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**COMPLICITY IN INTERNATIONAL LAW: SOME LESSONS
FROM THE U.S. RENDITION PROGRAM**

*By André Nollkaemper**

The central proposition of my talk is the complicity in international law is best understood as a nested concept. With this I mean that the idea of complicity in general international law is rather powerless, but that it can have significant normative power when it is used in the interpretation and application of rights and obligations in particular regimes, notably in

¹¹ See *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012) (noting that “the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing”).

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the sphere of human rights. I illustrate this proposition by the single most extensive example of complicity in recent history; the involvement of third states in the U.S. rendition policy after September 11, 2001.

On the basis of information that has been compiled over the past several years, the picture has emerged of an unprecedented network of over fifty states that cooperated in the rendition practices. This network includes U.S. allies such as Canada, Australia, and the United Kingdom. It also includes less likely candidates such as Djibouti, Ethiopia, Iran, Libya, Uzbekistan, and Zimbabwe.¹

In varying degrees and forms, these states have provided airspace and airports, transport and security arrangements for CIA teams, and detention facilities. In some cases they handed persons over to the CIA who were subsequently tortured. The available information suggests that without the cooperation of these states, the United States could not have engaged in what the Senate Select Committee on Intelligence last December called ‘brutal interrogations of detainees.’²

The question for this panel is whether and on what grounds the cooperating states are responsible for their collusion with the United States. Answering this question requires that we place these events in the larger context of complicity in international law. When Roberto Ago, back in 1978, proposed a rule of complicity to the International Law Commission (ILC), he acknowledged that this rule ‘partook more of the progressive development of international law rather than of its codification.’³ However, he also said that ‘if there was *one case* in which the Commission should carry out progressive development, it was surely the case [of complicity].’⁴

The ILC followed his suggestion and formulated relevant articles relating to the responsibility of states and international organizations. Many have acknowledged the potential power of these articles. Vaughan Lowe, then professor at Oxford, wrote that Article 16 on complicity may prove one of the most potent provisions in the ILC Articles.⁵ It forces states to pay with regard not only to the legalities of what they do themselves, but also to the legalities of what they help *other* states do. It may follow that when states act together, responsibility may not only be assigned to any one of them individually, but can be *shared* between them.

Yet, when the ILC wrapped up its work, the question was whether the introduction of complicity was just a good idea, or whether it actually would be relevant for the conduct of states or the practice of courts. The ILC had not been able to point to much relevant practice. Most states are not particularly fond of the principle of complicity and do not have much interest in pushing the practice by bringing claims. That the idea of complicity eventually has taken off in practice, then is not so much due to the practice of states, but rather to the fact that individual plaintiffs have pushed the principle in human rights litigation.

It is here where we reach the practice in relation to the rendition network. The litigation against states that allegedly cooperated in the U.S. rendition policy has already yielded more judicial decisions on complicity than on any other issue in the past decades. We have decisions of the European Court of Human Rights (ECHR), the Committee against Torture, the Human

¹ See Open Society Foundations, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (Feb. 2013), at <https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>.

² Available at <http://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/>.

³ Statement by Roberto Ago, [1978] 1 Y.B. INT’L L. COMM’N 240, ¶ 21.

⁴ *Id.* (emphasis added).

⁵ Vaughan Lowe, *Responsibility for the Conduct of Other States*, JAPANESE J. INT’L L. 1, 15 (2002).

Rights Committee, and the African Commission on Human and People's Rights. We also have decisions in national courts of, among others, Australia, Canada, Italy, and the United Kingdom. These proceedings have faced major challenges, in particular due to the contested and secret nature of much of the information. The large elephant in the room is that the United States itself was not a party in proceedings, and that much of the information in U.S. possession continues to be undisclosed.

The question whether courts can adjudicate complicity allegations in the absence of the United States and other states involved is controversial, and subject to ongoing litigation in the United Kingdom.⁶ But it did not bother the European Court of Human Rights, which proceeded to rule on questions of complicity.⁷ As a result, we now have a number of key international decisions.

What conclusions can we draw from the practice? Let me make three propositions on the basis of the emerging judicial practice.

My first point is that the general principle of complicity functions as an interpretative principle, rather than as an independent rule of decision. Situations of complicity are litigated by private claimants, who will rely on a specific cause of action in the form of a particular individual right. They do not rely on the general principle of complicity as formulated by the ILC.

These human rights treaties do not speak of complicity, and there is little express language in the treaties to ground a complicity argument. Nonetheless, the ECHR has interpreted and applied the individual rights in the treaty through the frame of complicity. These decisions expressly construe the obligations of the defendant states in the light of the alleged wrongdoing of a third party—in most cases the United States.

The concept of complicity provides a perspective and justification for doing this. It allows courts to place such individual rights not in a simple two party context, but in a context involving plaintiff, respondent state, and the absent third party that allegedly was the primary wrongdoer.

It may well be that the ECHR could have reached the same outcome without using complicity language. But the idea of complicity has had significant interpretative and constructive relevance for the way it approached the rendition cases. Put otherwise: the principle of complicity does not decide cases. Its main power has been shown when it was nested in human rights regimes and colored the construction of individual rights.

