly nuanced as every jurisdiction shapes its criminal law in different ways. Despite the diversity, most of the States focus on the same key features when drafting their criminal legislative provisions on complicity of individuals. As a matter of fact, most of the provision addressing complicity in a crime first describe the forms of complicity (intentionally helping or influencing the actor), then the nexus between the complicity and the crime (with a debate on the classification of acts of influence and assistance), and, finally, the accomplice's fault.[2] However, the same concept is hardly ever applied to States. This is for two reasons. First, because States make the law, they will never provide a mechanism to hold themselves accountable. Second, because only an international body, *super partes*, can be a third-party entity drafting State responsibility provisions all States can agree upon. As a matter of fact, this has always been the dilemma relating to State responsibility: States do not want to commit to an instrument limiting their sovereign power. These are the obstacles the Articles on State Responsibility for Internationally Wrongful Acts[3] faced throughout the years and are still facing.

The concept of State responsibility was developed in the aftermath of the Second World War. Since then, there were attempts of codifying the subject, and the most successful outcome was achieved by the International Law Commission (ILC), a UN ad hoc commission whose work led to a complete body of Articles on States' responsibility in 2001.[4] Despite the ILC's efforts, the Articles never became a binding convention due to the lack of consent among Member States. Notwithstanding this antagonism, the Articles are widely applied and referred to by scholars and international jurisprudence. This is mostly because the Articles are general and neutral, two features that helped their widespread application by international courts and tribunals all over the world. The Articles address the key features of responsibility and the ILC could not but include the concept of complicity among them. The provision on complicity reads: 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: (i) that State does so with knowledge of the circumstances of the internationally wrongful act; and (ii) the act would be internationally wrongful if committed by that State.[5]

Three elements must be taken into account when reading this provision.

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[1] V. Lanovoy, "Complicity", *Max Planck Encyclopedias of International Law*, 2015.

[2] M. Jackson, *Complicity in International Law*, Oxford University Press, 2015.

[3] ILC Articles on Responsibility of States for Internationally Wrongful Acts (adopted 12 December 2001) U.N. Doc. A/56/83, (ARS).

[4] *Ibid*.

[5] *Ivi*, Article 16.

a. The objective element: aid and assistance

The first element of the provision is the conduct, namely the "aid or assistance". It must be provided with the purpose of facilitating the commission of the wrongful act and must actually facilitate it in the end.[6] Nonetheless, Article 16 does not require that the aid or assistance is essential to the performance of the wrongful act: rather, the assisting conduct only has to significantly contribute to it.[7] There is no proper explanation of the meaning of "aid and assistance" in the Commentary of the ILC, and the interpretations of this objective element are generally based on positive criteria, such as the analysis of the causality requirement of complicity,[8] as well as negative criteria.[9] On a more practical point of view, there are several ways a State could aid or assist another in the commission of a wrongful act. For example, a State could allow the use of its territory by another State to carry out armed activities,[10] like when the US bombed Tripoli through the English airbases in 1986. In that occasion, the Libyan Government claimed that the United Kingdom was partly responsible for the bombing because it allowed the US to launch its fighter planes from the English soil, affirming that "the UK would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[11] Although the UK denied its responsibility,[12] the General Assembly (UNGA) also condemned its activities[13] and called upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya."[14]

b. The subjective element: knowledge

A second element of utmost importance in Article 16 is the aiding State's awareness of the current circumstances that make the principal State's conduct internationally wrongful.[15] Some uncertainties also cover this subjective element because the Commentary does not clarify the term "knowledge".

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[6] "The aid or assistance must be given with a view of facilitating the commission of the wrongful act, and *must actually do so*", ARS, Commentary on Article 16, para. 5, emphasis added.

[7] *Ibid*.

[8] T. Becker, *Terrorism and the State: rethinking the rules of State responsibility*, Bloomsbury Publishing, 2006, p. 292; *see also Prosecutor v. Tihomir Blaskic*, Case No. ICTY IT-95-14-T, Judgement, (2 March 2000) para. 285; *Prosecutor v. Anto Furundzija*, Case No. ICTY IT-95-17/1-T, Judgement, (10 December 1998) paras. 233-4 (holding that the degree of complicity required to cause responsibility did not amount to a *conditio sine qua non* but assistance only needed to have caused a substantial effect on the commission of the wrongdoing).

[9] "The supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment and personnel, *for the specific purpose of assisting an aggressor*, would constitute a joint responsibility.", I. Brownlie, *System of the Law of Nations: State Responsibility*, Oxford Clarendon Press, 1983, p.191, emphasis added.

[10] ARS, Commentary on Article 16, para. 8.

[11] Statement of Ambassador H. Houdeiry, Libyian People's Bureau, Paris, reprinted in the New York Times (16 April 1986).

[12] Statement of Mrs. M. Thatcher, Prime Minister, House of Commons Debates, 6th series, vol.95, col. 737 (15 April 1986).

[13] U.N.G.A. Res. 41/38 (20 November 1986), U.N. Doc. A/RES/41/38.

[14] *Ivi*, paras. 1, 3.

[15] R. Ago, *Seventh Report on State Responsibility*, U.N. Doc. A/CN.4/307, para. 72, (29 March, 17 April, 4 July 1978).

This led to a debate between actual (what the State knew at the time) and constructive knowledge (what the State knew and should have known). At a first glance, it might seem unlikely that there could be any reference to constructive knowledge in Article 16.[16] This is why in the ICJ *Genocide Convention* case,[17] the Court held that "there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *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."[18] Although this excerpt might seem to require an "at least" knowledge and, therefore, actual knowledge, in the same case the ICJ also held that "a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that *the State was aware, or should normally have been aware*, of the serious danger that acts of genocide would be committed".[19] It seems that this second excerpt welcomes that other part of the doctrine advocating for a constructive knowledge standard[20] which is triggered by the mere possibility to obtain knowledge[21] – either by exercising due diligence[22] or just by foreseeing the commission of the wrongdoing.[23] Recently, the standard of constructive knowledge has found application in different scenarios. For instance, in 2013, more than one hundred States ratified the Arms Trade Treaty[24] to regulate the international trade of conventional weapons and to prevent illicit arms trade.[25] In particular, Article 6(3) ATT expressly refers to the element of constructive knowledge when addressing States that trade weapons with other belligerent States: A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has *knowledge* at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[26] Another example of the application of the constructive knowledge standard can be found in the 1946 *Corfu Channel* case, where the ICJ held Albania

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[16] H. Moynihan, "Aiding and assisting: the mental element under Article 16 of the international law commission's articles on State responsibility", *British Institute of Int'l and Comparative Law*, 2018, vol. 67, p. 461.

[17] *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Judgement, I.C.J. Rep. 2007, (26 February) (*Genocide Convention* case).

[18] *Ivi*. para. 421, emphasis added.

[19] *Ivi*, para 432, emphasis added.

[20] P. Sands, A. Clapham, B.N. Ghràlaigh, "The lawfulness of the authorization by the United Kingdom of weapons and related items for export to Saudi Arabia in the context of Saudi Arabia's military intervention in Yemen", *Matrick Chambers, Gray's Inn*, 2015, paras. 5.13-5.

