

Intelligence sharing in multinational military operations and state complicity under international law

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Intelligence Sharing in Multinational Military Operations and Complicity under International Law

Marko Milanovic

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*Marko Milanovic**

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I. INTRODUCTION

The collection, pooling, and sharing of intelligence between the forces of States involved in multinational military operations is indispensable for their effectiveness and is a standard feature of modern coalition warfare.¹ However, such intelligence sharing also raises difficult questions of international law, in particular as to whether States sharing or receiving intelligence may be regarded as responsible for complicity in the wrongful acts of their partners.² Consider, for example, a situation in which a State provides intelligence to another which uses the intelligence for drone strikes that are (arguably) unlawful.³ The legal framework governing such questions is complex, consisting of general international law, particularly the law of State responsibility; international humanitarian law (IHL) or the law of armed conflict; international human rights law (IHRL), to the extent it applies extraterritorially and in armed conflict; international criminal law, with regard to the possible criminal responsibility of soldiers, intelligence officers and their military and civilian superiors. That international legal framework coexists with the domestic laws, particularly military and criminal laws, of partner States. The applicability of each of these regimes to intelligence sharing engages discrete sets of difficulties, which are compounded by structural uncertainties in how the different regimes interact.

1. See David Letts, *Intelligence Sharing Among Coalition Forces: Some Legal and Ethical Challenges and Potential Solutions*, in NATIONAL SECURITY INTELLIGENCE AND ETHICS (Seumas Miller, Mitt Regan & Patrick F. Walsh eds., forthcoming 2021, manuscript on file with author); Jonathan Howard, *Sharing Intelligence with Foreign Partners for Lawful, Lethal Purposes*, 226 MILITARY LAW REVIEW 1 (2018). On the various types of cooperative arrangements in the context of military operations, see Berenice Boutin, *The Interplay of International Obligations Connected to the Conduct of Others: Toward a Framework of Mutual Compliance Among States Engaged in Partnered Warfare*, 96 INTERNATIONAL LAW STUDIES 529, 531–34 (2020).

2. The focus of this article is State responsibility. I will not be examining the related question of complicity-based responsibility of international organizations such as NATO or whether in some cases international law imposes any similar responsibility directly on non-State actors, such as armed groups. On responsibility issues regarding the involvement of international organizations in multinational military operations, see generally Paulina Starski, *Accountability and Multinational Military Operations*, in THE “LEGAL PLURIVERSE” SURROUNDING MULTINATIONAL MILITARY OPERATIONS 300 (Robin Geiß & Heike Krieger eds., 2019).

3. For an example of a critical analysis of various forms of State assistance, including the sharing of intelligence, to the U.S. drone program, see AMNESTY INTERNATIONAL, DEADLY ASSISTANCE: THE ROLE OF EUROPEAN STATES IN US DRONE STRIKES (2018), <https://www.amnesty.org/download/Documents/ACT3081512018ENGLISH.PDF>.

Under customary international law, as codified in the International Law Commission's (ILC) Articles on State Responsibility (ASR),⁴ States accrue responsibility for internationally wrongful conduct attributable to them, normally because such conduct is committed by the State's own organs. The acts of collecting and sharing intelligence may as such be internationally wrongful if doing so would constitute a breach of an international obligation arising from primary rules of international law, such as IHL and IHRL, which will be addressed in more detail below.⁵

Other rules, general or sector-specific, allow for State responsibility to arise due to the assistance one State provides to the commission of a wrongful act by another State.⁶ The most relevant such complicity rule of general scope is codified in Article 16 ASR:

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.

The customary status of Article 16 was affirmed by the International Court of Justice (ICJ) in the *Bosnian Genocide* case.⁷ While the customary status of the rule was questioned by some authors and States during the ILC drafting process,⁸ no State has formally opposed it since the ILC completed its codification project, even if the practice in which the ILC grounded the

4. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC ASR].

5. International law also contains rules in specialized treaties that specifically address questions of intelligence sharing, such as the Five Eyes or UKUSA Agreement, but these are few and far between and will be outside the purview of this study. See further Scarlet Kim et al., *Newly Disclosed Documents on the Five Eyes Alliance and What They Tell Us about Intelligence-Sharing Agreements*, LAWFARE (Apr. 23, 2018), <https://www.lawfareblog.com/newly-disclosed-documents-five-eyes-alliance-and-what-they-tell-us-about-intelligence-sharing>.

6. On the notion of special, as opposed to general, complicity rules, see HELMUT AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 189 (2011).

7. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 420 (Feb. 26) [hereinafter *Bosnian Genocide*].

8. See AUST, *supra* note 6, at 169–73, 182–85; MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 150–51 (2015).

rule is hardly constant and uniform.⁹ The ILC set out an even more innovative rule in Article 41 ASR, which categorically prohibits State aid and assistance to another State's commission of a serious breach of a peremptory norm of international law. Article 41's relationship with Article 16 will be explored further below.

Some aspects of the Article 16 ASR rule are relatively uncontroversial. However, the rule's culpability (mental, subjective, fault) element has provoked much controversy. This is partly because the issue is inherently difficult and partly because the ILC's pronouncements on the point were unclear and contradictory. The proper interpretation to be given to that element is indeed the single most important question in determining the relevance of the Article 16 complicity rule in the intelligence-sharing context. The existence and elements of IHL- and IHRL-specific complicity rules and the extent of their divergence from Article 16 are also pivotal and unclear questions. The lack of clarity is exacerbated by the fact that the overwhelming majority of States have remained silent on the scope of the culpability requirements of either the general complicity rule or the sector-specific ones.

In 2018 a workshop was convened at Nottingham that aimed at clarifying some of these issues, bringing together academics, independent experts, and government legal advisers. The discussions at the workshop were based on a series of hypothetical scenarios that separated out as much as possible the discrete legal questions to be examined and progressed gradually in terms of complexity. A report published after the workshop summarizes the discussions and areas of agreement and disagreement.¹⁰ This article builds on the workshop (although the views expressed here are mine alone). The article also builds on recent academic studies on questions of responsibility grounded in complicity in international law, with a specific focus on matters of intelligence sharing in multinational military operations.¹¹

9. See AUST, *supra* note 6, at 190–91; JACKSON, *supra* note 8, at 152–53. See also JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 408 (2013) (Article 16 was initially a measure of progressive development by the ILC).

10. Report of the Nottingham Workshop on Intelligence Sharing in Multinational Military Operations (2018), <https://www.nottingham.ac.uk/law/documents/news-events/workshop-intelligence-sharing-report.pdf> [hereinafter Nottingham Workshop Report].

11. See AUST, *supra* note 6; JACKSON, *supra* note 8; VLADYSLAV LANOVOY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* (2016); Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, Nov. 2016), <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

My analysis proceeds as follows. Part II will draw on literature in legal theory and philosophy of intention to explore the fault element of complicity-type rules and set the conceptual foundations for the discussion to follow. Section III.A interprets the culpability element of Article 16 ASR, arguing that it should best be seen as containing three alternative forms of fault: direct intent, indirect intent, and willful blindness but for which the State would be considered to have acted with indirect intent. These are subjective forms of fault that depend on what the State officials making relevant decisions (such as the one to share intelligence with a partner) knew, believed, or wanted. Sections III.B and III.C examine rules on complicity specific to IHL and IHRL. These rules differ from the generally applicable one in Article 16 ASR in that they apply to State assistance to non-State actors, such as organized armed groups taking part in multinational military operations, and in that they prescribe lesser forms of fault, in particular, risk-based culpability for serious violations of these two bodies of law. Section III.D looks at how any risk-mitigation measures implemented by States should be conceptualized legally and at whether States can ever be justified in taking proscribed risks. Part IV then explores the issue of perspective, explaining that complicity rules are applied both *ex ante* (by State officials making decisions on whether to assist a partner or not) and *ex post* (by various actors, such as domestic and international courts, who may be evaluating whether the assisting State was complicit in a partner's violation of international law). This shift in perspective has significant implications for establishing the assisting State's fault. Finally, Part V examines the two main scenarios of intelligence sharing in military operations that may engage the complicity rules of international law: first, intelligence sharing assisting a wrongful act; and second, sharing and receiving unlawfully obtained intelligence. Part VI concludes.

II. ON CULPABILITY IN COMPLICITY

A. On the Elements of Complicity Rules and Article 16 ASR

Any complicity rule must delineate between those interactions between legal or natural persons that should be deemed as wrongful or harmful and those that are not (and may indeed be socially beneficial). The design of a complicity rule is, therefore, fundamentally about striking a fair balance. A very narrow rule may enable too many socially harmful interactions between two persons, while a very broad one may inhibit useful cooperation too much. This is particularly obvious in the international context. States cooperate all

the time for all sorts of reasons. They also cooperate with various non-State entities, from corporations to armed groups. An overbroad complicity rule may have the virtue of stopping harmful transactions (e.g., preventing the sale of weapons that would be used by the buyer to kill civilians in violation of IHL) but inhibit inter-State cooperation that could advance the welfare of the relevant States and their people (e.g., intelligence sharing for the purpose of combating terrorism).¹² The balance struck by a complicity rule will mainly depend on the calibration of three elements: the causal relationship between the assistance provided by the accomplice to the principal's wrongful act, the culpability required of the accomplice, and the nature of the accomplice's liability—that is, whether their conduct is regarded as equally blameworthy as that of the principal so that the principal's wrong is imputed to the accomplice.

