REVUE BELGE DE DROIT INTERNATIONAL
1996/2 — Éditions BRUYLANT, Bruxelles

COMPLICITY IN THE LAW OF INTERNATIONAL RESPONSIBILITY

BY

Bernhard GRAEFRATH

PROFESSEUR À L'UNIVERSITÉ HUMBOLDT
(BERLIN)

1. Complicity in the law of international responsibility is a rather specific topic and not necessarily on the main routes of discussions on state responsibility.

Actually the term complicity so far has been used in international relations in the political field. It has a pejorative connotation and denounces an act as illegal because it is part of another illegal act or in support of a crime. It always designates a form of participation and derives the moral condemnation from the illegality of the principal act. In our context complicity is a specific form of participation of a State (1). While it is a well established form of liability in national criminal law, it is a relatively new term in international law. But one should be careful not to confuse both terms, because complicity in the law of State responsibility has its own definition, which may be quite different from concepts pertaining to the field of municipal law.

In dealing with that topic I would like to base myself on the draft of the International Law Commission (ILC) on State Responsibility. After 30 year's work this draft has just been finished in first reading at the 48th session of the ILC, that is in July of 1996. It is now before the General Assembly of the UN and will be submitted to member States for their comments (2).

In defining complicity as a specific form of a violation of international law the ILC based itself on the State practice after the Second World War. As far as I can see, it is for the first time that an attempt has been made to codify complicity in connection with state responsibility. The ILC tried to avoid any reference and analogy to complicity as used in domestic law,

(1) It is always a State-to-State relationship. The participation of a State in illegal acts of individuals against another State may raise questions of attribution but cannot be qualified as complicity in the law of international responsibility. Cf. *Nicaragua v. United States of America*, ICJ Reports 1986, pa. 110/115/216 where the Court, however, found that financing and training the Contras was not sufficient for the purpose of attributing to the United States the acts committed by the Contras.

(2) Cf. A/CN.4/L.524 ; A/51/10.

in particular national criminal law. Obviously for that reason it eliminated in the end even any use of the terms complicity or participation. These terms, which had been used in the original proposal (3), do not any more appear in the wording of article 27 of the final draft (4).

The attempt to define complicity in article 27 as an autonomous internationally wrongful act was an important step. It provides the possibility to discuss and explore all the problems involved in such a legal construct. It transferred the term complicity from political rhetoric to the legal vocabulary of international law. We now have to find out, wheter the given definition of complicity can cope with the political reality we are faced with. I will try to point to some of the questions which come up in trying to apply the wording as it is drafted.

2. The first aspect I want to underline is the fact that according to article 27 complicity as a form of international responsibility constitutes itself an internationally wrongful act of the State which supports an internationally wrong carried out by another State. It does not create a kind of co-responsibility, of participation in another State's responsibility. Complicity as defined in article 27 does not appear as part of the internationally wrongful act which is supported by the aiding State, but as an autonomous internationally wrongful act. It has its own identity as a separate violation of international law. The ILC has stressed this point again and again :

> « the internationnaly wrongful act of participation through aid or assistance for the commission of an internationally wrongful act by another must not be confused with this principal offence, and consequently the international responsibility deriving from it must remain separate from that incurred by the State committing the principal offence » (5).

This distinction is much more than an academic exercise, it gets a very practical meaning in relation to the legal consequences of the wrongful act.

To define complicity as an autonomous wrongful act which entails in itself State responsibility is a rather sophisticated legal construction. It starts from the assumption that there exists a norm in general international law that prohibits giving assistance to an international delict. That however, may be an assumption which is difficult to prove, in particular

(3) Cf. *YBILC* 1978, II, (Part One), p. 60 ; Article 25. Complicity of a State in the international wrongful act of another State. « The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful. »

(4) Article 27, Aid or assistance by a State to another State for the commission of an internationally wrongful act. « Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation. » ; Cf. *YBILC* 1978, II (Part Two), p. 99.

(5) Cf. *YBILC* 1978, II (Part Two), p. 104.

because we still have a mainly bilateral structure of international law. And furthermore relying on such a general rule brings us within the realm of primary norms which demand or prohibit certain acts, leaves the area of secondary norms which work as a consequence of a violation of a primary norm and regulate responsibility.

3. In accordance with the concept of the ILC State responsibility constitutes a complex of secondary norms. They presuppose the existence of a primary norm and only stipulate what constitutes an internationally wrongful act, to whom it is attributable and what can be its legal consequences. Just from the beginning of its work on that draft the ILC insisted on limiting itself on secondary norms in codifying State responsibility. Trying to learn its lessons from earlier attempts to codify state responsibility, the Commission wanted by all means to avoid any dispute on the question whether and to what extent a primary norm actually exists, because that most surely would have frustrated any effort to codify general rules on State responsibility.