[21] O. Corten, "Quels droits et quels devoirs pour les etats tiers? Les effets juridiques d'une assistance a une acte d'agression", in *L'intervention en Irak et le droit international*, K. Bannelier and others, Pedone, Paris 2004, vol. 113.

[22] S. Talmon, "A Plurality of Responsible actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq", in *The Iraq War and International law*, P. Shiner and A. Williams, Hart, Oxford 2008, p. 219.

[23] B.D. Smith, "State Responsibility and the Marine Environment – the Rules of Decision", *Oxford University Press*, 1988, vol. 12.

[24] Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014), 3013 U.N.T.S. (ATT).

[25] *Ivi*, Article 1.

[26] ATT, Article 6(3), emphasis added.

responsible simply because it must or should have known about the mines placed in the Corfu Channel.[27] Here, the UK accused Albania of the destruction of its warships and the deaths of numerous British citizens due to the explosion of mines in the Corfu Channel. Although the ICJ never directly addressed them, Yugoslavia and Greece were likely to be implicated in the accident.[28] Indeed, some tests showed that it would have been impossible to not notice the mine-laying – probably by those states – occurring in Albania's territorial waters. So, Albania was held responsible primarily for the assumption that it had constructive knowledge of the wrongful act.

c. The *pacta tertiis* rule

Lastly, Article 16 requires the conduct of the assisting State to be unlawful, therefore in violation of the State's own obligations. In this way, the assisting State would still be bound by its obligations to not voluntarily cause a breach of an international instrument it is a Party to. In other words, States that are not bound by certain international obligations can act in full disregard of them (*pacta tertiis* rule),[29] but States cannot commit a wrongful act through another State when they are prevented from committing the same act by their international obligations.[30] Some controversial cases arise when obligations overlap. This might be the case of two different bilateral obligations essentially imposing the same duties upon the acting and the assisting State. Pursuant to the Vienna Convention[31], the assisting State should always respect the object and purpose of a treaty it is a Party to and comply with its obligations in good faith. Thus, the assisting State may be seen as eluding its own treaty obligation when it contributes to a wrongful act in violation of the same core obligation enshrined into another international instrument.

Even if the three elements were established before an international tribunal, one of the main issues affecting Article 16 would still be its enforcement. This has been addressed in the *Monetary Gold* case,[32] where the ICJ affirmed that it should first determine the responsibility of the main actor before holding the complicit State responsible. [33] Although this seems a huge barrier against the enforcement of Article 16, its importance does not rely on the likelihood of a conviction on its basis, but on the concrete changes it could bring to State practice.[34]

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[27] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement, I.C.J. Rep. 1949 (4 April).

[28] C. Chinkin, "Third Parties in International Law", *Oxford Clarendon Press*, 1993, vol. 319.

[29] E. David, "Article 34", in *Les Conventions de Vienne sur le droit des traités – Commentaire article par article*, O. Corten and P. Klein, Bruylant, Brussels 2006, para. 1.

[30] ARS, Commentary on Article 16, para. 6.

[31] Vienna Convention on the Law of the Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 U.N.T.S.331 (VCLT), Article 26.

[32] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Britain and Northern Island and United States of America)*, Judgement, I.C.J. Rep. 1954, (June 15)

[33] *Ivi*, p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgement, I.C.J. Rep. 1992, 240, para. 55 (26 June).

[34] Jackson, *supra* note 2, pp. 218-9.

2. State practice and *opinio iuris* of the concept of international complicity: an analysis of its customary law status

Article 38(1)(b) of the ICJ Statute states that the Court shall apply "international custom, as evidence of a general practice accepted as law".[35] This source of international law is called customary law and consists of two elements: state practice and *opinio iuris*. The majority of scholars support the finding that complicity in the commission of an internationally wrongful act does enshrine customary international law.[36] The first acknowledgement of the customary law status of Article 16 appeared in the ICJ Judge Schwebel's dissenting opinion in the *Military and Paramilitary Activities in and against Nicaragua* case,[37] and then in the ICJ ruling in the *Genocide Convention* case.[38] Furthermore, during the ILC drafting process of Article 16, the majority of governments were in favor of the existence of a customary rule,[39] while only a minority was against it.[40] The majority's belief is reflected in ICJ decisions,[41] the resolutions of the General Assembly,[42] and the resolutions of the Security Council.[43] However, it must be noted that Article 16 is not just subject to *opinio juris*, there is also consistent state practice to support its customary law status. Recently, state practice in this field was significantly witnessed with respect to (a) assistance in the unlawful use of force, and (b) military support in violation of international obligations.

a. Assistance in the unlawful use of force

There are numerous cases of States condemning the wrongful complicit conduct of other States in situations involving the use of force against territorial sovereignty. The aforementioned *Corfu Channel* case is a clear example: here the UK claimed that Albania

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[35] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 U.N.T.S. 933, Article 38(1)(b).

[36] A. Clapham, "Symbiosis in International Human Rights Law: the Öcalan Case and the Evolving Law on the Death Penalty", *Journal of International Criminal Justice*, 2003, vol. 1, p. 479; O. Corten, "L'arrêt rendu par la CIJ dans l'affaire du crime de génocide (Bosnie-Herzégovine c. Serbie): Vers un assouplissement des conditions permettant d'engager la responsabilité d'un Etat pour génocide?", *Annuaire français de droit international*, 2007 vol. 53 p. 277; C. Kress, "The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq", *Journal of International Criminal Justice*, 2004, vol. 2, pp. 251–2; A. Boivin, "Complicity and beyond: International law and the transfer of small arms and light weapons", *International Review of the Red Cross*, 2005, vol. 87, pp. 467-96; Talmon, *supra* note 22.

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua V. United States)*, Judgement, 1986 I.C.J. Rep. 14, (27 June) (*Nicaragua* case).

[38] *Genocide Convention* case, *supra* note 17, para. 420.

[39] Germany, Switzerland, U.N. Doc. A/CN.4/488, 75; Switzerland U.N. Doc. A/C.6/54/SR.22, para. 70.

[40] Finland, U.N. Doc. A/C.6/33/SR.39, para. 4; Mali, YBILC 1980, Vol. II, Pt. One, 101; Mexico, U.N. Doc. A/C.6/55/SR.20, para. 42; The Netherlands, U.N. Doc. A/CN.4/515, 28; Japan, U.N. Doc. A/C.6/54/SR.22, para. 8; the United Kingdom, the United States of America, U.N. Doc. A/CN.4/488, 75.

[41] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 15, pp. 55-6, paras. 121-7 (21 June).

[42] U.N.G.A. Res. 3314(XXIX) (14 December 1974), U.N. Doc. A/9631, pp. 142-3 (holding that a State can commit an aggression by allowing another State to use its land to perpetrate an aggression against a third State).