The culpability element of complicity rules is particularly prone to variation. We can see this reasonably clearly in the ILC's fashioning of a generally applicable inter-State complicity rule in Article 16 ASR. Some elements of this rule are less controversial than others. First, it is clear that under Article 16 the assisting State is responsible for *its own conduct* in providing assistance to a wrongful act, not for the wrongful act of the assisted State itself.¹³ Article 16 is, in other words, a non-attributive, non-imputational complicity rule.¹⁴ In some cases, this may be a distinction without consequence; in others, it may be crucial (for instance, with regard to the assessment of damages).¹⁵

Second, it is also clear that the parity of international obligations required by Article 16(b) does not generally require that the obligations stem from *the same source*;¹⁶ all that is needed is for the obligations to have the *same content*.¹⁷ Thus, for example, it would be wrongful under Article 16 for State *A* to assist State *B* in the commission of inhuman treatment, even if States *A* and *B* are parties to different treaties, both of which prohibit inhuman treatment.¹⁸

12. See, e.g., AUST, *supra* note 6, at 266–68.

13. See ILC ASR, *supra* note 4, art. 16 cmt. ¶ 1.

14. See JACKSON, *supra* note 8, at 167–68.

15. See ILC ASR, *supra* note 4, art. 16 cmt. ¶ 10. See also Moynihan, *supra* note 11, at 7; JACKSON, *supra* note 8, at 169–71.

16. For an extensive discussion, see AUST, *supra* note 6, at 258–65.

17. See CRAWFORD, *supra* note 9, at 410 (Article 16(b) “says nothing about the identity of norms or sources”).

18. For a critique of the double obligation requirement, see JACKSON, *supra* note 8, at 162–67.

Third, there is equally no dispute that the notion of aid and assistance is a broad, flexible one.¹⁹ The ILC's view was that it had to consist of positive acts (i.e., assistance by omission is excluded),²⁰ but the concept is otherwise limited only by the Article 16 requirement of a causal nexus between the aid and assistance provided by the assisting State and the wrongful act committed by the assisted State.²¹ How that nexus is best described as an operational legal test is a more difficult issue. The nexus threshold must be neither too high nor too low; on the one hand, assistance need not be the *but-for* cause of the wrongful act, while on the other, Article 16 should not capture incidental or de minimis acts of assistance. The most common formulations used in that regard are whether the assistance significantly, substantially, or materially contributed to the commission of the wrongful act.²² I will not dwell on the possible differences between these formulations here; the assessment will, in any event, be contextual and fact-specific. In any case, there is little doubt that the sharing of intelligence can, in appropriate circumstances, constitute aid and assistance in the sense of Article 16—that is, it is generally capable of satisfying the causal nexus requirement.²³

However, the fault element of Article 16 remains a matter of great controversy. The controversy stems in part from an apparent contradiction between the text of the article—which speaks of the assisting State providing its assistance “with knowledge of the circumstances of the internationally wrongful act” by the assisted wrongdoing State—and the commentary to the provision, which sets out an *intent* requirement:

Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance *must be given*

19. See Moynihan, *supra* note 11, at 8; JACKSON, *supra* note 8, at 153–54.

20. See *Bosnian Genocide*, *supra* note 7, ¶ 432 (distinguishing between complicity and a duty to prevent as negative and positive obligations, respectively). For critical analysis, see JACKSON, *supra* note 8, at 155–57; LANOVOY, *supra* note 11, at 96.

21. See JACKSON, *supra* note 8, at 155–57; Erika de Wet, *Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request*, 67 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 287, 298–301 (2018).

22. See ILC ASR, *supra* note 4, art. 16 cmt. ¶ 5 (“There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”). See also JACKSON, *supra* note 8, at 157–58; Moynihan, *supra* note 11, at 8–9; LANOVOY, *supra* note 11, at 184–86.

23. See, e.g., Moynihan, *supra* note 11, at 8; AUST, *supra* note 6, at 198; LANOVOY, *supra* note 11, at 178–80.

with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.²⁴

According to the ILC commentary, the *knowledge* requirement is essentially about whether the “assisting or aiding State is unaware of the circumstances in which its aid or assistance is *intended to be used* by the other State.”²⁵ The ILC then appears to supplement this knowledge requirement by a further *intent* to facilitate the commission of the wrongful act.²⁶ We will look at the contradictions in the commentary in more detail below.

Also, the commentary to Article 16 should be read together with that to Article 41(2) ASR, which provides that States must not render aid or assist in maintaining the situation created by a serious breach of *jus cogens*. The ILC is explicit that this rule goes beyond that of Article 16 in that it applies to assistance *after the fact*, that is, after the breach of *jus cogens* has occurred.²⁷ While the commentary also notes that the notion of aid and assistance in Article 41(2) should be read in conjunction with Article 16, the former article does not refer to *any* form of culpability on the part of the assisting State, not even knowledge. The ILC explains that there was “no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.”²⁸

24. ILC ASR, *supra* note 4, art. 16 cmt. ¶ 3 (emphasis added).

25. *Id.* art. 16 cmt. ¶ 4 (emphasis added).

26. *Id.* art. 16 cmt. ¶ 5 (“A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.”); *id.* art. 16 cmt. ¶ 9 (“Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.”).

27. *Id.* art. 41 cmt. ¶ 11. *See also* AUST, *supra* note 6, at 337.

28. ILC ASR, *supra* note 4, art. 41 cmt. ¶ 11.

Scholars and States are broadly divided into two camps with regard to the interpretation of the mental element of the (now) customary rule enshrined in Article 16.²⁹ First, many scholars advance a knowledge-based theory of the aid and assistance rule.³⁰ It would be unacceptable, so the argument goes, for a State that is (say) selling weapons to another State that it *knows* the latter would use to commit war crimes to escape responsibility under Article 16, simply on the basis that the assisting State's officials do not provide the assistance with the *purpose* of facilitating or committing war crimes, although they know full well that this is what the assistance will be used for. This basic normative argument is then supplemented by various formal moves—for instance, that the text of an ILC codification project should be given priority over the commentary, especially because in the ILC drafting process the commentary goes through less scrutiny than the text.³¹ Analogies are drawn to international criminal law, which, as a matter of customary law, sets out a knowledge-based test for complicity.³² It would be incongruent, under this view, to hold State officials criminally responsible for providing assistance to other actors but not the States on whose behalf they are acting. This is especially the case since the culpability thresholds of international criminal law tend to be higher than for State responsibility (as are generally those for criminal law as opposed to civil law). What could possibly justify a position whereby an individual who acted in their official capacity on the State's behalf was criminally responsible for complicity in an international crime, but the State on whose behalf the individual acted escaped any responsibility?

Second, there is the intent camp, which argues that a State can be responsible for complicity only if it provides assistance with the intention to facilitate the assisted State's wrongful act. The intent camp emphasizes the need to interpret the text and the commentary together and claims that, realistically, a variant of an intent standard is the maximum to which all States

29. For a succinct account, see Moynihan, *supra* note 11, at 18–19. See also Nottingham Workshop Report, *supra* note 10, at 6–10.

30. See, e.g., Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 KOKUSAIHO GAIKO ZASSHI 1, 8 (2002); Olivier Corten, *La Complicité dans le Droit de la Responsabilité Internationale: Un Concept Inutile?*, 57 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 57 (2011); JACKSON, *supra* note 8, at 160–61; LANOVOY, *supra* note 11, at 226–27.

31. See JACKSON, *supra* note 8, at 159–62; Giorgio Gaja, *Interpreting Articles Adopted by the International Law Commission*, 86 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (2015); Nottingham Workshop Report, *supra* note 10, at 5–6.

32. See JACKSON, *supra* note 8, at 75–80.

could agree.³³ As a matter of policy, a knowledge-based test would be over-inclusive and would inhibit State cooperation that can help advance important public interests, such as the prevention of terrorism. The proponents of this view argue that State practice is replete with examples of assistance provided to partners with unclean hands, a point that militates against a customary rule prohibiting such assistance. They similarly argue that analogies with international criminal law are inapposite because criminal law protects a narrow set of values and interests that may require different standards than the generally applicable law of State responsibility.³⁴

While this debate has attracted much scholarly attention, most States have remained silent on the issue, a fact that contributes to the formal indeterminacy of Article 16. The situation was not helped by the ICJ's foray into the issue in the *Bosnian Genocide* case. There the Court had to decide whether the Federal Republic of Yugoslavia (FRY) was responsible for complicity in genocide (prohibited in Article 3(e) of the Genocide Convention) in providing assistance to the forces of the Bosnian Serbs who committed genocide in Srebrenica in July 1995. The Court decided to use Article 16 ASR, an inter-State rule, by analogy to supply content to the Genocide Convention rule that prohibited States from assisting non-State actors in the commission of genocide.³⁵ In doing so, however, the Court avoided conclusively pronouncing on the mental element of Article 16. It held in particular that it was not necessary to decide whether or not an accomplice to genocide shared the principal perpetrator's specific, genocidal intent (which is itself a step above an intent or purpose to facilitate the crime) because

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.³⁶

33. See CRAWFORD, *supra* note 9, at 409.

34. See AUST, *supra* note 6, at 248–49. See also Helmut Aust, *A Path towards the Moral Sophistication of International Law? Some Remarks on Miles Jackson's "Complicity in International Law,"* EJIL:TALK! (Apr. 13, 2017), <https://www.ejiltalk.org/a-path-towards-the-moral-sophistication-of-international-law-some-remarks-on-miles-jacksons-complicity-in-international-law/>.

35. *Bosnian Genocide*, *supra* note 7, ¶ 420.

36. *Id.* ¶ 421.

On the facts, while there was little doubt that the aid provided by the FRY at least partly facilitated the Srebrenica genocide, there was also no evidence that the FRY authorities were “clearly aware”³⁷ that the Bosnian Serbs were committing or were about to commit genocide, especially because the decision to commit genocide was taken shortly before it was carried out.³⁸ On the other hand, the Court found that the FRY was responsible for failing to prevent the Srebrenica genocide because it was aware, or should normally have been aware, of a “serious risk” that genocide would take place in Srebrenica and did not act with due diligence to stop it.³⁹ Note the Court’s use of a constructive knowledge standard for triggering the duty to prevent: that the State *should have known* of a serious risk—that is, some significant possibility but not necessarily likelihood—that genocide would take place.⁴⁰

The contradictions between the ILC’s text of and commentary to Article 16 ASR, as well as the ICJ’s reluctance to clarify the mental element of the rule, are likely the consequence of an almost existential dilemma as to how this complicity rule should be calibrated. A culpability standard that required knowledge could be criticized as overinclusive, while one that required intent could be criticized as underinclusive. As I will proceed to show, however, that dilemma is a false one. Article 16 could—and should—incorporate varying degrees of knowledge and intent, using complementary and alternative forms of fault. Subject-specific complicity rules, such as those in IHL and IHRL, could do so as well.

