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978-1-107-01072-7 - Complicity and the Law of State Responsibility

Helmut Philipp Aust

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Complicity and the Law of State Responsibility

This systematic analysis of State complicity in international law focuses on the rules of State responsibility. Combining a theoretical perspective on complicity based on the concept of the international rule of law with a thorough analysis of international practice, Helmut Philipp Aust establishes what forms of support for wrongful conduct entail responsibility of complicit States and sheds light on the consequences of complicity in terms of reparation and implementation. Furthermore, he highlights how international law provides for varying degrees of responsibility in cases of complicity, depending on whether peremptory norms have been violated or special subject areas such as the law of collective security are involved. The book shows that the concept of State complicity is firmly grounded in international law, and that the international rule of law may serve as a conceptual paradigm for today's international legal order.

DR HELMUT PHILIPP AUST is a Senior Research Fellow at the Humboldt-University, Berlin. His key research interests lie in the fields of international responsibility, UN law, human rights law and the interaction between international and domestic law.

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Foreword

Until rather recently, ‘complicity’ was a marginal concept and a neglected issue in international law. The long gestation of Article 16 of the International Law Commission’s Articles on State Responsibility of 2001 did not attract much attention. According to this provision, ‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter, is internationally responsible.’ However, after the terrorist attacks on 11 September 2001 and in connection with the invasion of Iraq in 2003, certain cooperative behaviour by States raised the general awareness of the possible responsibility of States for providing ‘aid and assistance’. This awareness, in turn, shed more light on other areas in which States cooperated in a way which raised questions about their implication in the internationally wrongful acts of other States. Today, barely ten years later, the possible responsibility for complicity is one of the most important and difficult issues which arise in the daily work of government legal departments.

This state of affairs alone would justify the timely publication of a monograph which carefully researches and analyses the relevant issues and practice. But the present book is much more than a solid synthesis of practice and the interpretation of an increasingly relevant rule of international law. Helmut Aust also situates this rule within the larger context of international law. He shows that the general prohibition of aid and assistance, as it is laid down in Article 16, is merely one element within a web of more specific primary rules. He also argues persuasively that this prohibition is an expression of a more general legal principle which would guide the interpretation of Article 16. Finally, he demonstrates that the position which international law adopts with respect to ‘aid and assistance’ is a highly significant symptom of

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its own state of development, perhaps as important as the concept of peremptory norms.

Helmut Aust's perceptiveness for relevant practice, his mature sense of place and direction, and his talented erudition have contributed to making this book a felicitous example for the mutual enrichment of practice and theory. This is true both for what the book describes – the development of a norm from certain instances of practice which were successfully postulated by academic lawyers to be of more general significance – as well as for what the author does – developing prudent suggestions of how to interpret and conceive a rule within its wider political, historical and systematic context. The book shows that careful empirical analysis and historically informed systematic thinking with respect to a crucial rule of international law, if well done, are not only compatible with each other but ultimately interdependent. Their combination is necessary for the proper identification and development of international law. This book is a most valuable contribution to this end.

Georg Nolte
Humboldt University Berlin
15 November 2010

Preface

This book is a revised and updated version of the doctoral dissertation which I defended at the Faculty of Law of the Humboldt University Berlin in December 2009. As this is a book about complicity, it is only fair to gratefully acknowledge the ‘aid and assistance’ that I received from a number of people. It should very well be understood that this ‘complicity’ does not entail any responsibility for errors and misconceptions which can only be attributed to the author.

First of all, I would like to thank my academic teacher, Professor Georg Nolte. He supervised my work as a doctoral candidate. My way of thinking about international law has been deeply influenced by him. I am especially grateful for the academic guidance with which he has accompanied my work so far, as well as for his personal cordiality and warmth. He also initially directed my attention to the topic of this book.

I would also like to thank Professor Christian Tomuschat for being the second examiner of my thesis. I am very grateful to Professor James Crawford for his hospitality at the Lauterpacht Centre for International Law in Cambridge, for an important conversation about complicity in the work of the ILC as well as for the inclusion of this book in the Cambridge Studies in International and Comparative Law series.

Alejandro Rodiles was often the first person with whom I discussed ideas for this book. Our conversations about international law and other issues had a profound influence on this book. Dr Thomas Kleinlein and Dr Mindia Vashakmadze read the entire draft manuscript which benefited greatly from their constructive comments and criticism.