[43] S.C. Res. 301 (20 October 1971), U.N. Doc. S/INF/27 (urging States to abstain from cooperating with South Africa's occupation in Namibia).

was liable for its complicit conduct in the mine-laying of the channel[44] and sought to establish its responsibility.[45]

Another example of responsibility associated with an act of complicity arose in connection with the Osirak incident. In 1981, Israel bombed the nuclear site of Osirak in Iraq and violated Article 2(4) UN Charter which reads: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the UN.[46] As a consequence, the movement of the Non-Aligned States called upon every country not to provide aid or assistance to Israel.[47] Likewise, the UNGA considered the attack unlawful and urged States to refrain from assisting Israel with any kind of weapons or military supplies which may facilitate further aggressions against other States.[48]

Lastly, a recent situation raised several questions with respect to the general concept of complicity and what could – or should – be done to prevent the occurrence of attacks against other States. In 2008, Israel asked for the US allowance to fly over the Iraqi territory to conduct a targeted attack against Iranian nuclear facilities. At that time, the US had *de facto* control of Iraq and it denied the request without motivating the rejection.[49] However, in 2009, the New York Times published an investigatory article which identified some concerns expressed by the White House with regard to the targeted attack.[50] In particular, the article questioned whether the US could potentially be responsible had the attack occurred anyway.[51] Since the US was aware of the targeted attack, did it have an obligation to prevent it? And, if so, did a failure of this obligation to prevent entail its responsibility for acting in complicity with Israel? Some conclusions can be drawn in light of the Status of Forces Agreement concluded by the Iraqi and US authorities,. Article 27(4) of this agreement states that the use of Iraqi land, water and airspace as a route or launching pad for attacks against other countries is not permitted.[52] Considering that in 2008 the US was still in control of Iraq, it would be reasonable to assume that the US was bound by an obligation to at least try to prevent the attack against Iran through the use of the Iraqi territory or airspace.[53]

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[44] *Corfu Channel* case, memorial submitted by the United Kingdom, ICJ Pleadings 1949, vol I, 19 para. 94.

[45] H.P. Aust, "Complicity and the Law of State Responsibility", *Cambridge University Press*, 2011, vol. 257, p. 109.

[46] Charter of the United Nations (adopted 24 October 1945, entered into force 31 August 1965) 1 U.N.T.S. Art. 2(4)

[47] "Verbal Note of June 16, 1981 from the Permanent Mission of Cuba on behalf of the Non-Aligned Movement, addressed to the President of the Security Council, U.N. Doc. S/14544.

[48] U.N.G.A. Res. 36/27, (November 11, 1981), U.N. Doc. A/RES/36/27, para. 3.

[49] A. Benn and Haaretz Correspondent, "US Puts Brakes on Israeli Plan for Attack on Iran Nuclear Facilities", *Haaretz*, 12 August 2008, https://www.haaretz.com/1.5014443.

[50] D.E. Sanger, "US rejected aid for Israeli raid on Iranian nuclear site", *The New York Times*, 10 January 2009, https://www.nytimes.com/2009/01/11/washington/11iran.html.

[51] Aust, *supra* note 45, p. 114.

[52] Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Status of Forces Agreement) Iraq- U.S., Article 27(4), (adopted 17 November 2008, entered into force 1 January 2009).

[53] Aust, *supra* note 45, p. 114.

b. Military support in violation of International Law

Maybe one of the most significant examples on international complicity is weapons supply to States engaged in internal or international conflicts. In the 21st century, States attempted to regulate the field of arms export in a more substantial way. Today, there are numerous prohibitions on military supplies to belligerent countries but, unfortunately, these provisions are not always respected. In the international framework, remarks on State complicity were first expressed in 2010, when the UN Member States gathered in New York for a preparatory conference on the ATT.[54] The numerous preparatory conferences led to a final version of the ATT which now encompasses two provisions setting out limits to arms exports and authorizations: Article 6 and 7. On one hand, Article 6 lists the cases where exporting weapons is strictly prohibited and its content essentially reflects Article 16 ARS. As mentioned before,[55] this ATT provision makes reference to the element of constructive knowledge in the commission of wrongful acts, e.g. that the State could foresee that its supply of arms would facilitate international humanitarian law violations. On the other hand, when arms export is not completely prohibited under Article 6, Article 7 requires the State to conduct a risk assessment of the exportation before authorizing it. It states that each exporting State Party, prior to authorizing the arms export, should consider factors like the information provided by the importing State, and assess the potential that the conventional arms (a) would contribute to or undermine peace and security and (b) could be used to commit or facilitate a serious violation of international humanitarian or human rights law, commit or facilitate an offence under international conventions or protocols relating to terrorism or transnational organized crime to which the exporting State is a Party. If the State Party concludes that there is an *overriding risk*, it shall not authorize the export. Both under Article 6 and 7 ATT, the assessment of the risk is based on the State's knowledge of the current threats, either "at the time of the authorization" (Article 6) or "before the authorization" (Article 7). Despite the concerns voiced by some States that the assessment should be made before the transfer, the ATT only "encourages" but does not require States to reassess the authorization in case they are made aware of serious violations of international law prior to the transfer.[56]

In the European framework, the European Council's Committee on Foreign and Security Policy adopted the EU Common Position 2008/944/CFSP[57] on arms transport which replaced the EU Code of Conduct on Arms Exports of 1998.[58] The EU Common Position consists of eight criteria according to which Member States must assess the export of

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[54] U.N.G.A. Res. 64/48 (12 January 2010), U.N. Doc. A/RES/64/48.

[55] ATT, *supra* note 24.

[56] ATT, Article 7(7).

[57] European Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union L 335/99, 13 December 2008 ("EU Common Position").

[58] Council of the European Union, European Codes of Conduct on Arms Export, 8675/2/98 (5 June 1998) http://www.poa-iss.org/RegionalOrganizations/EU/EU%20Code%20of%20Conduct%201998.pdf.

weapons on a case-by-case basis. The EU Criterion 2, as amended by the Council Decision 2019/1560/CSFP[59], sets out a two-step process to assess the compliance of the recipient country with international human rights and humanitarian law. First, the supplier State should verify if the recipient State's policy complies with human rights and humanitarian law. Secondly, it should gauge whether the recipient State has committed human rights abuses and assess whether there is a *clear risk* that the military supply might be used in the commission of serious humanitarian violations. In any event, the seriousness of the violations should be assessed on their character, nature and effects. These features do not have to be systematic or widespread for the violation to be "serious".[60] Lastly, Article 5 of the EU Common Position further stresses that supplier States investigate the end use of the military goods before they grant export licenses. This assessment must be made "on the basis of reliable prior knowledge of end use in the country of final destination".[61]

The Organization for Security and Cooperation in Europe (OSCE) has also regulated the field of arms export by adopting the OSCE Principles Governing Conventional Arms Transfers (the OSCE Principles)[62]. In particular, Principle 4 limits arms export and provides a clear list of factors to consider when evaluating the end use of the military supplies. Although the OSCE Principles are more detailed than every other provision regarding arms export, their test could probably be construed as establishing a lower benchmark. Indeed, the ATT "overriding risk" and the EU Common Position "clear risk" refer to more serious threats whereas the Principles encompass all kinds of transfers that would likely facilitate the commission of wrongful acts.[63]

As of today, many countries ratified the ATT and introduced provisions on arms export in their national legislation. These legislative maneuvers speak for the willingness to consider the arms supply as a complicit wrongful conduct. However, legislative innovations are not the only way to express the States' standing with respect to complicity, as their considerations on arms export are also of utmost importance. The next paragraphs will focus on the extent to which considerations of complicity played a role in reaching final decisions on providing belligerent States with weapons.

i. State practice and *opinio iuris* on arms export

Today, responsibility for supplying weapons is still not set in stone. Indeed, the European Commission on Human Rights clarified that militarily supplying a State which violates its international obligations does not automatically entail the responsibility of the supplier under the European Convention of Human Rights (ECHR).[64] This decision was given in a case that arose after the Iraqi Minister of Foreign Affairs signed a contract with an Italian

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[59] European Council Decision (CFSP) 2019/1560 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (16 September 2019).