To demonstrate how this is the case requires, however, a theoretical detour. A major factor contributing to the level of disagreement regarding the interpretation of Article 16 and its cognates is the terminological and conceptual difficulty of any question of knowledge and intentionality, exacerbated by the lack of consistency among the different national legal systems in which international lawyers are first trained. Improving our understanding of these issues thus requires resort to the accumulated expertise of those who have devoted particular thought and energy to analogous questions, such as psychologists, philosophers (of the law, of language, and of the mind), and international and domestic criminal lawyers. To be clear, my aim

37. *Id.* ¶ 422.

38. *Id.* ¶ 423.

39. *Id.* ¶¶ 431–38.

40. Human rights bodies also generally use constructive knowledge regarding State fault for failing to comply with positive duties of protect. In the ECHR context, see Vladislava Stoyanova, *Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights*, 33 LEIDEN JOURNAL OF INTERNATIONAL LAW 601 (2020).

here is only to develop a conceptual framework that is *good enough* for better understanding the dilemmas posed by Article 16 ASR and similar State-focused complicity rules. My purpose is not to set out a full-fledged theory of epistemology or intention, nor am I capable of so doing. That said, no amount of conceptual “clarification” of the type we will embark upon can ultimately overcome substantive moral and political disagreements, which conceptual debates may only serve to mask.⁴¹ But it is important to know what we are really disagreeing about.

B. Culpability from the Individual to the State

Let us first dispense with the supposed difficulty of conceptualizing culpability in terms of mental elements, or the mens rea of States.⁴² It is a truism that States are abstract legal entities and thus physically incapable of directly knowing or intending anything. When, however, we speak of knowledge or intention in the context of the law of State responsibility, we do so with the understanding that States are composed of and can, in reality, only act through human beings. Therefore, to say that State *A* knows something or intends something is simply shorthand for saying that a natural, physical person *X*, who is *acting on behalf of the State*—that is, whose conduct is *legally attributable* to the State—knows or intends something. This process is conceptually no different from imputing mental states to legal entities, such as corporations, under domestic law, even if the rules of attribution of conduct will obviously be different. Every domestic legal system that allows for the criminal liability of corporations must (except in cases of strict liability) attribute to the corporation the mens rea of some specific individual acting on its behalf—an ordinary employee, a senior manager, a member of the board

41. See Nicola Lacey, *A Clear Concept of Intention: Elusive or Illusory?*, 56 MODERN LAW REVIEW 621, 626 (1993) (“Among these various points, the principal message is this: the real source of uncertainty and disagreement in the application of criminal law concepts such as intention is not ultimately to do with the concept, but with practical, moral and political issues. Should this person be convicted, and of what offence? What is the appropriate role of criminal law in this area? Conceptual analysis of *mens rea* terms, let alone their stipulation, is inadequate as a lid to keep a jar containing these kinds of substantive issues shut.”).

42. In a somewhat different context, see, e.g., James Green, *Self-Defence: A State of Mind for States?*, 55 NETHERLANDS INTERNATIONAL LAW REVIEW 181, 192–95 (2008).

of directors, and so forth.⁴³ Attributing mens rea to States is, again, conceptually no different.

As a matter of international law, it does not matter what position *X* holds in *A*'s governmental hierarchy. It is perfectly possible for an intelligence agent to possess an item of information or intend a certain action without the knowledge of their immediate superiors or the highest-ranking officials of the State, who may even have contradictory intentions.⁴⁴ But this is simply irrelevant. From the standpoint of the law of State responsibility, the State is a unitary entity and remains responsible for the conduct of all of its organs, even if the conduct is unknown to the head of State or government or is *ultra vires*.⁴⁵

There is thus no conceptual barrier to thinking about the mental states of States. These are the mental states of concrete human beings engaging in the conduct (the provision of assistance) that is attributable to the assisting State and that falls within the purview of Article 16 or a similar complicity rule.⁴⁶ Whatever the mental element required by the rule really is, it is the relevant State organ or agent that must act with such mental element—that is, the fault lies with an individual or a group of individuals acting on the State's behalf, especially those individuals deciding on or engaging in the prohibited conduct (such as the sharing of intelligence).⁴⁷ That said, it is entirely possible to find that the State acted with fault without identifying these officials by position or name. I should add that I should not be taken as

43. For example, for the position in English law see *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705 (House of Lords attributing to a company the fault of a natural person who was the company's "directing mind"); *Tesco Supermarkets Ltd. v. Nattrass* [1971] UKHL 1, 26: "In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company." For a comparative overview of corporate liability for bribery in 38 OECD member States, including the various attribution rules used in their criminal laws, see OECD, *Liability of Legal Persons for Foreign Bribery: A Stock-taking Report* (Dec. 9, 2016), <https://www.oecd.org/corruption/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm>.

44. See also Moynihan, *supra* note 11, at 16–17.

45. See ILC ASR, *supra* note 4, art. 7, art. 7 cmt.

46. But see LANOVOY, *supra* note 11, at 339–40.

47. See ILC ASR, *supra* note 4, art. 16 cmt. ¶ 3.

arguing that there are no hard cases in attributing fault to States. In the intelligence-sharing context in particular, and especially with regard to the use of knowledge-based fault standards, one major difficulty is that the different components of the State may not be exchanging the information they possess with each other, so that a proper assessment of the risk of sharing intelligence with a partner is never made. I will deal with this issue in more detail below.⁴⁸ But such difficulties, conceptual or evidentiary, should not be exaggerated.

It is, of course, true that in numerous contexts the relevant culpability standard is *objective*—for example, whether the State acted *reasonably* or with *due diligence* to prevent some kind of harm that it knew or *ought/should have known* about.⁴⁹ But this is not because there is some kind of generally applicable presumption against subjective culpability standards or because no fault is required at all. Rather, the question of fault or culpability is entirely context-specific and a matter of the proper interpretation to be given to the primary rule or the complicity rule being applied.⁵⁰ It is perfectly appropriate,

48. See Part IV.

49. Responsibility for fault under an objective standard is not equivalent to strict liability, which is responsibility with no fault at all. The objective standards are themselves forms of fault, just like negligence in domestic law. For a discussion of various fault standards, including objective ones, in the context of positive obligations under the ECHR, see Stoyanova, *supra* note 40.

50. As the ILC explains,

Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective.” . . . In other cases, the standard for breach of an obligation may be “objective,” in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

ILC ASR, *supra* note 4, art. 2 cmt. ¶ 3. See also *id.* art. 16 cmt. ¶ 3 (“the *relevant State organ or agency* providing aid or assistance *must be aware* of the circumstances”) (emphasis added); art. 16 cmt. ¶ 5 (“A State is not responsible for aid or assistance under article 16 *unless the relevant State organ intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct”) (emphasis added).

for example, for State responsibility for the commission of genocide to depend on the existence of a specific genocidal intent on the part of the relevant State officials, while the State's responsibility for failing to prevent genocide would depend on an objective standard of conduct, such as due diligence. A wholly different matter is the *proof* of such subjective mental states as knowledge or intent, which will again depend entirely on the context in which such proof is being sought and will normally require inference from conduct, with all the problems that this usually entails.⁵¹

A more difficult question is the extent to which the legal categories of mens rea and the "folk," or lay, intuitions about mental states that support them, correspond to actual psychological phenomena. This question can only be answered (if at all) by psychologists and neuroscientists and is obviously beyond the scope of our inquiry.⁵² My point is simply that to the extent that intent and knowledge are workable and coherent concepts, at least in law, there is no issue whatsoever with attributing them to the State.

C. Knowledge and Intent Compared

Before looking specifically at the mental element of complicity, it is important to define knowledge and intent as precisely as possible,⁵³ a task made more difficult by terminological inconsistencies and variations between legal cultures. Even within a single legal tradition the meaning of the terms can vary from context to context, from one area of the law to another. Then there are the "folk," or lay, conceptions of knowledge and intent,⁵⁴ as well as the very nuanced and sophisticated ones found in philosophical scholarship, which has found the question of the definition of intention "both intriguing and enormously difficult to answer in any simple terms."⁵⁵ All this

51. See Moynihan, *supra* note 11, at 17; A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE 147–48 (6th ed. 2016).

52. See Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 179 (R.A. Duff & Stuart Green eds., 2011).

53. Intent and intention are synonyms, although the former is more prevalent in formal legal contexts. I will use them interchangeably.

54. There are many different conceptions of knowledge and intent in ordinary usage, depending on the context. References to ordinary usage are necessarily reductivist and simplistic. See Lacey, *supra* note 41, at 627.

55. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 116 (2d ed. 2008).

variation means that it is simply impossible to arrive at any kind of comprehensive set of definitions; accordingly, my ambition here is only to draw a few important and necessary distinctions.

First, the legal concepts of knowledge and intent need not align perfectly with the “folk” usage of the terms or with how these terms are used by philosophers.⁵⁶ Ultimately, law has to contain *rules* about these concepts, and these rules serve a multitude of different purposes, a situation that can lead to divergence from the usage of terms outside the legal context.⁵⁷

Second, knowledge and intent both require *objects or referents*; they can only operate with regard to something. These objects can be (1) actions, (2) the consequences/results of those actions, or (3) facts/attendant circumstances.⁵⁸ Philosophical discussions have generally revolved around the relationship between action and intention—all actions (as opposed to involuntary movements) are by definition intentional under some description.⁵⁹

Third, knowledge and intent differ in psychological *valence*—intent is a *pro-attitude* (e.g., approval, admiration, liking, preference) in favor of a certain course of events or line of conduct, while knowledge requires no such attitude. The agent wants to commit the action and thereby achieve *some* result; they act with some goal in mind.⁶⁰ In the legal literature, we frequently say that knowledge is a cognitive phenomenon while intent is a volitional one—that is, it involves the exercise of the free will or choice of a person who is pursuing some kind of goal.