Treating complicity as an autonomous wrongful act necessarily brings up the question whether that would not mean dealing with a primary norm (6). It was the New Zealand member of the Commission, Quinten Baxter, who pointed to this problem.

> « The article as it stood, more than any article the Commission had adopted, seemed to leap the barrier between secondary and primary rules. Nowhere else in the draft had the Commission said that a particular kind of action constituted an internationally wrongful act of a State. Superficially at least, that statement looked like the identification of a primary rule. » (7)

To avoid such a deviation from the general course of the ILC he explained that the real purpose of the complicity article was, to say that

> « even if the State could not itself be said to have committed a given internationally wrongful act, it might have committed a separate internationally wrongful act by facilitating the commission of the first. » (8)

Whether this formulation can dismiss the impression that we in fact deal with a primary rule may be doubtful. Anyway it seems to be a good explanation for the intentions of the ILC.

As the most typical example for complicity the Commission used the case that a State allows its territory to be used by another State for perpetrating an act of aggression against a third State. That case, which is generally accepted as complicity to an act of aggression which entails State responsibility, is of course described as an act of aggression, as a primary rule, in

(6) That was quite obvious in the original wording : « The fact that a State renders assistance... constitutes an internationally wrongful act... ».

(7) Cf. *YBILC* 1978, I, p. 236.

(8) Cf. *YBILC* 1978, I, p. 237.

the definition of aggression adopted as res. 3314 (XXIX) by the GA. Other typical examples for complicity are the supply of weapons to support a State which commits aggression or genocide ; assistance for a State to maintain a regime of Apartheid or colonial domination ; also assistance for a State to close an international waterway (9).

4. International responsibility of a State is the consequence of an internationally wrongful act which can be attributed to a State. The ILC draft distinguishes between three types of perpetrators.

a) The State which is liable for having committed an internationally wrongful act.

b) The State which creates responsibility by causing a dependent State or forcing another State to commit an internationally wrongful act (10).

c) The State which creates responsibility by aiding another State to commit an internationally wrongful act.

Only the last type, the participation of a State in the commission of an internationally wrongful act by another State is defined as complicity under article 27 of the ILC draft.

Complicity therefore is explicitly distinct from joint action of several States which results in considering several States as co-perpetrators of an internationally wrongful act which, of course entails separate responsibility for each of these States. But complicity is also distinguished from incitement to commit an internationally wrongful act which does not entail international responsibility because the instigated State remains sovereign in its decision to commit or not commit the internationally wrongful act. The State alone therefore is considered liable for the wrongful act (11).

5. When can we speak of complicity ? What are the criteria which characterize the conduct of a State as an internationally wrongful act of complicity ?

The ILC draft contains three criteria :

a) There must be substantial aid or assistance to an internationally wrongful act of another State.

b) The aid must have been provided with the intention to facilitate the commission of the internationally wrongful act.

(9) See these and other examples in Ago's report YBILC 1978, II (Part One), p. 58 ; J. QUIGLEY, « Complicity in International Law, A New Direction in the Law of State Responsibility », *B.Y.B.I.L.*, 1986, p. 77 (83).

(10) Cf. Article 28 YBILC 1979, II, (Part Two), p. 94.

(11) However, one has to be careful because under certain circumstances incitement may turn out to be actually assistance. « For example, if a State concluded an agreement with another State undertaking to maintain benign neutrality if the latter committed an act of aggression, that was not more incitement but aid and assistance, and it would then be proper to speak of complicity. » ; Ago *YBILC* 1979, I, p. 240.

c) The internationally wrongful act to which assistance has been rendered must have been actually accomplished. There is no complicity in an attempt.

6. While the first criterion, aid, has not been defined in the article and may therefore be very broadly interpreted, the second, the subjective criterion, intent, has been defined very narrowly.

The draft does not give any hint as to the kind of aid or assistance which is meant by article 27. From the discussion in the ILC and its commentary one may conclude that it should be substantial aid, but in the text the kind of assistance remains totally open. It may be financial or economic aid, supply of weapons but also political aid in form of international treaties or establishing or maintaining diplomatic relations. This of course, is extremely broad. Perhaps it would be useful to qualify the aid which could trigger complicity. The Commission in its commentary requires that

> « the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act. » (12)

P. Reuter approached that question from another angle in raising doubts,

> « wheter assistance that was materially too remote could be regarded as complicity. » (13)

This points to a causal link between the wrong and the aid furnished. It might be useful to try to reflect both aspects in the wording of the article and thereby to qualify the aid or assistance which may be considered to cause complicity.