[60] *Ivi*, paras. 6-7.

[61] EU Common Position, *supra* note 57, Article 5.

[62] Organization for Security and Co-operation in Europe, Principles governing conventional arms transfers, DOC.FSC/3/96 (25 November 1993) file:///Users/home/Desktop/yemen/OSCE%20principles.pdf.

[63] *Ivi*, Principle 4(a),(b).

[64] *Rasheed Haje Tugar v. Italy*, Application No. 22869/93 (18 October 1995).

company for the supply of anti-personnel mines to be exported to Iraq. Almost ten years later, an Iraqi man stepped on one of them while working on a minefield. He was severely injured and filed a complaint against the Italian Government before the European Court of Human Rights (ECtHR) for not passing laws which would have barred the exportation of mines to Iraq, a country systematically involved in violations of human rights. The Court's finding, however, contradicted his view: it held that the injury suffered by the applicant was not a direct consequence of the failure to legislate on arms transfers as it was "too remote" to attract Italy's responsibility.[65] This holding shows that international issues of complicity can be assessed on a case-by-case basis, in light of the circumstances of each incident.

In 1950, the Governments of the UK, France, and US agreed to adopt a Tripartite Declaration on security in the Near East which stated the three countries' plan to supply arms to the States in the Near East after having received assurances that the purchasing States did not intend to undertake any act of aggression. They also stated that similar assurances were to be requested from any other State in the area to which they permitted arms to be supplied in the future.[66] Among the three countries, the UK has been the most vocal with respect to the sale of international weapons. In particular, in 1958, the British Secretary of State was called to state the position of the Government with regard to the shipment of arms from the Soviet bloc to Yemen, which were later used against Aden, a former British colony. The Secretary said that the policy of her Majesty's Government had always been to urge restraints in arms deliveries to the Middle East although arms deliveries in themselves would not constitute grounds for protest, adding that the Government had reported to the UN acts of Yemeni aggression on the frontier and had protested to the Yemeni government too.[67] Subsequently, Lauterpacht, a well-known international law scholar, analyzed this statement and argued that nothing in the Secretary of State's words implied that a State may not have incurred responsibility for complicity in supplying weapons to another State.[68] In 2004, the Under Parliamentary Secretary of State for the Foreign and Commonwealth reaffirmed that the UK Government would not supply military assistance to individuals or units known, or suspected to be involved in human rights abuses.[69] Since he referred to "individual or units" only, this statement was considered ambiguous as to whether the UK also condemned the supply of weapons to States.

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[65] *Ivi*, p. 4.

[66] Tripartite Declaration Regarding Security in the Near East, Three-power statement, released to the press on 25 May 1950, in the XXII Department of State Bulletin, (Forgotten Books, 2018) p. 886.

[67] E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment", *International and Comparative Law Quarterly*, 1958, vol. 7, p. 551.

[68] "The Answer suggests that the responsibility for the use of those arms [...] must rest primarily upon the State which receives them. There is, however, nothing in the answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct". *Ibid.*

[69] *British Year Book of International Law*, Oxford University Press, 2004, vol. 75, p. 706.

Another example of this state practice can be found in the Czech policy ending its military support to Iraq due to the latter's unlawful invasion of Kuwait in 1990.[70] Germany dealt with similar situations too. In 1982, the Federal Republic of Germany suspended the export of arms supplies to Argentina after the latter occupied the Falkland Islands. Its goal was to prevent the arms exports to a country non-compliant with its international duties and the UN Security Council resolutions.[71] In 1995, Germany also limited the use of the arms exported to Turkey to only self-defense cases against attacks under Article 5 NATO Treaty.[72] To avoid incurring in responsibility for complicity, Germany kept monitoring Turkey's compliance with this condition of their deal.[73]

ii. Complicity in the conflict in Yemen

In Yemen, gross human rights violations have occurred since 2015.[74] The main aggressor is Saudi Arabia but there are other international players behind the scenes, including Italy. Indeed, Italian weapons are exported internationally and, sometimes, to States that do not fall within the requirements set out in the Italian law 185/90.[75] Recently, the New York Times[76] and Reported.ly[77] conducted an investigation that showed that Saudi Arabia used Italian bombs against the Yemeni civilians.[78] The reports explained that Italy might be in breach of national and international law, in particular the ATT to which the country is a Party. The EU Parliament attempted to stop the arms flow to the Middle East by passing a non-binding resolution establishing an arms embargo on Saudi Arabia in November 2017[79]

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[70] "In the context of the military intervention in Kuwait, the Government of the Czech and Slovak Federal Republic has decided to suspend all supplies of a military character to the Republic of Iraq. At the same time, the Czech and Slovak Federal Republic stops delivering also all other items that could be used by Iraq for military purposes", in D. Bethlehem, *The Kuwait Crisis: Sanctions and Their Economic Consequences*, *Part I*, Cambridge University Press, 1991, p. 101.

[71] Aust, *supra* note 45, p. 134.

[72] North Atlantic Treaty, (adopted 4 April 1949, entered into force 24 August 1949), 34 U.N.T.S. 243.

[73] Aust, *supra* note 45, p. 134.

[74] "A chi vende le armi l'Italia", *Il Post*, 9 June 2019, https://www.ilpost.it/2019/06/09/armi-italia-esportazioni/

[75] Nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento, Legge 180/1990, published in Gazzetta Ufficiale on 14 July 1990, modified by the law 148/2003 (17 June 2003).

[76] M. Browne, B. Marcolini, and A. Tiefenthaler, "How did bombs made in Italy kill a family in Yemen?", *The New York Times*, 29 December 2017, https://www.nytimes.com/video/world/middleeast/100000005254317/civilian-deaths-yemen-italian-bombs.html?emc=edit_ta_20171229&nl=top-stories&nlid=60168601&ref=cta.

[77] M. Browne, Reported.ly, "Da dove vengono le bombe usate in Yemen", *Il Post*, 26 June 2015 https://www.ilpost.it/2015/06/26/yemen-bombe-inchiesta-italia/.

[78] In 2015, a civil war broke out in Yemen between the Houthis, a group in control of the capital Sana'a and allied with the former President Ali Abdullah Saleh's forces, and the faction supporting the government of Abd Rabbuh Mansur Hadi in Aden. Al-Qaeda in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and the Levant (ISIS) also carried out some attacks during the war. In 2015, the Houthis extended their control on the south of Yemen and reached Aden. Hadi left the city and shelter in the United Arab Emirates (UAE). The day after, the UAE and Saudi Arabia launched a joint military operation by using airstrikes to attack the Houthis and restore Hadi's government. A UN report showed that in just one year almost 16.200 Yemeni citizens died, among whom almost 10.000 civilians. The UN High Commissioner for Human Rights (UNHCHR) reported that the UAE coalition caused the majority of the deaths by launching airstrikes. "Yemen crisis: why is there a war?", *BBC News*, 19 June 2020, https://www.bbc.com/news/world-middle-east-29319423.