56. *Id.* at 116–17.

57. See generally R.A. Duff, *Intentions Legal and Philosophical*, 9 OXFORD JOURNAL OF LEGAL STUDIES 76 (1989).

58. See HART, *supra* note 55, at 119.

59. For a classical account, see ELIZABETH ANSCOMBE, INTENTION (1957). For a sophisticated and more recent exploration of distinctions between beliefs, desires, and intentions and between intentions and intended actions, see RICHARD HOLTON, WILLING, WANTING, WAITING (2009).

60. I am avoiding using the terms desire and motive here. The relationship between intention and desire is a complex issue in both the philosophical and legal literature, the key issue being whether intention is a species of or entails desire. See, e.g., R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 44–82 (1990); John Finnis, *Intention and Side Effects*, in 2 INTENTION AND IDENTITY: COLLECTED ESSAYS 173 (John Finnis ed., 2011). Motive is a goal further removed causally from the intended action and its immediate result. Motive in that sense is also a sub-species of intention, but intention relates to consequences that are (in the criminal context) outside the defined scope of the elements of the offense, and the intention as to these consequences is thus legally not a part of the intent required by the offense. See also SIMESTER ET AL., *supra* note 51, at 137.

A person can thus intend to perform some action, know or foresee that the action is likely or not likely to lead to a result, and act with or without the intention of bringing about that result. The same action can therefore be intentional under one description but not under others. Imagine a scenario in which *A*, a soldier, shoots at a person he sees on a hill and thinks is an enemy soldier but turns out to have been *B*, a member of *A*'s own unit. The proposition that *A* intentionally fired his weapon is true, as is the one that *A* intentionally fired his weapon to kill the person on the hill, but the proposition that *A* intentionally fired his weapon to kill *B* is false. Whether *A*'s action is regarded as intentional thus depends on the words we use to describe it.

In ordinary language, knowledge and intention can refer to both actions and their consequences, but intention cannot refer to *facts* that are not consequences; in other words, facts that are not causally related to some action also being described. One can *know* that the Earth revolves around the Sun, but one cannot *intend* that the Earth revolve around the Sun. One can *know* that there is such a thing as anthropogenic climate change, but one cannot *intend* that there be such a thing. One can, of course, *hope* that a certain state of affairs is or is not true, but one cannot intend it. Again, intent/intention is a mental state tied to action—one can certainly intend to (now or in the future) work on ameliorating climate change or act in some way *because* climate change exists.⁶¹ As a *legal* matter, however, intent can (confusingly) be *redefined* as hope or belief as to mere existence of attendant circumstances, if intent is required for that type of element of an offense.⁶²

As for knowledge, it is traditionally (but not universally) defined in epistemology as a justified true belief, a definition that largely aligns with commonsense usage and legal practice. Thus, person *A* knows that proposition *P* is true if and only if (1) *P* is, in fact, true; (2) *A* subjectively believes that *P* is true; and (3) *A* is justified in so believing, perhaps because the belief is formed on the basis of appropriate and relevant evidence.⁶³ *A* is able in this

61. See also DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY, *supra* note 60, at 87–89.

62. See SIMESTER ET AL., *supra* note 51, at 145–46.

63. See generally Jonathan Jenkins Ichikawa & Matthias Steup, *The Analysis of Knowledge*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 7, 2017), <http://plato.stanford.edu/entries/knowledge-analysis/>. Disregard of the traditional definition generally turns on the issue of justifiability and so-called Gettier cases. See Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963). See also PAUL BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM (2006).

sense to *know* anything from whether the lights are on in the room (something the person can establish through direct perception) to such facts as that the Earth revolves around the Sun or humans are causing significant changes to the climate (if *A* has the capacity to examine a sufficient quantum of evidence in that regard and has done so). The legal conception of “knowledge,” just like that of “intention,” need not, of course, align with that of philosophy—this is especially the case with regard to the justifiability criterion, which is less important to law than are moral or commonsense intuitions about a person’s culpability.⁶⁴

Knowledge can relate to circumstances that existed in the past or that exist in the present. Thus, *A* can *know* that there once existed a person called Gaius Julius Caesar who became the dictator of Rome and was assassinated on the Ides of March. *A* can *know* that dinosaurs once roamed the Earth and then became extinct. *A* can *know* that another person, *B*, is sitting with him in his room. These are facts that a human being can be certain about, to the extent that a human being can know anything.

However, there are points of fact in the past or present about which one cannot be certain—there are many things we do not know for sure, and will never be able to know for sure, about ancient Rome or the life of Caesar or the extinction of the dinosaurs. We may simply lack sufficient information or evidence about specific points in the past or the present—for example, whether Vladimir Putin has ever had a very naughty tape starring one Donald Trump in his drawer. Similarly, we may have reasonably sufficient information—for example, regarding whether there were weapons of mass destruction in Iraq in 2003—yet process it in a biased or otherwise erroneous way. In short, it is simply a fact of life that we constantly have to make decisions in conditions of uncertainty, conditions no less unclear even if some facts in the past or present can, in theory, be known with absolute certainty.⁶⁵

We also frequently speak of propositional knowledge (knowledge-that) when it relates to circumstances or events *in the future*. *A* *knows* that he will eventually die, since every person there ever was ultimately died and since he has a sufficient understanding of human biology. *A* *knows* that if he drops a tennis ball that he is holding in his hand the ball will start falling to the ground because this is what has happened every time he dropped something and

64. See further Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOYOLA OF LOS ANGELES LAW REVIEW 405, 428–33 (2021). See also SIMESTER ET AL., *supra* note 51, at 157.

65. See also Lawrence Solum, *Legal Theory Lexicon 070: Uncertainty, Risk, and Ignorance*, LEGAL THEORY LEXICON, https://lsolum.typepad.com/legal_theory_lexicon/2011/05/legal-theory-lexicon-070-uncertainty-risk-and-ignorance.html (last visited Sept. 13, 2021).

because he is familiar with the nature of the force of gravity. *A* can even *know* something that will occur billions of years into the future—for example, that in some five billion years the Sun will exhaust the hydrogen in its core, exit its main sequence, expand into a red giant, and engulf the inner planets of the Solar System.

In other words, one *can* know the future; there are future facts just as there are facts in the past or the present. However, the vast majority of future facts are contingent and thus not knowable in this sense, but are only assessable as a matter of degree of likelihood or probability. This is especially the case when a future event depends on the actions of other human beings and is thus *necessarily* contingent, a point of particular importance for our inquiry into complicity.⁶⁶ We will return to it later.

D. *A Continuum of Culpability*

This brings us to the continuum of the types of fault that we are familiar with from comparative criminal law. The diversification of culpability is a consequence of ordinary moral intuitions under which the wrongfulness of instances of the same conduct causing exactly the same consequences (e.g., death) will vary depending on the mental state of the wrongdoer, as will accordingly the level of responsibility and punishment. Domestic legal systems also vary, of course, in how precisely they define the specific points along this continuum.

One example of a carefully crafted diversified approach is the influential Model Penal Code of the American Law Institute (MPC), which deliberately avoids the ambiguity associated with the term “intent”⁶⁷ and instead distinguishes between four culpable mental states—purpose, knowledge, recklessness, and negligence—requiring the proof of the mental state associated with each specific material element of a given criminal offense.⁶⁸ For example, MPC section 2.02(2)(a) defines purpose as follows:

A person acts purposely with respect to a material element of an offense when:

66. See also James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 165, 194 (2012).

67. See MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 43–44 (2d ed. 2015).

68. Element analysis thus parts ways with offense analysis, which looks at the crime as a whole and requires a single mens rea for that offense.

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.⁶⁹

Section 2.02(2)(b) then proceeds to define knowledge:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Note how the MPC definition of purpose in section 2.02(2)(a)(i), requiring a “conscious object” to engage in the relevant conduct or to cause a specific result corresponds to the philosophical definition of intention in the context of goal-driven action. But the purpose with regard to attendant circumstances in section 2.02(2)(a)(ii) is actually either knowledge (awareness that they exist, as also set out in section 2.02(2)(b)(i)), or subjective belief, or even mere hope, that they exist (neither of which is knowledge as that term is conventionally defined in philosophy).⁷⁰

Like most domestic legal systems, those U.S. jurisdictions that base their criminal laws on the MPC essentially require that the members of a jury or professional judges tasked with determining the culpability of an individual establish the subjective mental state of that individual, a task that is of course impossible through any direct means. The practical difficulties of inferring mental states from an individual’s statements or behavior mean that fine distinctions of the kind drawn in the MPC can look artificial or impracticable;

69. MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 1985) [hereinafter MPC].

70. *See also* DUBBER, *supra* note 67, at 53–54. Similarly, see section 5.2(2) of the Criminal Code Act 1995 of Australia, under which “[a] person has intention with respect to a circumstance if he or she believes that it exists or will exist.”

they do not actually correspond to what finders of fact are really doing, especially if they can exercise a significant degree of discretion and do not have to provide full reasoning for their decisions (as is the case with juries).⁷¹

Moreover, our moral intuitions may well lead us to conclude that conceptually distinct mental states are equally culpable, deserving of the same condemnation, and that, therefore, the various distinctions regarding mental states should be collapsed.⁷² In fact, in recent years psychologists and experimental philosophers have been testing the working of these intuitions, with some striking findings. For instance, in an experiment in which the subjects were presented with a vignette in which the protagonist commits an action causing a harmful side effect as a consequence of an effect he actually desires, the vast majority of subjects, when given a binary choice of descriptions of the protagonist's conduct (intentional v. unintentional), agreed that the harmful side effect was caused intentionally but they were not willing to agree with that proposition when the side effect was beneficial.⁷³ When given multiple possible descriptions, however, the subjects most often chose the label "knowingly" for such conduct and showed a capacity for making fine distinctions on the basis of their assessment of the protagonist's desire to cause an effect—the greater the assessed desire, the greater the blameworthiness.⁷⁴ There is an ongoing controversy in this body of scholarship about whether and to what extent people's intentionality judgments are driving their moral judgments (as has commonly been thought) or whether it is in fact moral judgments about blameworthiness that drive (and bias) "folk" judgments about intentionality (i.e., we think that a particular course of conduct is blameworthy and therefore think that it is intentional).⁷⁵

71. See Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 317, 317–22 (2009). See also James A. Macleod, *Belief States in Criminal Law*, 68 OKLAHOMA LAW REVIEW 497 (2016).