My second point is that the nesting of complicity in human rights regimes has influenced the standard of knowledge that is key to any finding on complicity. A single most important question in disputes over complicity is what an allegedly complicit state knew of the eventual wrong to be committed by the state that it aided.

Applied to the rendition case, the question is how much a state that provided overflight should know of what the CIA planned to do once the flight landed? And how much should a state that provided a detention facility know of what happened in the detention facility, before it can be held responsible on the basis of complicity?

The questions are particularly important since much about this complicity-network remains unexposed. Most of the over six thousand pages compiled by the U.S. Senate Select Committee on Intelligence remains secret.

⁶ *Belhaj v. Straw*, [2014] EWCA Civ. 1394.

⁷ *El Masri v. Macedonia*, 2012-VI Eur. Ct. H.R. 263; *Abu Zubaydah v. Poland*, App. No. 7511/13, Judgment, Eur. Ct. H.R. (July 24, 2014); *Al Nashiri v. Poland*, App. No. 28761/11, Judgment, Eur. Ct. H.R. (July 24, 2014).

The ILC stipulated that a state could be responsible for complicity if it had knowledge of the circumstances of the wrongful act.⁸ In the Commentary it even suggested that knowledge may not be enough but that a state was only complicit if it shared the intention of the wrongdoing state.⁹

These high standards were deemed necessary for making the article acceptable for states. This is a fundamental point. The principle of complicity brings the risk of transforming good faith cooperation into a wrong when cooperation results in injury. Thereby it may even deter socially desirable cooperation. A high standard of knowledge or even intention balances the benefits and drawbacks of a complicity rule.

But in a human rights context, the calculation of interests may well be different. The nesting of the idea of complicity in a human rights context led the ECHR to soften the required knowledge, by relying on a concept of constructed knowledge. In the *El-Masri* judgment, the ECHR emphasised that Macedonian authorities actively facilitated the detention of the plaintiff in Afghanistan by handing him over to the CIA, despite the fact that they *were aware or ought to have been aware of the risk of that transfer*.¹⁰

And in the decisions against Poland, the ECHR held that Poland's complicity in the rendition must be established with reference to what it knew or ought to have known. What Poland ought to have known, then is derived largely from publicly accessible information, but also from its cooperative relationship with the United States.¹¹

There is not a word here on intention. Intention is either presumed or outright irrelevant. The larger point here is when the idea of complicity is imported in particular regimes, such as human rights, the demanding requirements that the ILC attached to it may be relaxed.

My third and final point is by nesting complicity in a particular human rights regime, it may make complicit states responsible for the entire injury caused to third parties. The dominant position in international law, based on the ILC's construction, was that a complicit state is only responsible for its *own* wrong—not for the conduct of the state that it assisted.

In this logic, we would say that Macedonia would be responsible for handing over an individual to the CIA in the face of risk that he would be tortured. We would *not* normally say that the act of ill-treatment at the hands of the CIA *itself* is attributed to Macedonia.

This approach thus disconnects the complicit state from the eventual wrong and the injury caused. That distinction may seem like a legal nicety. But it has major symbolic and expressive relevance. It also may be relevant to questions of reparation.

The ECHR takes a different approach. The Court concluded that Macedonia and Poland were responsible for acts performed by foreign officials on its territory with its acquiescence or connivance—acts that were clearly not their own acts. This allowed the Court to say that these states were responsible for the torture at the hands of the CIA.¹²

This approach is not without problems. The suggestion that complicity functions as a principle for attribution of conduct is problematic. Yet, the ECHR's approach hints at the normative power of the notion of complicity. Its approach may allow us to say that if a state

⁸ Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), [2001] II(2) Y.B. INT'L L. COMM. 26 [hereinafter ARSIWA]; Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, [2001] II(2) Y.B. INT'L L. COMM. 66, art. 16(b) [hereinafter ARSIWA Commentary].

⁹ ARSIWA Commentary, *supra* note 8, at art. 16, ¶ 5.

¹⁰ *El-Masri*, *supra* note 7, at ¶ 239.

¹¹ *Abu Zubaydah*, *supra* note 7, at ¶ 442.

¹² *See, e.g., El-Masri*, *supra* note 7, at ¶¶ 223, 241.

assists another state with knowledge that the person is tortured, it bears responsibility for the torture *itself, even if that is carried out by that other state.*

More than anything else, this outcome will help to drive home the point that states must pay regard not only to the legalities of what they do themselves, but also to the legalities of what they help *other* states to do. If they do not, they will take the blame for the conduct of other states.

For the complicit state, the outcome may feel unjust. Given that the United States itself has not been held responsible, the complicit states then are left with the blame and the costs. Yet, it is not obvious that this outcome is worse than an outcome where the complicit state and the United States are left off the hook, and effectively the costs are shifted to the victim.

Like the relaxation of the standard of knowledge, this line of reasoning may not easily be transposed back to general international law. But that is precisely the point I want to make here. The rendition cases demonstrate that the role and impact of the idea of complicity will often depend on it being nested in a particular regime with its own logic and justification. The stakes between the parties and the powers of the court will be quite different from what applies in the traditional interstate context of general international law. The general idea or principle of complicity in international law may continue to remain largely unaffected, until it is put to use again in a regime that can make it relevant.