Not the aid or assistance as such is prohibited or illegal. The last sentence in article 27 explicitly states that it is not necessary that such aid or assistance would constitute in itself a breach of an international obligation. The asistance becomes a separate wrongful act only if rendered with the intention to support an internationally wrongful act of another State (14).

7. Intention therefore, becomes an essential, constituent element in complicity. But also intention is not clearly defined in article 27. It says only :

> « if it is established that the assistance is rendered for the commission of an internationally wrongful act. »

Mostly that wording is interpreted to mean that the assistance must be given with the intention to support the commission of the wrongful act.

(12) *YBILC* 1978, II, (Part Two), p. 104.

(13) Cf. *YBILC* 1978, I, p. 229.

(14) Different from aid is « the sole fact, that a State failed to take the preventive or repressive measures required of it with respect to actions committed in its territory by an organ of another State ». *YBILC* 1978, II, (Part One), p. 53.

That means, assistance, even the supply of weapons, cannot be considered as complicity if the State which delivered the arms did not know that they would be used to commit an international delict. Even knowledge of the unlawful activities of a State is not sufficient if it cannot be established that the arms have been supplied for the purpose af assisting the other State in committing its wrongful act. It seems highly questionable that such a narrow interpretation of the intent as a decisive criterion for complicity is really useful.

It can easily make the whole construction of complicity unworkable. In most cases it may be extremely difficult, if not impossible, to prove that a State did not only know that its assistance will be used for illegal purposes, but that it had been supplied just for that purpose, that is with the intention to facilitate the commission of the wrongful act. According to that definition e.g. a State supplying arms to Turkey under the condition that they must not be used to suppress the Kurds cannot be held guilty of complicity if afterwards the weapons were used exactly for that purpose. Even supplying arms knowing that Turkey may use them against the Kurds would not be sufficient to prove the intent required for complicity.

Or e.g. the provision of weapons or financial aid to Israel which enables Israel to continue its settlement-policy in the occupied territories, an internationally wrongful act condemned by the international community (15), is not sufficient to establish complicity if it cannot be proven that the aid has been rendered for that purpose. According to the wording of the article it is not sufficient to prove that the aiding State knew or must have known that its assistance may be used by the receiving State to commit or continue to commit an internationally wrongful act. In addition it would be necessary to prove, that the State in supplying the assistance wanted to support the wrongful act.

I give these examples and stress the point that even knowledge of the principal wrongful act is not sufficient, with a view to show that the Commission in introducing such a narrow criterion of intention has set up a very high, perhaps too high threshold to transform assistance into an internationally wrongful act of complicity.

Furthermore it remains unclear what article 27 means when it says « if it is established ». That is open to an interpretation that some kind of verification for the intention is needed ; a finding, a statement or determination by somebody or within a certain procedure to make sure that the aid has been supplied with the intention to support the internationally

(15) Cf. SC Res. 465, 1 March 1980.

wrongful act (16). That, of course would make it even more difficult to find cases of complicity.

On the other hand one has to admit that a strong criterion for complicity in article 27 is necessary because the main conditions are rather broad. Neither is the kind of aid or assistance qualified nor is complicity limited to certain wrongful acts, actually it can accompany any breach of an international obligation.

8. To apply the complicity-rule to all kinds of international wrongs produces unnecessary difficulties. In our times the density of communication between States, the mutual cooperation and interdependance is so highly developed and is rapidly growing every day that any financial transaction or many commercial or political activities can be used as assistance for the one or other activity of a State. Many resources and equipments are of dual use, may be used for peaceful or military purposes. It is extremely difficult to guarantee that they cannot be used for unlawful purposes. That works in favour of a strong intention-criterion to qualify complicity. But as I tried to show this at the same time creates enormous difficulties to produce evidence and to prove the illegal intention. That may actually make it impossible to apply the complicity-rule to international crimes, or to apply it aqually to small and big States. It leaves to many possibilities for States to claim that aid which they furnished had not been delivered with the intention to facilitate the wrongful act in question.