72. See HART, *supra* note 55, at 117; JEREMY HORDER, *ASHWORTH'S PRINCIPLES OF CRIMINAL LAW* 190–92 (2016).

73. See Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190 (2003); Joshua Knobe, *Intentional Action in Folk Psychology: An Experimental Investigation*, 16 PHILOSOPHICAL PSYCHOLOGY 309 (2003).

74. See Steve Guglielmo & Bertram F. Malle, *Can Unintended Side Effects Be Intentional? Resolving a Controversy over Intentionality and Morality*, 36 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1635 (2010).

75. See further Steve Guglielmo & Bertram F. Malle, *Enough Skill to Kill: Intentionality Judgments and the Moral Valence of Action*, 117 COGNITION 139 (2010); Joshua Knobe, *Person as Scientist, Person as Moralist*, 33 BEHAVIORAL AND BRAIN SCIENCES 315 (2010); Joshua Knobe & Zoltán Gendler Szabó, *Modals with a Taste of the Deontic*, 6 SEMANTICS & PRAGMATICS 1

Be that as it may, it is simply a fact that most legal systems have, at least in some contexts, long treated as intentional those actions producing certain results that were done in mental states that were less clear-cut than the MPC idea of purpose⁷⁶ and that do not correspond neatly with either “folk” or philosophical thinking about intentionality.⁷⁷ In law, intent is “a term of art, encompassing many situations that we would not call ‘intentional’ in ordinary language.”⁷⁸ Thus, for example, many common law systems have used a concept of intent that includes not only the MPC idea of purpose, termed *direct* intent, but also *oblique*, or indirect, intent.⁷⁹ Oblique intent treats as intentional those consequences of an action that were foreseen by the person as inevitably resulting from their action, even though they were not the goal of the action.⁸⁰ For example, *A* wishes to kill *B*, who is traveling on a train. To do that, *A* blows up the train, killing not only *B* but a number of other passengers, whose deaths are a matter of indifference to *A* but which he is ready to accept in order to achieve his goal of killing *B*. The element of volition here—which could deserve the label of *intent*—is that *A* chose to act in

(2013); Jonathan Phillips, Jamie B. Luguri & Joshua Knobe, *Unifying Morality’s Influence on Non-moral Judgments: The Relevance of Alternative Possibilities*, 145 COGNITION 30 (2015); Florian Cova, *The Folk Concept of Intentional Action: Empirical Approaches*, in BLACKWELL COMPANION TO EXPERIMENTAL PHILOSOPHY (Wesley Buckwalter & Justin Sytsma eds., 2016); Florian Cova, Anthony Lantian & Jordane Boudesseul, *Can the Knobe Effect Be Explained Away? Methodological Controversies in the Study of the Relationship between Intentionality and Morality*, 42 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1295 (2016); Andrew J. Vonasch & Roy F. Baumeister, *Unjustified Side Effects Were Strongly Intended: Taboo Tradeoffs and the Side-Effect Effect*, 68 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 83 (2017).

76. See further Sarah Finnin, *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 325, 328–33 (2012).

77. In criminal law, this has especially been the case with regard to crimes involving physical harm to other persons. See HART, *supra* note 55, at 119 (“for the law, a foreseen outcome is enough, even if it was unwanted by the agent, even if he thought of it as an undesirable by-product of his activities”).

78. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 443 (2000).

79. For the classical argument in favor of the inclusion of oblique intent, see Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE LAW JOURNAL 417 (1987). For a philosophical critique of oblique intent, see Duff, *Intentions Legal and Philosophical*, *supra* note 57; DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY, *supra* note 60, at 74–82 (note however that Duff does not argue against responsibility in cases of oblique intent but disputes the conceptual coherence of the notion). For a critique of Duff, see Michael Gorr, *Should the Law Distinguish Between Intention and (Mere) Foresight?*, 2 LEGAL THEORY 359 (1996). See also Finnis, *supra* note 60 (criticizing the notion of oblique intent as misconceived).

80. I leave aside here the issue of whether having a goal is conceptually distinct from desiring. For a discussion of this issue, see FLETCHER, *supra* note 78, at 440–42.

the way he did, *knowing* what the consequences of his action would be.⁸¹ In proceeding with the action nonetheless, *A* reconciled himself to the consequences though he may not have desired them as such. In other words, it is not that *A* simply had the foresight that something would happen, but rather that while having such foresight, he consciously acted—as he could have chosen not to do—in a way that would bring about those results.⁸²

Jurisprudence has varied from system to system and within systems as to whether such oblique intent is a species of intent as such or simply evidential support for an inference that (direct) intent exists.⁸³ In the MPC framework, this would be an instance of a person acting *knowingly* with regard to a consequence, “aware that it is practically certain that his conduct will cause such a result,”⁸⁴ a formulation designed to capture the contingent, probabilistic nature of such knowledge.⁸⁵ In the private tort law context, the orthodox position in American law is that the concept of intent encompasses an oblique form, the equivalent of acting knowingly under the MPC. For example, the *Restatement of Torts (Second)* defines the word “intent” as denoting either that “the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”⁸⁶ The *Restatement of Torts (Third)* retains this dual definition while modifying the language to make it more consistent with the MPC conceptual framework: “A person acts with the intent to produce a consequence if: (a) the person acts with the purpose

81. To a level of practical certainty higher in the scale than simply an appreciation of high probability. See Williams, *supra* note 79, at 421.

82. See HART, *supra* note 55, at 121–22 (focusing on choice and control over the outcome with regard to both direct and oblique intent). See also Duff, *Intentions: Legal and Philosophical*, *supra* note 57, at 87–88 (arguing that under a consequentialist moral paradigm control over the outcome is the basis of responsibility in cases of oblique intent); Steve Guglielmo, Andrew E. Monroe & Bertram F. Malle, *At the Heart of Morality Lies Folk Psychology*, 52 INQUIRY 449 (2009) (arguing that moral judgments about blame critically depend on an assessment of the agent’s capacity to choose whether to do his action).

83. See, e.g., DAVID ORMEROD & KARL LAIRD, SMITH, HOGAN, & ORMEROD’S CRIMINAL LAW 90–9 (15th ed. 2018); Beatrice Krebs, *Oblique Intent, Foresight and Authorisation*, 7 UNIVERSITY COLLEGE LONDON JOURNAL OF LAW AND JURISPRUDENCE 1 (2018); M. Cathleen Kaveny, *Inferring Intention from Foresight*, 120 LAW QUARTERLY REVIEW 81 (2004); SIMESTER ET AL., *supra* note 51, at 142–43 (all discussing the evolution of case law in England and Wales).

84. MPC, *supra* note 69, § 2.02(2)(b)(ii).

85. See DUBBER, *supra* note 67, at 55.

86. RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1979) (emphasis added).

of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.”⁸⁷

In addition to the widespread adoption of oblique forms of intent, many common law systems have traditionally avoided confining culpability strictly to purpose in many other ways.⁸⁸ For example, the crime of murder is in various common law jurisdictions defined as requiring either the purpose to kill *or* the purpose to cause grievous bodily harm without a purpose of causing death. Similarly, common law systems generally employ the doctrine of transferred malice—if *A* shoots at *B* with the intent of killing *B*, but misses *B* and kills *C*, *A* will be guilty of the murder of *C* even though he did not desire to bring about *C*'s death. In some common law jurisdictions, a cognate doctrine is the felony murder rule, which imposes responsibility for murder on any person who kills another, without desiring to do so, if the death arises in the context of the commission of a specific felony, such as robbery.⁸⁹ Finally, in the complicity context, the doctrine of joint enterprise imposes criminal responsibility on a person who contributes to the commission of an offense by others with whom he shares a common purpose, such responsibility extending even to crimes outside the common purpose but whose commission was foreseen.⁹⁰ All of these doctrines (rightly or not) enable the conviction for an offense (e.g., murder) of a person who did not act with the *purpose* of bringing about the prohibited consequence.

87. RESTATEMENT (THIRD) OF TORTS § 1 (AM. L. INST. 2010). The commentary then further explains,

A purpose to cause harm makes the harm intentional even if harm is not substantially certain to occur. Likewise, knowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm. Of course, a mere showing that harm is substantially certain to result from the actor's conduct is not sufficient to prove intent; it must also be shown that the actor is aware of this. Moreover, under Subsection (b) it is not sufficient that harm will probably result from the actor's conduct; the outcome must be substantially certain to occur.

Id. at 7.

88. See Moore, *supra* note 52, at 201–2.

89. See FLETCHER, *supra* note 78, at 447–48; DUBBER, *supra* note 67, at 90–92.

90. This remains the position under customary international criminal law, although not under the Rome Statute of the ICC. This variant of common-purpose liability was recently considered by the UK Supreme Court in *R v. Jogee* [2016] UKSC 8, [2017] AC 387, and by the Privy Council in *R v. Ruddock* [2016] UKPC 7, holding that the common law of England and Wales had taken a “wrong turn” (*Jogee*, ¶ 87) in allowing foresight as mens rea for joint enterprise.

