

Helmut Philipp Aust. ***Complicity and the Law of State Responsibility***. Cambridge: Cambridge University Press, 2011. Pp. 520. £80. ISBN: 9781107010727.

International law has long been seen as a ‘primitive legal order’ lacking key components such as a generally applicable enforcement mechanism.¹ There is some truth to this view, as evidenced by the long absence of another component that is common to developed legal systems, namely responsibility for actors who deliberately aid, assist, or are otherwise complicit in illegal acts.

In 2001, the International Law Commission moved to close this gap with Article 16 of its Articles on State Responsibility:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.²

The timing of Article 16 was fortuitous, for in the past decade the issue of complicity has moved to the centre of debates about international law. If the 2003 invasion of Iraq was illegal – as many now believe it was – were non-participating countries that allowed the invading forces to use their airspace or territory also violating international law? If the United States’ programme of ‘extraordinary rendition’ was illegal, what of those countries that allowed the CIA to use their airspace and airports, or to set up secret prisons within their territory?

Neither Article 16 nor its supporting commentary can fully answer these questions,³ and this is where Helmut Philipp Aust’s excellent new book comes in. A Senior Research Fellow at Humboldt University in Berlin, Aust provides a comprehensive examination of state practice as it relates to complicity, along with a thought-provoking theoretical discussion of where the concept might fit within the current and future development of international law.

As Aust explains, the principle of complicity in international law predates the ILC Articles, as evidenced by treaties such as the 1997 Convention on Anti-Personnel Land Mines.⁴ Article 1(1) (c) of the so-called ‘Ottawa Convention’ provides:

Each State Party undertakes never under any circumstances:

...

- (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State party under this Convention.

However, different states have different views as to what ‘assist’ actually means in this context, ranging from ‘actual and direct participation’ (Australia) to ‘as broad an interpretation as possible’ (Brazil). This is not a theoretical matter: In 2001, Canadian soldiers operating in Afghanistan were ordered by their American commander to lay mines around their camp.

¹ See, e.g., H. Kelsen, *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures 1940–41* (1997), at 51–55; M. Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community* (1968); Dinstein, ‘International Law as a Primitive Legal System’, 19 *New York University Journal of International Law and Politics* (1986) 1.

² ILC Articles on Responsibility of States for Internationally Wrongful Acts, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

³ For the ILC’s commentary on Article 16, see J. Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), at 148–151.

⁴ 2007 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, available at: <http://www.apminebanconvention.org/overview-and-convention-text/>.

When they refused to do so, US soldiers – whose country has not ratified the Convention – laid the mines for them.⁵

As a result of incidents like this, states have, in Aust's words, become 'increasingly aware of the potential legal risk to which they are exposed in military cooperation' (at 207). Indeed, the United States' refusal to ratify most humanitarian conventions, combined with its position as the principal military and intelligence ally of dozens of countries, is responsible for a number of the recent, difficult issues of complicity in international law.

This new awareness of legal risk led to an awkward compromise in the 2008 Convention on Cluster Munitions,⁶ Article 1(c) of which mirrors the Landmines Convention:

Each State Party undertakes never under any circumstances to:

...

(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

Article 1 is, however, qualified by Article 21(3):

Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

Article 21(3) is qualified in turn by Article 21(4), which specifies that a State Party may not 'expressly request the use of cluster munitions in cases where the choice of munitions is within its exclusive control'.

The end result is that a party to the Cluster Munitions Convention can rely on such munitions in almost any situation when its soldiers are operating side-by-side with the soldiers of a non-party. Earl Turcotte, who headed the Canadian team at the negotiations leading to the Cluster Munitions Convention, ultimately resigned in protest at his government's broad interpretation of the exemption provided by Article 21.⁷

The issue of complicity has also arisen in the context of 'extraordinary rendition', the US practice of transferring suspected terrorists to third states for interrogation under torture or other forms of cruel, inhuman or degrading treatment. There is considerable state practice available here, though most of it supports rather than undermines the prohibition on complicity – since the states that provided airspace and territory always denied and sought to conceal their involvement.

When the truth finally came out, there was little doubt about the issue of responsibility. In 2006, the Secretary General of the Council of Europe said:

In accordance with the generally recognised rules on State responsibility, States may be held responsible for aiding or assisting another State in the commission of an internationally wrongful act. There can be little doubt that aid or assistance by agents of a State party in the commission of human rights abuses by agents of another State acting within the former's

⁵ For more on Canada's spotty record with respect to the Landmines Convention, see M. Byers, *Intent for a Nation: What is Canada For?* (2007), at 105.

⁶ Convention on Cluster Munitions, entered into force 1 August 2010, available at: <http://www.cluster-convention.org/>.

⁷ Postmedia News, 'Lead Canadian negotiator dropped from disarmament talks,' 7 February 2011, available at: <http://www.ipolitics.ca/2011/02/07/lead-canadian-negotiator-dropped-from-disarmament-talks-2/>; Blanchfield, 'Canadian ex-arms negotiator breaks silence on cluster bombs,' *Toronto Star*, 1 April 2011, available at: <http://www.thestar.com/article/967916>.

jurisdiction would constitute a violation of the [European] Convention [on Human Rights]. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State party's responsibility under the Convention.⁸

In just five years, Article 16 had already crystalized into a generally accepted, core principle of international law.