9. I think we should try to facilitate the functioning of intention as the decisive criterion and ease the burden of proof in ordre not to leave loopholes for perpetrators which act as accomplices of international crimes. A way to do this would be to introduce a presumption of intention. Whenever it has been established that a State is committing an international crime any substantial aid or assistance rendered to such a State which may be used in the crime should suffice to be considered as complicity. Such a rule could be based on article 2,5 of the UN Charter. Article 2,5 of the Charter prohibits assistance to any State against which the United Nations take preventive or enforcement actions. I should not be too difficult to derive from this rule a presumption of intention in cases where assistance is given to a State knowing that the international community has taken action against that State because of a serious violation on international law. In such cases it should be presumed that the assistance is rendered with the specific object of falicitating the commission of the internationally wrongful act in question. After the condemnation of Apartheid as a international crime by the General Assembly it must be presumed that

(16) Also Ago found it dangerous to use the words « if it is established », « since that would suggest a form of judgment by a judicial or other authority, an idea the Commission had so far avoided ». *YBILC*, 1978, I, p. 241.

assistance rendered to that regime is given with the intent to support the commission of that crime.

Such an interpretation is not only derived from article 2,5 of the Charter. Another example is the rule that a State which allows its territory to be used for aggression by another State, cannot claim that it did not intent to support aggression. Another example in support of such a presumption can be found in the ILC's draft itself. Despite the fact that the ILC in its draft has barely defined specific legal consequences for international crimes it has generalized article 2,5 of the Charter in its article 53, saying that

> *a*) « an international crime committed by a State entails an obligation for every other State...
>
> *b*) not to render aid or assistance to the State which has committed the crime... » (17).

No intention is mentioned in these cases.

I would think that as a rule whenever an organ of the international community, (I would include the Security Council, the General Assembly, the International Court of Justice or any other authorized body), has established that an act likely to endanger the international peace, (or if preferred, a violation of international law affecting the international community as a whole), exists, assistance to the perpetrator is not only a violation of the Charter but also an act of complicity. In such cases intention should be presumed, because in such circumstances the crime is a matter of common knowledge. It may however, be open to the State concerned to prove that it had not acted intentionally or that the assistance has been given for purely humanitarian reasons. It would be sufficient to add a paragraph to article 27 with such a presumption in cases where an international crime has been committed.

10. As already mentioned another main problem with article 27 is that it does not make any distinction between different internationally wrongfull acts, that it applies to any wrongful act. Given the widespread interdependence of State activities this opens a rather large field of application for the complicity concept. I very much doubt that this would be to the advantage of a workable rule. When the ILC discussed Ago's proposals some members of the ILC and also States wanted to distinguished beween international crimes or serious violations of international law and international delicts (18) and suggested to relate complicity only to crimes or to violations which were likely to endanger the peace and international

(17) This should not be interpreted as an automatic embargo. If the aid or assistance is qualified as substantial and not too remote there remains sufficient room for commercial transactions and humanitarian relief actions which cannot be considered making it materially easier for the State to commit the wrongful act.

(18) Cf. the distinction between international crimes and international delicts in article 19 of the draft.

security (19). The ILC rejected these suggestions without forwarding convincing reasons (20). Also Ago, when rejecting proposals to limit complicity to international crimes or violations of peremptory norms, simply declared that « he remained convinced that the rule stated in article 27 (then 25) was a general rule. » (21)

Quigley, who wrote the most elaborated analysis of article 27, also rejects the idea of limiting complicity to most serious violations by asserting :

> « it makes little sense to provide for complicity responsibility only for certain violations but not for others. If a State is liable for aiding an international wrong, it should be liable for aiding any international wrong. » (22)

This all or nothing argument cannot stand any serious test. There actually exist in contemporary international law many differentiations between certain kinds of norms and also of violations. I just refer to the differentiation made in the UN-Charter between acts which violate or endanger international peace and other acts, or the distinction between peremptory and other norms, or bilateral and *erga omnes* norms, the criminal responsibility of individuals for certain international crimes and the distinction between international crimes and international delicts in the draft on State Responsibility itself. All this demonstrates that the international community certainly makes a distinction between different categories of international obligations and also of internationally wrongful acts. And the interest of the international community certainly is much stronger to enforce respect of international rules, the violation of which affects the whole international community, than of other rules. I would prefer complicity-responsibility which is limited to violations of international law which adversely affect the international community as a whole. And I am convinced that it would be much easier to give effect to such a rule.

11. Finally I would like to draw your attention to a question which is not dealt with in the ILC draft. What are the legal consequences in case of complicity ?