Continental/civil law systems have similarly used an umbrella concept of intent which includes *dolus directus* and *dolus indirectus* (corresponding to direct and oblique intent in the common law). (In some systems, those same concepts are labeled *dolus directus* in, respectively, the first degree and the second degree.⁹¹ In order to avoid confusion, I will not use these terms, but they convey the same basic idea.)⁹² This is also the position in Article 30(2)–(3) of the Rome Statute of the International Criminal Court (ICC), which provides as follows:

2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.⁹³

The construction that a person is aware that “a consequence will occur in the ordinary course of events” is again meant to address the epistemic problem of not being able to know the future and therefore allowing for contingency. The formulation essentially conveys the same idea as foresight of practical, virtual, or near-certainty.⁹⁴

91. See Finnin, *supra* note 76, at 332–33. Obviously, these various systems will also use the equivalent of *dolus* in their own language, in addition or as an alternative to the Latin terms.

92. See Mohamed Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, 19 CRIMINAL LAW FORUM 473, 474, 482–87 (2008).

93. Rome Statute of the International Criminal Court art. 30(2)–(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

94. For example, the influential project of a draft Criminal Code for England and Wales, completed in 1989 by the Law Commission, uses very similar terminology to convey the same idea. Section 18(b) of the Code provides that a person acts intentionally with respect to: “a circumstance when he hopes or knows that it exists or will exist; (ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.” 1 CRIMINAL LAW: A CRIMINAL CODE FOR ENGLAND AND WALES 51 (Law Com. No. 177, 1989). The Commission’s commentary on the provision notes the impossibility of knowing the future and the provision’s openness due to contingency and embraces a concept of indirect intent:

Civil law systems frequently also include within an umbrella concept of intent the sub-type called *dolus eventualis*, the closest common law equivalent of recklessness.⁹⁵ *Dolus eventualis* is still regarded in such systems as *dolus*, i.e., a species of intent.⁹⁶ It differs from *dolus indirectus* in that the foreseen probability of the consequence resulting from the action is lower than practical

Where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a pre-condition—as where D, in order to injure P, throws a brick through the window behind which he knows P to be standing; or it may be a necessary concomitant of the first result—as (to use a much quoted example) where D blows up an aeroplane in flight in order to recover on the insurance covering its cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends to kill the crew. But there is no absolute certainty in human affairs. P *might* fling up the window while the brick is in flight. The crew *might* make a miraculous escape by parachute. D's purpose *might* be achieved without causing the second result—but these are only remote possibilities and D, if he contemplates them at all (which may be unlikely), must know that they are only remote possibilities. The result will occur, and D knows that it will occur, “in the ordinary course of events . . . unless something supervenes to prevent it.” It is, and he knows it is, “a virtual certainty.” We have adopted the phrase, “in the ordinary course of events” to ensure that “intention” covers the case of a person who knows that the achievement of his purpose will necessarily cause the result in question, in the absence of some wholly improbable supervening event.

2 CRIMINAL LAW: A CRIMINAL CODE FOR ENGLAND AND WALES 192 (Law Com. No. 177, 1989). Similarly, under section 5.2(3) of the Criminal Code Act 1995 of Australia “[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.”

95. This is the case, for example, in the law of South Africa, a hybrid common law/continental system. *See, e.g.*, Director of Public Prosecutions, Gauteng v. Pistorius 2016 (2) SA 317 (SCA) (Paralympian Oscar Pistorius guilty of murdering his girlfriend, Reeva Steenkamp, on the basis of *dolus eventualis*). *See also* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICHIGAN JOURNAL OF INTERNATIONAL LAW 79, 83, 87–91 (2013) (discussing mens rea concepts in various legal traditions and exploring the issue of whether recklessness and *dolus eventualis* are substantially equivalent or the latter is somewhat more demanding than the former). Fletcher regards recklessness as equivalent to conscious negligence in some civil law systems rather than as equivalent to *dolus eventualis*. *See* FLETCHER, *supra* note 78, at 446. The problem of distinguishing between *dolus eventualis* and conscious negligence has long preoccupied criminal law scholars in the continental European tradition, but that particular qualification issue is not of central importance to us here. *See further* DUBBER, *supra* note 67, at 61–63. For an extensive comparative examination of mens rea standards, *see* JEROEN BLOMSMA, *MENS REA AND DEFENCES IN EUROPEAN CRIMINAL LAW* (2012).

96. *See* FLETCHER, *supra* note 78, at 445–48.

certainty, although municipal systems differ as to whether mere possibility suffices for this species of intent or a particular risk threshold is required.⁹⁷

Intent defined as purpose or *dolus directus* covers those results of an action that are conscious objects or goals of the action even in those situations in which it is highly unlikely that the action will result in the desired consequence.⁹⁸ For example, if person *A*, who has no prior arms training, picks up a rifle and shoots at person *B* five hundred meters away, he may be aware that it is extremely unlikely that the action of taking a shot will result in *B*'s death but still *intend* that *B* shall die. If by luck *B* actually is struck by the bullet and dies, *A* would be liable for murder on the basis of his intent as purpose/direct intent, even though *A* foresaw that *B* would most likely not die.⁹⁹

However, oblique intent/*dolus indirectus* and recklessness/*dolus eventualis* focus on foresight and lack the element of goal or desire: the consequence of the agent's action is unwanted but is foreseen, and the agent has reconciled with, or is indifferent to, its occurrence. The difference between oblique intent and recklessness is that with regard to the former the occurrence of the consequence is practically or virtually certain, while with regard to the latter there is only a possibility or risk of its occurrence (with different descriptors used in different jurisdictions).¹⁰⁰ Again, in all of these cases the agent chooses to act while being aware of the certain, probable, or possible harmful consequences of their action.

The upshot of this analysis is as follows: "intent" and "acting intentionally" are legally ambiguous terms that are perceived differently in different jurisdictions.¹⁰¹ The key question is whether intent will, as a matter of law, capture only those results of an action that were actively wanted, or also

97. See also DOUGLAS GUILFOYLE, INTERNATIONAL CRIMINAL LAW 188–92 (2016); FINNIN, *supra* note 76, at 333–36; OHLIN, *supra* note 95, at 103–6 (exploring different conceptions of *dolus eventualis*).

98. See, e.g., WILLIAMS, *supra* note 79, at 431; FINNIN, *supra* note 76, at 330–31 (any degree of possibility suffices with direct intent).

99. See, e.g., ORMEROD & LAIRD, *supra* note 83, at 90; cf. R v. Dadson [1850] 175 Eng. Rep. 499 (defendant convicted for intentionally shooting a man who he wrongly believed was out of range).

100. See, e.g., ORMEROD & LAIRD, *supra* note 83, at 96–98 (discussing the difficulty of distinguishing between intention and recklessness below a threshold of a certainty); BLOMSMA, *supra* note 95, at 72–73. Cf. RESTATEMENT (SECOND) OF TORTS, *supra* note 86, § 8A cmt. (discussing the progression from intent, to recklessness, and then to negligence as the foreseen probability of a consequence decreases).

101. See FLETCHER, *supra* note 78, at 443.

those that were foreseen with virtual certainty or with something less than such certainty, but whose occurrence was acceptable to the agent. All legal systems suffer from difficulties in dealing with intent, both doctrinally and in practice.

E. Knowing What, Intending What?

We have, up to this point, discussed the mens rea of a person with respect to their own actions, their consequences, and any attendant circumstances. But our object of inquiry is, of course, the mens rea of complicity. In such situations there are (at least) two agents—the principal and the accomplice—each of whom is engaging in some kind of conduct with some kind of mens rea. The conduct of the accomplice is the provision of assistance to the principal, which makes it easier for the principal to commit a wrong—for example, *A* sells *B* a gun that *B* then uses to kill *C*. The issue, therefore, is what mens rea *A* needs to have with respect to his action of provision of assistance and its consequences, and with respect to any further action by *B*.

As a general matter, domestic legal systems tend to deal with accomplice liability far more elaborately in the criminal law context than in the private law context.¹⁰² This is most likely because true tort complicity scenarios are rare and can be captured by broadly defined torts (including inducing breaches of contract) or by concepts such as joint tortfeasance.¹⁰³ One domestic legal system that has grappled with complicity scenarios more directly in the tort context is the American one, in the jurisprudence of U.S. federal courts under the Alien Tort Claims Act. But there the U.S. courts have mostly imported mens rea standards from international criminal law to define complicity in tort for violations of international law, producing a jurisprudence that is substantial but complex and confusing, especially to outsiders and particularly when these standards are applied to corporate entities.¹⁰⁴

102. For two substantial recent works on private law accessory liability in common law systems, see JOACHIM DIETRICH & PAULINE RIDGE, *ACCESSORIES IN PRIVATE LAW* (2015); PAUL S. DAVIES, *ACCESSORY LIABILITY* (2015).

103. See also Hazel Catty, *Joint Tortfeasance and Assistance Liability*, 19 *LEGAL STUDIES* 489 (1999); Henry Cooper, *Liability for Assisting Torts*, 41 *MELBOURNE UNIVERSITY LAW REVIEW* 571 (2017); Sarah L. Swan, *Aiding and Abetting Matters*, 12 *JOURNAL OF TORT LAW* 255 (2019) (again focusing on common law systems).

104. See also Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 *HASTINGS LAW JOURNAL* 61 (2008); Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 *CORNELL LAW REVIEW* 1593, 1630–34 (2020).

In trying to conceptualize the fault element of a State complicity rule in international law resort to criminal law analogies is thus inevitable. Again, this is—with due caution—not inappropriate since the mental attitudes that the fault or culpability element tries to capture are those of individuals acting on behalf of States.¹⁰⁵ I will therefore use the gun-seller example above as a useful thought experiment. Note that in this scenario *A*'s action was knowing and volitional and hence intentional under some minimal description—that is, the proposition that *A* intended to sell a gun to *B* is true since *A* knew that he was giving a gun (and not something else, say, a gun-like toy) to *B*, and wanted to engage in this conduct (that is, he was not compelled or coerced to do so).