Now that Aust has thoroughly documented that fact, it bears thinking about how this development might play out in future. For instance, as the world enters a new phase of rapid and devastating climate change, the issue of the legal responsibility of large corporate emitters and national regulators will likely rise to the fore.⁹ One can even imagine a future where states which aid or assist other states in changing the climate, for instance by exporting particularly high-carbon forms of fossil fuel, might face allegations of complicity – not least because some of the main exporters such as Canada have accepted the compulsory jurisdiction of the International Court of Justice, while key importers such as the United States and China have not.

One can also imagine legal and diplomatic efforts to narrow the scope of the principle of complicity, similar to how some states have sought to narrow human rights-related exceptions to state immunity after the ground-breaking *Pinochet* case.¹⁰ Strategies here might include the conclusion of bilateral and multilateral treaties with qualifications similar to those in the Cluster Munitions Convention, or the taking of a case with a particularly supportive fact pattern to the ICJ. Customary international law is an ongoing and highly iterative process, with some rules being the subject of intense political struggles that can reshape and even render them inapplicable over time.

All this raises an interesting question concerning the sources of international law. Although the International Law Commission's mandate is to promote 'the progressive development of international law' and 'its codification', the Commission usually leans towards the latter role, which its Statute defines as 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.¹¹ That, certainly, was the approach taken by James Crawford, the ILC's fifth and final Special Rapporteur on State Responsibility, who in the Commentary to Article 16 refers to a previous review of specific substantive rules on complicity within international law, while also identifying some state practice concerning military assistance.¹²

Aust, in his examination of complicity, quite naturally follows the state practice-oriented approach taken by the ILC – while concurrently arguing that the development of the principle of complicity reflects that the international legal system is built on the conception of a 'rule of law'. However, core principles inherent to a rule of law system should not be susceptible to redefinition or elimination by politically motivated states seeking to reduce their legal exposure for assisting with law breaking. One wonders whether a firmer and more intellectually coherent foundation for complicity might have been found in Article 38(1)(c) of the ICJ Statute, namely as a 'general principle of law'.¹³ For the principle of complicity – or

⁸ Council of Europe, 'Report of the Secretary General on the Use of His Powers under Article 52 of the European Convention on Human Rights,' SG/Inf (2006), at 5, para. 23.

⁹ See, e.g., R. Lord *et al.* (eds), *Climate Change Liability: Transnational Law and Practice* (2011).

¹⁰ See, e.g.: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2002) 3, available at: <http://www.icj-cij.org/docket/files/121/8126.pdf>.

¹¹ 1947 Statute of the International Law Commission, available at: http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf.

¹² Crawford, *supra* note 3.

¹³ 1945 Statute of the International Court of Justice, available at: <http://www.icj-cij.org/documents/>.

its equivalent – is well established in most domestic legal systems, both in criminal law and, more importantly for state responsibility, in civil law.

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Amanda Perreau-Saussine and James Bernard Murphy (eds). ***The Nature of Customary Law. Legal, Historical and Philosophical Perspectives***. Cambridge: Cambridge University Press, 2009. Pp. ix, 338. £28.99. ISBN: 9780521115568.

In order to make 'headway' in one of the most intractable debates in our field – the nature and workings of customary international law – authors seem to employ one of three tactics. One is to repeat and rehash the same narrow, doctrinal debates that scholars have been having for the last forty-odd years.¹ Another and far more courageous approach is for the author to seek to completely re-imagine (and remake) customary international law.² A third, finally, is to reflect on the nature of customary law more widely and to include insights from jurisprudence/legal theory, legal history, and moral/political philosophy.

An example of that third approach is the book under review, *The Nature of Customary Law*, edited by Amanda Perreau-Saussine and James Bernard Murphy and based on a conference at the University of Cambridge in 2005. It is decidedly the most notable and the most accomplished project in recent years. The two editors have assembled 13 authors, who have undertaken to elucidate certain historical and philosophical/theoretical aspects of the *problematique* resulting, it must be said, in a very well-executed *bricolage*. The more pragmatic readers are warned at the outset that neither is it a book on customary law in international law nor, for the most part, does it purport to describe how customary law comes about or is ascertained. But, as mentioned above, this was a conscious choice and one that has a great deal of merit. Beyond international legal scholarship and practice's narrow account lie the very rich 'domestic' debates in the common law culture as well as parallel efforts in moral philosophy and (legal) historiography. The conscious decision of the editors to take account of these debates, coupled as it is with their choice of collaborators, does result, however, in a significant cultural bias. This bias, one hastens to add, does not detract from the high quality of the book, and in some ways enlivens the debate. One must, however, be aware of the limitations of this choice. Of the 13 authors in this volume, all but two hail from an Anglophone background, and the lawyers among these also had their legal education in a common law system. Continental legal traditions are represented only by Christoph Kletzer (Austria) and Randall Lesaffer (Belgium).

It may be best if we retrace how the reader may stumble upon this bias, as indeed the present reviewer did while reading the book. Jean Porter's chapter on Gratian's *Decretum* is an excellent

¹ The beginning of the 'modern' era of debate on customary international law can conveniently, if not accurately, be fixed with the publication of A.A. D'Amato, *The Concept of Custom in International Law* (1971).

² Brian Lepard's recent book could be counted amongst these: B.D. Lepard, *Customary International Law. A New Theory with Practical Applications* (2010), reviewed in this *Journal* by Niels Petersen, '[Book review:] Brian D. Lepard, Customary International Law. A New Theory with Practical Applications (2010)', 21 *EJIL* (2010) 795.