[79] Resolution on the situation in Yemen, Eur. Parl. Doc. 2017/2849 (RSP), 30 November 2017, p. 15; Browne, Marcolini, and Tiefenthaler, *supra* note 76.

which was reiterated in October 2018.[80] Some countries like Switzerland, Germany, Finland, Norway, and Denmark followed through this resolution and cut arm sales to Saudi Arabia.[81] However, there are still many countries denying the illegality of their arms sales to Saudi Arabia. For example, Roberta Pinnotti, the former Italian Minister of Defense, claimed that the sale of weapons to Saudi Arabia "was done in compliance with the law".[82] As a matter of fact, the Italian authorities were trying to avoid the application of the law 185/90[83] by saying that the conflict could not be defined as such since Saudi Arabia never officially made a war declaration.[84] In 2019, Italy finally complied with the EU Parliament resolution and stopped the sale and exportation of military supplies to Saudi Arabia and the UAE.[85] However, it seemed that Italy did not stick to its decision. Based on a governmental report on arms export, *Rete Italiana per il Disarmo* and *Rete della Pace* disclosed that the Italian government had granted arms export licenses for a value of € 195 million in 2019.[86] Despite the critics coming from the opposition, Italy kept approving arms export licenses, the profits continued to grow, and Yemeni civilians continued to suffer. Italy was not the only State involved in the arms supply to the Saudi-led coalition, as analyzed by a UN report shedding light on the role of the western countries in the conflict in Yemen.[87] Indeed, the report identified other players (the US, France and the UK) as major arms exporters to the Saudi-led coalition in Yemen. Additionally, it did not simply address the airstrikes and the mine-laying as military operations but, more specifically, as "war crimes".[88] This view was also confirmed by UN spokespersons, NGOs like Amnesty International, Human Rights Watch and Oxfam.[89] Local human rights organizations calculated that from 26

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[80] Resolution on the situation in Yemen, Eur. Parl. Doc. 2018/2853 (RSP), 4 October 2018, p. 3.

[81] D. Bisaccio, "Germany extends arms embargo on Saudi Arabia", *Defense & Security Monitor*, 22 June 2020 https://dsm.forecastinternational.com/wordpress/2020/03/24/germany-extends-arms-embargo-on-saudi-arabia/.

[82] Browne, Marcolini, and Tiefenthaler, *supra* note 76.

[83] Legge 180/1990, *supra* note 75.

[84] *A chi vende le armi l'Italia*, Il Post, *supra* note 74.

[85] D. Affinito, "Export di armi, dove e perché violiamo le leggi Italiane e dell'Onu", *Corriere della Sera*, 15 October 2019, https://www.corriere.it/dataroom-milena-gabanelli/export-armi-turchia-dove-perche-violiamo-leggi-italiane-dell-onu/57dbf612-ef70-11e9-9951-ede310167127-va.shtml.

[86] "Export 2019: ancora bombe italiane verso i paesi coinvolti nel conflitto in Yemen", *Rete Italiana per il disarmo e Rete della Pace*, 19 May 2020, https://www.disarmo.org/rete/a/47671.html.

[87] Press Release, Group of International and Regional Eminent Experts on Yemen, Yemen: collective failure, collective responsibility – UN Expert Report (2 September 2019). The report is the outcome of the work of a Group of International and Regional Experts on Yemen created by the Human Rights Council to examine the alleged human rights violations and abuses occurring in the country since September 2014.

[88] Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, "Situation of human rights in Yemen, including violation and abuses since September 2014". Established pursuant to Resolution 36/31 (2017) concerning Technical assistance and capacity-building for Yemen in the field of human rights, U.N. Doc. A/HRC/42/CRP.1 (3 September 2019).

[89] *See generally*, "Targeting Saada, unlawful coalition airstrikes on Saada City in Yemen", *Human Rights Watch*, 30 June 2015, https://www.hrw.org/report/2015/06/30/targeting-saada/unlawful-coalition-airstrikes-saada-city-yemen#_ftn10; "Yemen: Airstrike and weapon analysis shows Saudi Arabia-led forces killed scores of civilians", *Amnesty International*, 2 July 2015, https://www.amnesty.org/en/latest/news/2015/07/yemen-airstrike-analysis-shows-saudi-arabia-killed-scores-of-civilians/; "Oxfam's Statement amended 8 May 2015: Oxfam condemns coalition bombing of a warehouse containing vital humanitarian aid", *Oxfam International*, 18 April 2015, https://www.oxfam.org/en/press-releases/oxfams-Statement-amended-8-may-2015-oxfam-condemns-coalition-bombing-warehouse.

March to 11 June 2015 alone, the Saudi-led coalition carried out over 2,274 airstrikes.[90] Other international and regional authorities have condemned the airstrikes and addressed them as a violation of international humanitarian law. For instance, the UN Under-Secretary-General for Humanitarian Affairs referred to the Saudi Arabia bombing campaign as a "clear contravention of international humanitarian law and unacceptable."[91] The UN High Commissioner for Human Rights also stressed that the huge amount of civilian deaths "ought to be a clear indication [...] that there may be serious problems with the conduct of hostilities".[92] Amnesty International accused Saudi Arabia of intentionally violating international humanitarian law with its airstrikes, underscoring that there "is no indication that the Saudi Arabia-led military coalition has done anything to prevent and redress [international law] violations".[93] These international bodies pointed their fingers not only against the Saudi-led coalition, but also against those countries supporting it with military supplies. In this case, for example, one of the main military providers was the US. Indeed, several rankings affirm that the US is the biggest arms exporter in the entire world.[94] Consequently, several questions on its complicity in the conflict in Yemen have been raised during the last years.[95] In 2019, the US Senate attempted to pass a resolution to finally end the military supply to the Saudi-led coalition. However, the former US President Trump vetoed the resolution and the Senate was not able to override his veto.[96]

France is also deeply involved in the war in Yemen, despite the several international instruments limiting – or prohibiting – its participation. Indeed, France has been acting in full disregard of the EU arms embargo on the Saudi-led coalition, the ATT and its national legislation.[97] Furthermore, France's conduct has also violated the EU Common Position 2008/944/CFSP[98] which prevents the export of weapons to States violating international humanitarian law.[99]

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[90] *Ibid*, Human Rights Watch.

[91] M. Nichols, "UN says air strikes on Yemen port could worsen aid crisis", *Reuters*, 19 August 2015 https://news.trust.org/item/20150819211048-uj5ii.

[92] *Zeid calls for investigation into civilian casualties*, UN OHCR (14 April 2015) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15836.

[93] Amnesty International, *supra* note 89.

[94] M. Bazzi, "America is likely complicit in war crimes in Yemen. It's time to hold the US to account", *The Guardian*, 3 October 2019, https://www.theguardian.com/commentisfree/2019/oct/03/yemen-airstrikes-saudi-arabia-mbs-us; Affinito, *supra* note 85.

[95] L. Lewis, "Promoting Civilian Protection during Security Assistance: Learning from Yemen", *CNA Analysis and Solutions*, 5 May 2019, p. 8, https://www.cna.org/CNA_files/PDF/IRM-2019-U-019749-Final.pdf.