In that regard, even from this simple complicity scenario, it becomes apparent that speaking of “knowledge” or “intent” as the mental elements of accomplice liability is reductive and ambiguous. As explained above, both knowledge and intent are propositional attitudes—each needs an object or referent.¹⁰⁶ In our scenario, the gun seller, *A*, can have such attitudes towards his own conduct (giving the gun to *B*) and towards *B*'s conduct (the killing of *C*). These attitudes can be cognitive and volitional, both ranging on a spectrum.

When we are speaking of the mens rea of complicity, we are therefore speaking about the interplay of four different factors: (1) *A*'s cognitive assessment of whether *B* is committing or intends and is able to commit a wrongful act, such as killing *C*, an assessment ranging from practical certainty that he does not through various levels of risk or likelihood that he does up to a practical certainty that he does; (2) *A*'s volitional or conative attitude with regard to *B*'s action, ranging from disapproval through indifference to approval; (3) *A*'s cognitive assessment of whether *B* intends to use the aid that *A* provides for the wrongful act—for instance, intends to use the gun given by *A* to kill *C*—again ranging from a practical certainty that *B* does not to a practical certainty that he does; and finally (4), *A*'s volitional or conative attitude with regard to his own action of assisting *B*, ranging from wanting for this action not to facilitate *B* in the commission of the wrong through indifference to wanting it to facilitate *B*'s commission of the offense.

Crucially, *A*'s assessment of *B*'s intent to kill *C* and of what *B* will do with the gun is necessarily *always* an assessment of probability. *A* cannot read *B*'s mind and so cannot directly *know* what *B* intends to do with the gun;

105. See Moynihan, *supra* note 11, at 19.

106. See *supra* Section II.C.

instead, *A* must make inferences from *B*'s statements and behavior in their context.¹⁰⁷ Similarly, *B*'s use of the gun will always temporally follow *A*'s action of providing the gun, and sometimes may come long thereafter.¹⁰⁸ Therefore, it is always possible for *A* to assess erroneously *B*'s intent (to the effect, e.g., that *B* never intended to kill *C* or never intended to use the gun to do so) or for *B* to change his mind (e.g., he intended to use the gun to kill *C* but before following through decides against it). In other words, *B* is an independent moral agent, and *A*'s beliefs or knowledge about *B*'s current and future intent and behavior are inevitably of a dynamic and probabilistic nature. Knowledge, in this context, can only mean *foresight*.

This is not to exaggerate the practical difficulty of predicting the behavior of other people—we do so all the time¹⁰⁹—but simply to explain the inferential and probabilistic nature of the process. In law, we can choose a point on the cognitive spectrum to which we wish to attach the legal label of *actual knowledge*—for example, *A* *knows* that *B* will use the gun to kill *C* if *A* is practically certain that *B* will do so, thinks it is highly probable that *B* will do so, or thinks it is likely that *B* will do so. But there is no categorical difference between that label and the knowledge of the existence of a risk—the difference is one of degree, not one of kind. In either case, we are dealing with probabilistic foresight.¹¹⁰ We can *know* in the orthodox sense of justified true belief only what some other person has already done or is currently doing; predicting future behavior is always an assessment of some degree of probability.

That said, my main point is that there is no intrinsic reason why the mental element for complicity-type responsibility has to be at any specific point on the cognitive/volitional spectrum above. There are, of course, normative arguments as to where the line should be drawn.¹¹¹ But as a matter of positive law, it is ultimately a choice for the legislator(s) or the courts as to where to

107. See SIMESTER ET AL., *supra* note 51, at 147–48.

108. See, e.g., ORMEROD & LAIRD, *supra* note 83, at 205–6.

109. The difficult question is how exactly we do this. In this regard, see Heller, *supra* note 71 (discussing simulation and projection as the key mechanisms used by jurors when assessing the mental states of other persons).

110. See Stewart, *supra* note 66, at 192–94; *but see* JACKSON, *supra* note 8, at 77–78.

111. See, e.g., Antony Duff, *Intention Revisited*, in THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS 148, 172–73 (Dennis J. Baker & Jeremy Horder eds., 2013) (arguing in favor of a philosophically justifiable notion of intention as direct intent, and specifically that with regard to complicity for some types of offenses indirect intent—which he does not deem to be a species of intention as such—should suffice for culpability).

draw the line—often not a wholly determinate line—in weighing the different competing normative and policy considerations at play.¹¹² It is simply a fact that different systems have drawn this line in different places. It is also a fact that, like international law, many systems have experienced periods of (at times extreme) uncertainty and fluidity as to what the proper standards should be.¹¹³

Several considerations influence where the culpability line for complicity should be drawn in criminal law. First, the complicity rule should not be overbroad: it should not excessively inhibit otherwise lawful conduct that could potentially serve some useful social purpose. This is essentially the same concern as the one under Article 16 ASR with regard to inhibiting inter-State cooperation. Second, whether the accomplice is regarded as being equally culpable as the principal (which sometimes goes against our moral intuitions, and sometimes not), or is their culpability of a lesser kind. Third, relatedly, is complicity regarded as *imputational*, that is, is the principal's offence imputed to the accomplice, or is the accomplice being held responsible for her own conduct of providing the assistance. Finally, the workability of the rule, in other words, how easy it would be to apply in practice, for example with regard to questions of proof.

Again, in different systems these concerns are weighed differently, leading to different approaches to the nature of complicity generally and its mental element specifically. This is simply because these considerations are such that their evaluation is perfectly open to reasonable disagreement. Indeed, we can observe this same fragmentation even within the confines of international criminal law.

The Nuremberg military tribunals and the modern ad hoc tribunals settled on the accomplice's knowledge that the aid provided will assist the principal's crime as the relevant mens rea standard. It has been argued that this standard reflects customary international law (although the discernment of culpability standards for individuals from fragmented State practice is hardly

112. See JACKSON, *supra* note 8, at 46.

113. Consider, for example, how the UK Supreme Court departed from prior expansive understandings of the culpability element in joint enterprise liability in *Jogee*, *supra* note 90, a change in position that apex courts in other jurisdictions refused to follow, e.g., in Australia. See *Miller v. The Queen*; *Smith v. The Queen*; *Presley v. The Director of Public Prosecutions* [2016] HCA 30. For an extensive analysis in the private law context of the different strands of jurisprudence on the mental elements for accessory liability in equity, contract, and tort, see DAVIES, *supra* note 102, at 109–22, 156–61, 203–9.

an exact science).¹¹⁴ However, overinclusiveness concerns¹¹⁵ motivated the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to adopt a divergent position in which it formally reaffirmed the knowledge mens rea standard but required the actus reus (and again *not* the mens rea) of aiding and abetting to have been *specifically directed* to the facilitation of the offense¹¹⁶—a position rejected by other tribunals¹¹⁷ and subsequently abandoned by the ICTY itself.¹¹⁸

The drafters of the Rome Statute of the ICC, on the other hand, opted for the *purpose of facilitating the commission of the crime* as the mens rea of aiding and abetting,¹¹⁹ a formulation chosen as a compromise between diverse domestic legal traditions, perhaps also because of concerns that the customary knowledge standard would be overinclusive.¹²⁰ The choice of the term “purpose” rather than intent is particularly interesting in light of the fact that, as

114. For a comprehensive analysis, see Manuel J. Ventura, *Aiding and Abetting*, in *MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW* 173 (Jérôme de Hemptinne et al. eds., 2019). See also Hathaway et al., *Aiding and Abetting in International Criminal Law*, *supra* note 104, at 1600–17.

115. See Alexander K.A. Greenawalt, *Foreign Assistance Complicity*, 54 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 531, 540–42 (2016); JACKSON, *supra* note 8, at 84.

116. See Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Chamber Judgment, ¶¶ 26–44 (Int’l Crim. Trib. for the former Yugoslavia Feb. 28, 2013). In their concurring opinion, Judges Meron and Agius would have actually preferred to conceptualize specific direction as part of mens rea rather than actus reus. *Id.* at VII (joint separate opinion by Meron, J., and Aguis, J.).

117. See, e.g., Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶¶ 417–75 (Sept. 26, 2013).

118. See Prosecutor v. Šainović et al., Case No. IT-05-87-A, Appeals Chamber Judgment, ¶ 1650 (Int’l Crim. Trib. for the former Yugoslavia Jan. 23, 2014); Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-A, Appeals Chamber Judgment, ¶¶ 94–108 (Int’l Crim. Trib. for the former Yugoslavia Dec. 9, 2015). See further Ventura, *supra* note 114; Leyla N. Sadat, *Can the ICTY Šainović and Perišić Cases Be Reconciled?*, 108 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 475 (2014); Janine Natalya Clark, “*Specific Direction*” and the Fragmentation of International Jurisprudence on Aiding and Abetting: Perišić and Beyond, 15 *INTERNATIONAL CRIMINAL LAW REVIEW* 411 (2015); Marko Milanovic, *ICTY Appeals Chamber Reverses Stanišić and Simatović Acquittal, Orders Retrial, Kills Off Specific Direction (Again!)*, EJIL:TALK! (Dec. 15, 2015), <https://www.ejiltalk.org/icty-appeals-chamber-reverses-stanistic-and-simatovic-acquittal-orders-retrial-kills-off-specific-direction-again/>; JACKSON, *supra* note 8, at 80–85.