I received valuable feedback on and suggestions for my work from a great number of people, including Gebhard Bücheler, Dr Thomas Burri, Professor Michael Byers, Dr Alejandro Carballo, Christian Djefal,

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Professor Bardo Fassbender, Dr John Morss, Jörn Müller, Nina Naske, Judge Andreas Paulus, Judge Bruno Simma, Paulus Suh, Carla Thies, Mehmet Toral and Dr Annemarieke Vermeer-Künzli. I would also like to thank the participants in the Munich–Oxford seminar in international law of April 2007, the AjV workshop in Munich in October 2007, Andreas Paulus’ colloquy at Frauenchiemsee in August 2008 as well as the Visiting Fellows Roundtable in Cambridge in October 2008 where I had the chance to present parts of this work and received important feedback. Finally, two anonymous reviewers at Cambridge University Press provided helpful suggestions and constructive criticism. Nienke van Schaverbeke at Cambridge University Press was a great help in turning the manuscript into this book as well as a pleasure to work with.

This book was written at three splendid institutions. Most parts originated at the Institute for International Law, University of Munich. I would like to thank all members and staff of the Institute for being such a warm and generous community, in particular Christine Schuhbeck-Schmidt. I would also like to express my gratitude to the librarians at the Peace Palace Library in The Hague where I had the privilege to work for two periods of three weeks each. The Lauterpacht Centre for International Law at the University of Cambridge proved to be every bit the inspiring place for an intense period of research and writing I expected it to be. My stays in Cambridge and The Hague were supported by scholarships from the German Academic Exchange Service (DAAD). The doctoral dissertation underlying this book received the Thesis Prize of the *Absolventen und Freunde der Juristischen Fakultät der Humboldt-Universität zu Berlin – Bibliotheksgesellschaft e.V.*

Finally, I would like to thank my family: my parents supported me generously throughout my studies for which I cannot thank them enough. My brother Martin has been an important influence for me as well as a good friend in all times. My wife Johanna is a constant source of love and inspiration. Without her, I would not know what would become of me.

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Abbreviations

Note: all abbreviations used in the study are included here save those which are document symbols of the United Nations or other international organisations.

ACP	African, Caribbean and Pacific Group of States
Add.	Addendum
APM	anti-personnel mines
ASR	Articles on State Responsibility
AWACS	Airborne Warning and Control System
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
CAT	UN Convention Against Torture
CCPR	Covenant on Civil and Political Rights
CFSP	Common Foreign and Security Policy (EU)
col.	column
CPA	Coalition Provisional Authority
CSIS	Canadian Security and Intelligence Service
CTS	Canadian Treaty Series
DARIO	Draft Articles on the Responsibility of International Organizations
DRC	Democratic Republic of the Congo
DSU	Dispute Settlement Understanding
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms / <i>Reports of the European Court of Human Rights</i> (only in footnotes)
ECOSOC	Economic and Social Council

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ECtHR	European Court of Human Rights
ETS	<i>European Treaty Series</i>
EuGRZ	<i>Europäische Grundrechte-Zeitschrift</i>
EWHC	England and Wales High Court
FAA	Foreign Assistance Act (US)
FCO	Foreign and Commonwealth Office (UK)
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILDC	<i>Oxford Reports on International Law in Domestic Courts</i>
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
Inter-AmCtHR	Inter-American Court of Human Rights
ITLOS	International Tribunal for the Law of the Sea
JZ	<i>Juristen-Zeitung</i>
MRT	Moldovan Republic of Transdnistria
NATO	North-Atlantic Treaty Organization
NGO	non-governmental organisation
NPT	Non-Proliferation Treaty
OAS	Organization of American States
OAU	Organization of African Unity
OJ	<i>Official Journal</i>
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
R2P	'responsibility to protect'
Res.	Resolution
RIAA	<i>Reports of International Arbitral Awards</i>
SALW	small arms and light weapons
SCC	Supreme Court of Canada
SCR	<i>Reports of the Decisions of the Supreme Court (Canada)</i>
sec.	section
SOFA	Status of Forces Agreement

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UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	<i>United Nations Treaty Series</i>
USC	United States Code
Vol.	Volume
WTO	World Trade Organization
YBILC	<i>Yearbook of the International Law Commission</i>