[96] P. Zengerle, "Senate upholds veto of Yemen resolution in victory for Trump Saudi policy", *Reuters*, 2 May 2019 https://www.reuters.com/article/us-usa-saudi-yemen/senate-upholds-veto-of-yemen-resolution-in-victory-for-trump-saudi-policy-idUSKCN1S81UU.

[97] Disclose, "La France et le Yémen: cartographie d'un mensonge d'Etat", *Mediapart*, 15 April 2019, https://www.mediapart.fr/journal/international/150419/la-france-et-le-yemen-cartographie-d-un-mensonge-d-etat?onglet=full.

[98] EU Common Position, *supra* note 57.

[99] *Ibid*, Article 2(2)(b).

In the UK, the 2002 Export Control Act,[100] the 2008 Export Control Order,[101] and the Consolidated EU and National Arms Export Licensing Criteria (the Consolidated Criteria)[102] regulate the field of arms export. In particular, the Consolidated Criteria implement the ATT, the EU Common Position and the OSCE principles in the UK legislative framework and make their breach challengeable before the UK courts. The Consolidated Criteria are eight different criteria according to which all UK arms exportations must be assessed on a case-by-case basis. However, for every application "all relevant information available at the time the license application is assessed" must be taken into account.[103] For example, the Government could consider "reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organizations".[104] It is noteworthy that State assurances are not included in the guidance to the criteria as an example of reliable evidence.

The 2002 Export Control Act is the legislative framework regulating arms exports and empowers the Secretary of State to control them, whereas the 2008 Export Control Order describes the powers granted. Pursuant to Section 32 of the 2008 Export Control Order, it is possible to amend, suspend or revoke a license in two cases, namely (a) where there has been a change in circumstances in the destination country or region such that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies; (b) where new information has come to light about a particular export which indicates that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies.[105] Further indicating a capacity for flexibility, the UK Government created a specific mechanism to suspend licenses already granted to countries going through a sudden deterioration in security and stability after the uprisings of the 2011 Arab Springs.[106] And yet despite the availability of these mechanisms, none has been deployed against Saudi Arabia. It is not a mystery that it has consistently been ranked amongst the "worst of the worst" States for political and civil rights considerations, as shown by the NGO Freedom House's report which included it among the twelve countries in the world where rights are protected the least.[107] Eventually,

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[100] Export Control Act (adopted 24 July 2002, entered into force 1 May 2004) http://www.legislation.gov.uk/ukpga/2002/28/contents.

[101] Export Control Order (adopted 17 December 2008, entered into force 6 April 2008), 2008/3231, http://www.legislation.gov.uk/uksi/2008/3231/made as amended by the Export Control (Amendment) Order (ECJU) (adopted 8 February 2018, entered into force 5 March 2018), 2018/165 http://www.legislation.gov.uk/uksi/2018/165/pdfs/uksi_20180165_en.pdf.

[102] The Consolidated European Union and National Arms Export Licensing Criteria, (25 March 2014) https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm.

[103] Consolidated Criteria, footnote 198, Column 10WS.

[104] *Ivi*, Column 14WS.

[105] Export Control Order, *supra* note 101.

[106] UK Parliamentary Committee on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Control (2013)*, Section 9 – Arms Export Control Policies, (17 July 2013) https://publications.parliament.uk/pa/cm201314/cmselect/cmquad/205/20502.htm.

[107] "Freedom in the World 2015: Saudi Arabia", *Freedom House* https://freedomhouse.org/country/saudi-arabia/freedom-world/2020.

even the UK Foreign and Commonwealth Office (FCO) included Saudi Arabia in a list of twenty-seven countries to which the UK has "wide-ranging concerns" relating to "the gravity of the human rights situation in the country".[108] Despite its skeptical statements on Saudi Arabia's position, the UK Government kept minimizing the Saudi-led coalition's attacks.[109] It stated that it regularly received reports on the situation in Yemen[110] as well as updated assurances of compliance with international humanitarian law from Saudi Arabia.[111] In November 2015, the position of the UK Government slightly changed. It acknowledged the need to carry out proper investigations to clarify the Saudi Arabian attacks.[112] However, the Ministry kept holding that the Government was satisfied that the licenses granted to Saudi Arabia up to that point were compliant with the Criteria.[113] Nevertheless, the UK Court of Appeals[114] decided to investigate the lengths the UK Government went to in order to ascertain the legality of its export licenses in compliance with its EU and international obligations.[115] The appeal arose from a decision of the High Court delivered on 10 July 2017 which dismissed the claim of Campaign Against the Arms Trade (CAAT) and concluded that the government's arms export was totally lawful.[116] The Court of Appeal took into account the legal test under the 2002 Export Control Act,[117] the 2008 Export Control Order,[118] and Article 2 of the EU Common Position.[119] According to the Court's analysis, the UK Government should have considered the attitude of the recipient

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[108] UK Foreign and Commonwealth Office, "Human Rights and Democracy Report 2014" (12 March 2014) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415912/21064_WL_Human_Rights_Annual_Report_High_Res.pdf.

[109] "We have not seen any credible evidence that suggests that the coalition has breached the law", UK Parliament, House of Commons, Yemen: Armed Conflict: Written question - 6862, (20 July 2015) https://www.parliament.uk/business/publications/written-questions-answers-Statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&use-dates=True&answered-from=2015-07-20&answered-to=2015-07-20&keywords=yemen.

[110] *Ibid*. Yemen: Armed Conflict: Written question – 10364, (12 October 2015) https://www.parliament.uk/business/publications/written-questions-answers-Statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&use-dates=True&answered-from=2015-10-12&answered-to=2015-10-12&keywords=yemen.

[111] *Ibid*. Yemen: Armed Conflict: Written question – 10564, (14 October 2015) https://www.parliament.uk/business/publications/written-questions-answers-Statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons%2clords&use-dates=True&answered-from=2015-10-14&answered-to=2015-10-14&keywords=yemen.

[112] B. Quinn and D. Smith, "Calls for investigations into Saudi Arabia's actions in Yemen", *The Guardian*, 11 November 2015 https://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen

[113] *Ibid*.

[114] *The Queen (on the application of Campaign Against the Arms Trade) (CAAT) v. Secretary of State for International Trade (SSIT)*, (*CAAT* case) (2019) E.W.C.A. 1020.

[115] D. Sabbagh and B. McKernan, "UK arms sales to Saudi Arabia unlawful, court of appeal declares", *The Guardian*, 20 June 2020, https://www.theguardian.com/law/2019/jun/20/uk-arms-sales-to-saudi-arabia-for-use-in-yemen-declared-unlawful.

[116] *The Queen (on the application of Campaign Against the Arms Trade) (CAAT) v. Secretary of State for International Trade (SSIT)*, (*CAAT High Court* case) (2017) E.W.H.C. 1726.

[117] Export Control Act 2002, *supra* note 100.

[118] Export Control Order 2008, *supra* note 101.

[119] EU Common Position, *supra* note 57.

country towards the principles of international human rights law.[120] Nevertheless, the UK never made – nor tried to make – any assessment of whether the Saudi-led coalition could have acted in violation of Article 2, neither before nor during the conflict in Yemen. Thus, the Court overturned the Hight Court ruling.[121] This does not mean that the arms export to Saudi Arabia must be suspended. Only the UK government can do so, but it should nevertheless reconsider the situation in light of the Court of Appeals' decision.