The draft treats complicity as a separate, an autonomous wrongful act, not as participation in the principal internationally wrongful act. In the wording of article 27 any reference to participation or the accessory character of the wrongful act has been avoided. In the original proposal of Ago it was absolutely clear that we deal with participation by a State in the internationally wrongful act of another State (23). The original draft

(19) Cf. RIPHAGEN, *YBILC* 1978, I, p. 233 ; the comment by the Netherlands in *YBILC* 1982, II, (Part One) p. 18.
(20) Cf. *YBILC* 1978, II, (Part Two) p. 104.
(21) Cf. AGO, *YBILC* 1978, I, p. 240.
(22) *Ibid.* p. 105.
(23) Cf. note 3 ; *YBILC* 1978, II (Part One), p. 53.

directly said that the aiding State « thus becomes an accessory to the commission of the offence. » (24)

That necessarily leads to the question « wheter such a participation should not cause the participating State to bear some share of the international responsibility of the other State, » (25) Ago and the ILC sought it inadmissible to generalize the idea of an equal responsibility for the accomplice except in cases as aggression where an express provision exists. And even then Ago found it

> « impossible to conclude that the treatment by international law of complicity of any kind in a given act is necessarily the same as its treatment of the act itself. » (26)

He was convinced that complicity should be treated as a specific international wrong which is characterized differently and does not necessarily have the same legal consequences as the principal act (27).

Such a separate treatment necessarily follows from article 27 of the draft. For that reason complicity does not need any special treatment in relation to legal consequences. However, the Commission had always tried to stress the distinction between complicity

> « and other possible forms of association in an internationally wrongful act where the degree of participation is such that the State in question becomes a veritable co-author of the principal internationally wrongful act » (28).

But when it comes to legal consequence of responsibility any distinction between an accomplice and a co-author disappears because complicity too, is treated as a separate wrongful act.

As the draft stands, there is in principle no distinction from an internationally wrongful act, which has been committed by several States. In case of a multiple responsibility of States — for which the draft also does not contain any specific rule — it may be assumed that the principle of joint and several liability has to be applied. That gives the best protection for the injured State. The injured State can claim full compensation from each of the States involved in the wrongful act. The injured State cannot be held to accept only shares of responsibility according to a greater or lesser part of responsibility of the perpetrators (29). As an example for a regulation of joint and several liability I want to refer to the Convention on the International Liability for Damage Caused by Space Objects from 1972. It

(24) Cf. *YBILC* 1978, II (Part One), p. 60.
(25) Cf. *YBILC*, 1978, II (Part One), p. 52 ; *YBILC* 1978, II (Part Two), p. 99.
(26) Cf. *YBILC* 1978, II (Part On), p. 60.
(27) Cf. *YBILC* 1978, II (Part One), p. 60 ; *YBILC* 1978, II (Part Two), p. 103.
(28) Cf. *YBILC* 1978, II (Part Two), p. 104.
(29) Cf. J.E. Noyes/B.D. Smith, « State Responsibility and the Principle of Joint and Several Liability », in : 13 *The Yale Journal of International Law*, 1988, p. 225.

recognizes joint and several liability both for concerted and independant conduct of launching States.

The principle of joint and several liability seems absolutely justified when we have several perpetrators or co-authors of an internationally wrongful act. However, it seems highly questionable wether the same can be applied to complicity. In general it may be assumed that participation by aid entails a lesser degree of responsibility than equal participation in the wrongful act. I think in general judges would hesitate to apply the principle of joint and several liability to complicity, except for very specific cases.

The ILC sought, but did not say so in the draft, that as to legal consequences for complicity certain factors should be taken into consideration « and above all the extent and seriousness of the aid or assistance actually furnished. » (30) That may be true. But if complicity entails liability, that is legal consequences according to the degree of participation — however that is measured — it seems necessary to say so in the draft, which treats complicity as an autonomous wrongful act. Even if the draft would be amended by such a clause, or a hint that actually we deal with a form of participation, determining the degree of liability will always remain a point of dispute. But such a clause would clearly distinguish complicity from the joint action of several perpetrators. It would stress the fact that « the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains. » (31)

To summarize, I believe the concept as it appears from article 27 is too broad and should be narrowed. It is for that reason that I would suggest to qualify the terms aid or assistance. Furthermore, I would on the one hand limit complicity to international crimes or wrongful acts which effect the international community as a whole and on the other hand facilitate the application of complicity-responsibility by a presumption of intent, whenever the existence of an international crime has been established (32). To determine the legal consequences of an act of complicity in distinction from those related to a co-perpetrator it would be better to stress the accessory character of complicity in the wording of article 27.

I am convinced that such a more modest concept of complicity would be applicable with much more efficiency than article 27 as it stands. At the same time it would better reflect international practice, correspond to the needs os State practice and contribute to strengthen the rule of law in international relations.

(30) *YBILC* 1978, II (Part Two), p. 104.

(31) Cf. *YBILC* 1978, II (Part Two), p. 103.

(32) To avoid unnecessary dispute, I want to make clear when I use the term « international crime », I base myself on article 19 of the ILC's draft, but I simply want to use a short form of reference to serious violation of international law which affect the whole international community.