3. Complicity between States and Multinational Enterprises (MNE): the attribution criteria

Given that both the legal personality and international responsibility of MNEs is still highly disputed, a possible means to address the MNE's wrongdoings is to attribute them to a State. The first classical criterion of attribution is enshrined in Article 5 ARS, by which the corporate conduct can be attributed to the State if the MNE exercised elements of governmental authority and was acting in that capacity when committing the wrongful act.[122] The second criterion of attribution is enshrined in Article 8 ARS which addresses State responsibility when the State gives instructions, direction and control over the conduct of a non-State actor.[123]
There might be, however, an additional criterion of attribution enshrined in Article 16.

a. International jurisprudence on the criterion of attribution for complicity

It is noteworthy that this criterion of attribution based on complicity can be traced back to old arbitral decisions. In the 1930 *Poggioli* case,[124] the Italian-Venezuelan Commissions considered the failure by the Venezuelan authorities to prosecute four men who attempted to take the life of an Italian citizen, Mr. Poggioli. He claimed that the Venezuelan authorities acted in complicity with the four men and, in particular, that they advised the culprits of their pending arrest. The arbitrator expressly made reference to complicity as a criterion of attribution: "When the authorities of the State of Los Andes have acted *in apparent conjunction with criminals*, and have with them and under the circumstances heretofore detailed joined in the commission of offences against private individuals, and no one has been punished therefore and no attempt made to insure punishment, *the act has become in a legal sense the act of the government itself.*"[125] Several authors extensively discussed this issue in connection with international jurisprudence on human rights abuses and State

[120] *CAAT* case, *supra* note 114, para.21.

[121] *CAAT* case, *supra* note 114, paras. 164-7.

[122] ARS, Article 5.

[123] ARS, Article 8. In the *Genocide Convention* case, the ICJ stated that Article 8 reflects customary law.

[124] *Poggioli* case, UNRIAA, Vol. X (Sales No. 60.V.4), 669.

[125] *Ibid*. p. 698.

practice on the fight against terrorism. [126] For instance, in the *Lasva Valley* case,[127] the International Criminal Tribunal for the former Yugoslavia (ICTY) further defined the requirement of overall control in a way that made attribution arise out of complicity. In the Tribunal's view, a State has overall control over non-State actors when it (a) provides them with "financial and training assistance, military equipment and operational support" and (b) takes part "in the organization, coordination, or planning of [its] military operations."[128] As Amoroso, a well-known scholar, pointed out, from this second condition it can be inferred that the concept of control is extended over its scope, transmuting into a form of complicity.[129] The Inter-American Court of Human Right (IACtHR) adopted the same approach and held that Colombia was responsible "for the violations committed by paramilitary groups who have acted with the support, acquiescence, involvement, and cooperation of State security forces."[130] The ECtHR also applied this attribution criterion in the *Ilascu v. Moldova* case.[131] This case dealt with the wrongful acts perpetrated by the government of Transdniestria in control of part of the territory of Moldova. In the end, the Court held Russia responsible for its military support to the Transdniestrian forces. In particular, it motivated its ruling on the grounds that the Russian forces handed the applicants in this case over to the illegal Transdniestrian regime, knowing of the fate awaiting them.[132] Lastly, even the African Commission on Human and People's Rights (AFCHR) referred to attribution for complicity in the 2001 *Social and Economic Rights Action Center (SERAC) and Another v. Nigeria* case.[133] Here, the Commission gauged the attributability of the Nigerian Petroleum Company (NNPC) conduct to Nigeria and held the State responsible: "The government of Nigeria *facilitated* the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian government *has given the green light to private actors*, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis". In light of this jurisprudence, it seems that attribution for complicity might be a relevant criterion to assess State responsibility, at least when the fundamental values of the international community (e.g. peace, human rights, environment) are at stake. Following this reasoning, the same criterion could be applied to MNEs' conduct.

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[126] E. Savarese, "Issues of Attribution to States of Private Facts: Between the Concept of De Facto Organs and Complicity", *The Italian Yearbook of International law*, 2006, vol. 15, p. 111; J. Cerone, "Re-Examining Int'l Responsibility: Inter-State Complicity in the Context of Human Rights Violations", *Int'l Law Student Association Journal of Int'l & Comparative Law*, 2008, vol. 14, p. 525.

[127] *Prosecutor v. Kordic´ and Cerkez*, Case No. ICTY IT-95-14/2, Judgement, (26 February 2001).

[128] *Ibid*. para. 115.

[129] D. Amoroso, "Moving towards complicity as a criterion of attribution of private conducts: imputation to States of corporate abuses in the US case law", *Leiden Journal of International Law*, 2011, vol. 24, p. 996.

[130] *Case of the Rochela Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 163, para. 78 (2007); *Case of the Ituango Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 148, paras. 125.1, 125.25, 133 (2006); *Case of the Mapiripa´ n Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 134, paras. 121–3 (2005); *Case of the 19 Tradesmen*, Inter-Am. Ct. H.R. (ser. C) No. 109, paras. 84(b), 115, 134, 135, 137, 138 (2004).

[131] *Ilascu v. Moldova*, Application No. 48787/99 (ECtHR, 8 July 2004).

[132] *Ibid*. para. 384.

[133] *Social and Economic Rights Action Center (SERAC) and Another v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).

b. Attributing corporate wrongful acts to States through the criterion of attribution for complicity: US case law

The Alien Tort Statute (ATS) is a unique legal tool which allows aliens to bring tort claims before the US courts for violations of the law or a treaty the US is Party to.[134] In the 1995 *Kadic* case, the Second Circuit affirmed it had jurisdiction under the ATS over non-State actors, and, in particular, over the leader of a non-recognized State.[135] This decision paved the way for complaints against corporations. Indeed, in the 1998 *Unocal* case, the California District Court dealt with abuses committed by a multinational enterprise in Myanmar and held that the ATS conferred its jurisdiction not only over natural, but also legal persons.[136] Since then, US Courts have followed the route of holding non-State actors liable for violating State-addressed norms when their conduct could be attributed to the State (also known as State-action requirement).[137] The legal ground for this assessment is 42 US Code 1983, introduced by the Civil Rights Act of 1871, which provides redress for crimes committed by State actors. While at the beginning private actors did not fall within this category, subsequently, US courts recognized that these latter could also act "under the color of law".[138] In *Forti*, for example, the Court applied the State-action requirement in order to hold a private entity responsible for breaching State-addressed laws.[139] Therefore, Section 1983 enshrines the attribution criterion as it expressly requires that the wrongful act committed by the non-State actor is "fairly attributable to the State".[140] This implicit reference to international law is made more explicit in *Beanal v. FreeportMcMoRan* where the court referred to domestic jurisprudence as well as to international law principles to gauge whether the State-action requirement was met.[141] In any event, the tendency of the US courts is obviously to apply their domestic law rather than international law. From a practical point of view, this is not only easier because of their familiarity with the law, but also because the US law sets a lower threshold for cooperation. Indeed, in most of the ATS cases, no effective control is required, but only that the government officials and the MNEs cooperated at an equal level in the commission of the crime.[142] In this regard, the US jurisprudence developed three tests to meet the State action requirement: the "public-function", the "State-compulsion" and the "joint-action" tests.[143] The first two tests closely recall Article 5 and 8 ARS. Pursuant to the public-function test, "a private party who performs a function that has traditionally been the

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[134] Alien Tort Statute (ATS), 28 U.S.C. §1350 (1789). It was invoked for the first time in the 1980 *Filàrtiga* case when the Second Circuit ruled that customary law was part of the law of the nations under the ATS. *Filàrtiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[135] *Kadic v. Karadzic*, 70 F.3rd 232 (2nd Cir. 1995).

[136] *Doe v. Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997).

[137] S. Joseph, *Corporations and Transnational Human Rights Litigations*, Oxford Hart Publishing, 2004, p. 33.

[138] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

[139] *Forti v. Suarez-Mason*, 672 F. Supp. 1531, p. 1546 (N.D.Cal. 1987).

[140] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, p. 935 (1982).

[141] *Beanal v. FreeportMcMoRan, Inc*., 969 F. Supp. 362, p. 375 (E.D. La. 1997).

[142] Amoroso, *supra* note 129, p. 1002.

[143] *See generally* E. Chemerinsky, "Dialogue on State Action", *Touro Law Review*, 2000, vol. 16, p. 775.

exclusive prerogative of the State may be deemed a State actor".[144] On the other hand, the State-compulsion test requires that "the State creates, coerces, or significantly encourages the challenged activity to the extent that the decision is deemed to be the State's".[145] These two tests merely reflect principles of international law and do not bring any innovative standard to the table. On the contrary, the joint-action test envisages the new criterion of attribution based on complicity. Pursuant to this test, the State-action requirement is met "where there is substantial degree of cooperative action between the State and private actors in effecting the deprivation of rights".[146] Although the case law on joint-action is not "a model of consistency", there are some common patterns.[147] For example, the State-action requirement was never satisfied when the host State failed to prevent the private actors' wrongful acts.[148] On the other hand, the courts found States responsible even when State agents did not take part directly in the wrongdoings. In *Abdullahi v. Pfizer*, the applicant claimed that a pharmaceutical company tested an experimental drug on numerous Nigerian children, thus causing their death or severe diseases[149] and, in the court's view, those actions were attributable to the State of Nigeria.[150] Likewise, in *Arias v. Dyncorp*, the Columbian District Court held the US and Colombia responsible for the actions of Dyncorp.[151] The company had sprayed fumigants onto Colombian cocaine and heroin poppy plantations which resulted in unlawful damage to some Ecuadorian plantations. In particular, the court noted that because (a) Dyncorp engaged in aerial spraying of Colombian cocaine and heroin fields pursuant to a contract with the US State Department, and (b) the compensation for this activity had to come from funds approved by Congress under Plan Colombia, (c) the company acted in coordination with Colombia and the US.[152] Private wrongful acts have also been attributed to the States when they were part of a plan set up by a corporation along with government officials. In *Wiwa v. Royal Dutch Petroleum*, the applicant claimed that the MNE had several meetings with the Nigerian authorities to plan a joint action to suppress the Ogoni rebels and that numerous human rights abuses followed from those meetings. [153] Despite the defendant's position that the MNE did not act under State control, the Court held that, for the purpose of attribution, it was sufficient that the State and the MNE simply conspired. In fact, it was not necessary that they "acted in concert to commit each specific act that violated the plaintiffs' rights".[154]

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[144] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, p. 353 (1974).

[145] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, p. 170 (1970).

[146] *Collins v. Womancare*, 878 F.2d 1145, p. 1154 (9th Cir. 1989).

[147] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, p. 632, dissenting opinion of Judge O'Connor.

[148] *Aldana v. Del Monte*, 416 F.3d 1242 (11th Cir. 2005) (holding that the police's failure to act in response to Del Monte's private security forces did not entail complicity since the police lacked the intention to facilitate the crime).

[149] *Abdullahi v. Pfizer*, 562 F.3d 163 (2nd Cir. 2009).

[150] *Ibid*. p. 188; *see also Abdullahi and Others v. Pfizer*, U.S. Dist. LEXIS 17436, 18 (S.D.N.Y. 2002).

[151] *Arias v. Dyncorp*, 517 F. Supp. 2d 221, (D.D.C. 2007).

[152] *Ibid*. p. 18. The same matter is also pending before the ICJ (*Ecuador v. Colombia, Case concerning Aerial Herbicide Spraying*, General List, No. 138).

[153] *Wiwa and Others v. Royal Dutch Petroleum*, U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

[154] *Ibid*. pp. 42-6.

Conclusion

Despite the uncertainties relating to the meaning of Article 16 "aid and assistance", the best approach seems to be the one adopted by the ECtHR, namely a case-by-case basis assessment[155]. In this way, the vagueness of Article 16 actually becomes its strength, because it makes the provision adaptable to a wide range of situations. The same considerations should apply to the debate between actual and constructive knowledge. Different situations might require different standards. For example, in case of human rights violations, the duty of due diligence might require the supporting State to conduct further steps to gauge that no wrongful acts are committed with its aid or assistance.[156] On the other hand, in cases of commercial activities, higher degrees of knowledge might be required to implicate the supporting State's responsibility.[157] Since the drafting of the ARS, States never decided to convert the articles into a treaty, yet they have made numerous references to them. Indeed, they have often relied on Article 16 in cases of complicity relating to assistance in the unlawful use of force, wars and, mostly, supply of military weapons. Furthermore, they introduced provisions in their national legislative frameworks to prevent acts of complicity in international crimes and committed to the ATT, which was ratified by one-hundred and seven States in 2013. Despite the several issues relating to the enforcement of the provisions on complicity, there is no doubt that States are aware of the importance of this legal concept. Therefore, as the ICJ itself held, the wide State practice and *opinio iuris* on Article 16 make the provision amount to customary international law. However, States are not the only actors that may bear international responsibility. Indeed, it is significantly more common (and easier) for a multinational corporation to violate international law. So, as described above, when it comes to MNEs' international responsibility, the issue is indeed thornier. Despite the lack of a general framework addressing their responsibility, there is consistent international as well as national jurisprudence on attribution of the corporations' conduct to States based on the concept of complicity. It might be a temporary solution to tackle with complicated situations, but there is indeed a tendency towards that end. So the time may not be ripe for addressing the complicity and, therefore, responsibility, of multinational enterprises at an international level but hope must not be lost. Like any process, time is essential for the consolidation of a new legal concept at a national level, before being subsequently endorsed at a higher stage and then reaching wide applicability. This is the weakness, strength and, also, beauty, of international law: sometimes it can be too vague but it is shapeable to numerous situations, widely applicable across countries and keeps promoting new ideas for a better future.

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[155] *Rasheed Haje Tugar v. Italy*, *supra* note 64.

[156] *Velàzquez Rodrìguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, (1998).

[157] K.J.M. Smith, "A Modern Treatise on the Law of Criminal Complicity", *Oxford University Press*, 1991, p. 153; A. Duff, "Can I help you? Accessorial liability and the intention to assist", *Legal Studies*, 1990, vol. 10, p. 178.

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