119. Rome Statute, *supra* note 93, art. 25(3)(c).

120. See, e.g., Hathaway et al., *Aiding and Abetting in International Criminal Law*, *supra* note 104, at 1628–29. Elies van Sliedregt & Alexandra Popova, *Interpreting “for the Purpose of Facilitating” in Article 25(3)(c)?* (Dec. 22, 2014), <http://jamesgstewart.com/interpreting-for-the-purpose-of-facilitating-in-article-253c/>.

we have seen above, the Statute otherwise uses the latter, which includes an oblique, indirect form of intent.¹²¹ While commentators have generally seen this standard to be higher than the customary knowledge one, they have much debated its exact parameters. In particular, a line of scholarship essentially argues that an oblique, indirect intent as to the result of facilitation (that is, that the accomplice was practically certain that the aid provided would facilitate the principal's crime) could suffice to meet even this standard.¹²² The ICC is yet to decide conclusively between various competing positions on exactly how the purpose requirement should be interpreted.¹²³

F. Conclusion

To summarize some of the main conclusions so far:

First, there are numerous defensible ways in which a complicity rule can be formulated. How a particular rule will be calibrated will depend foremost on a policy choice, the placement of the line that needs to be drawn between inhibiting socially harmful interactions and not inhibiting those that might be socially beneficial.

Second, the calibration of a complicity rule will mostly depend on the definition of its mental (culpability, fault) element and its causal nexus or contribution element (my primary focus in this article is on the mental). Both will inevitably be shaped by moral intuitions about the blameworthiness of the accomplice's conduct in specific cases, an approach sometimes leading to inconsistent outcomes.

Third, there is no conceptual difficulty in ascribing fault to States. The mental element is that of individuals who are the State's organs or agents making the relevant decisions and engaging in the relevant conduct. There is also no great difficulty (although caution is warranted) in borrowing con-

121. Rome Statute, *supra* note 93, art. 30(2)(b). See also KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 165–66, 299–300 (2013).

122. See James G. Stewart, *An Important New Orthodoxy on Complicity in the ICC Statute?* (Jan. 21, 2015), <http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/> (including comments thereto and the other posts in the symposium).

123. Its most elaborate judgment on this point to date is *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-1989-Red, Public Redacted Version of Judgment pursuant to Article 74 of the Statute (Oct. 19, 2016). For a discussion of this case, see Manuel J. Ventura, *Aiding and Abetting and the International Criminal Court's Bemba et al. Case: The ICC Trial and Appeals Chamber Consider Article 25(3)(c) of the Rome Statute*, 20 INTERNATIONAL CRIMINAL LAW REVIEW 1138 (2020).

cepts and using analogies from criminal law, international or domestic, especially since comparative private law generally has few developed complicity doctrines.

Fourth, terms such as “knowledge” and “intention” can be ambiguous and confusing. Great care is needed in how they are defined and used, especially because of the variance between legal systems and traditions.

Fifth, in the complicity context, the accomplice may have any of a variety of degrees of knowledge regarding the principal’s ongoing or future wrongful conduct and regarding how the principal would use the assistance that the accomplice provides. As to any future conduct of the principal, the knowledge of the accomplice is inherently contingent. It is always probabilistic foresight to some level of likelihood or certainty. Even for criminal complicity—let alone in the State responsibility context—the accomplice need not foresee “the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions.”¹²⁴ Knowing about the general type and nature of the offenses suffices. Accomplices may also have various degrees of intent with regard to his own actions and with regard to the wrongful conduct of principals.

Sixth, accordingly, a complicity rule can employ many permutations of cognitive and volitional fault requirements. It may require purpose/direct intent to facilitate.¹²⁵ It may couple that element with an additional volitional requirement that the accomplice share the principal’s purpose—that is, hopes that the principal will succeed. It may require intent to facilitate but include within that concept not only purpose/direct intent but also oblique/indirect intent, even *dolus eventualis*.¹²⁶ Or it may formulate fault in

124. Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 288 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006).

125. See, e.g., Rome Statute, *supra* note 93, art. 25(3)(c); MPC, *supra* note 69, § 2.06(3).

126. See, e.g., Strafgesetzbuch [StGB] [Penal Code] § 27, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0167 (Ger.); Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, arts. 12, 25, https://www.legislationline.org/download/id/8991/file/SWITZ_Criminal%20Code_as%20of%202020-07-01.pdf (Switz.); Criminal Code, Official Gazette of the Republic of Serbia, No. 85/05, 88/05, 107/05 (as amended through Dec. 24, 2012), arts. 25, 35; https://www.legislationline.org/download/id/5480/file/Serbia_CC_am2012_en.pdf; Croatian Criminal Code, 2011, arts. 28, 38, https://www.legislationline.org/download/id/7896/file/Croatia_Criminal_Code_2011_en.pdf. Note that unlike the Swiss, Serbian, and Croatian codes, which expressly include oblique intent or *dolus eventualis* in the definition of intent, the German Criminal Code contains no definition of intent, which is left to jurisprudence and is regarded by German courts to include *dolus eventualis*. See generally Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD JOURNAL OF LEGAL STUDIES 99 (2004).

purely cognitive terms, as knowledge or degrees of foresight of the principal's wrongdoing and how the principal will use the assistance provided.¹²⁷ Again, there is simply no inherently right answer for how the culpability element of a complicity rule should be formulated.¹²⁸ It even may be perfectly defensible not to differentiate between accomplices and principals in the first place, but to have a unified theory of participation in an offense or some other wrong.¹²⁹

Bearing this in mind, let us now return to the complicity rules in international law that can specifically capture intelligence sharing in multinational military operations: the generally applicable complicity rule in Article 16 ASR and the regime-specific rules of IHL and IHRL.

III. COMPLICITY RULES IN INTERNATIONAL LAW APPLICABLE TO INTELLIGENCE SHARING

A. Proper Interpretation to Be Given to Article 16 ASR

1. On the Contradictions in the ILC Articles

The same competing considerations that underlie discussions of mens rea for complicity in criminal law are relevant to the mental element of the rule codified in Article 16 ASR. People can reasonably disagree as to how these considerations should be weighed. The resulting uncertainty is fueled by the lack of formal determinacy of the rule in Article 16 since relevant State practice is scarce, ambiguous, and open to interpretation. Reliance on the work product of the ILC is made more difficult by the fact it is internally inconsistent—that is, the text of Article 16 is not fully congruent with the ILC's commentary—a difficulty that is compounded by the uneven use of the terms “knowledge” and “intent” within the commentary.

The lack of consensus on how the mental element of Article 16 should be interpreted is therefore completely understandable. But before venturing

127. See, e.g., Code Penal [C. pén] [Penal Code] arts. 121–27 (Fr.). See also the position under customary international criminal law, *supra* note 90 and accompanying text.

128. It is instructive to consider in that regard how Herbert Wechsler, the principal drafter of the MPC, favored knowledge as the mens rea for complicity but was overruled on that point by other drafters who preferred purpose. See DUBBER, *supra* note 67, at 92–93.

129. This is, for example, the position in Italian criminal law. For an argument that such a unitary theory of perpetration should be used in international criminal law, see Stewart, *supra* note 66.

into a normative argument as to what the proper interpretation of Article 16 should be, it is important to explore the ILC's inconsistencies in more detail. In particular, it is necessary to understand that the ILC fails to distinguish clearly between knowledge (or foresight) as to the existence of the wrongful act by the wrongdoing State and knowledge as to the facilitation of the commission by the assisting State. It also fails to distinguish between the different possible notions of intent.

The ILC commentary contradicts not only the text of the Articles but itself as well, and it does so in the first two sentences:

Article 16 deals with the situation where one State provides aid or assistance to another *with a view to facilitating* the commission of an internationally wrongful act by the latter. Such situations arise where a State *voluntarily* assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by *knowingly* providing an essential facility or financing the activity in question.¹³⁰

The phrase “with a view to facilitating” clearly refers to a species of intent and would most naturally be interpreted as referring to purpose/direct intent to facilitate—the outcome of facilitation is the conscious object of the assisting State’s conduct. The reference to assistance being provided “voluntarily” could be taken as referring only to the *action* of providing assistance, for example, the provision of money or intelligence (which is voluntary and not coerced or inadvertent), but not to its *result* (the facilitation of the wrongful act)—that is, the action is intentional under some *minimal* description. The final reference to assistance being provided “knowingly,” of course, lacks any explicit volitional element and is unclear as to what exactly the assisting State must know.

The ILC then explains that the requirement from the text of Article 16 that the assisting State needs to know “the circumstances of the internationally wrongful act” is in turn about the “circumstances making the conduct of the assisted State internationally wrongful” and about “the circumstances in which its aid or assistance is intended to be used” by the assisted State.¹³¹ In doing so, however, the Commission confuses knowledge of the ongoing or future existence of the wrongful act with knowledge of how the assistance provided would be used. It is perfectly possible for the assisting State to have varying degrees of knowledge with regard to these two matters. For example,

130. See ILC ASR, *supra* note 4, art. 16 cmt. ¶ 1 (emphasis added).

131. *Id.* cmt. ¶ 4.

the assisting State might be aware only of a substantial risk that the assisted State would commit a wrongful act but know with practical certainty that the aid provided would be used (or not) to further the wrongful act if the assisted State goes through with the act.

Recall that in this context, knowledge means probabilistic foresight. One can *know* with absolute certainty the circumstances of the wrongful act only if it has already occurred (in which case Article 16 does not apply) or is ongoing. But of course, Article 16 is also meant to apply to *future* wrongful conduct that the assisting State would be aiding, which is why the ILC speaks of it *knowing* the assisted State's *intent*. This encompasses not only the intent to commit (or continue committing) the wrongful act but also its intent to use the assistance provided to it for that act. However, it bears noting that in this context the assessment of the assisted State's intent is only part of the overall prospective assessment of whether the wrongful act and its facilitation are likely to occur. It is possible, for example, for the assisted State to intend to commit the wrongful act but for its occurrence to be objectively unlikely because the assisted State lacks the means (technical or other) to successfully proceed with its act and implement its intent.

A major problem with the ILC's intent requirement as part of the assisting State's fault is the inconsistent terminology used to describe it.¹³² On three occasions in the commentary the Commission used the "with a view to facilitating" formula, which appears to (but need not) evoke purpose.¹³³ On three further occasions, the Commission referred to an assisting State "deliberately" procuring, assisting, or participating in the wrongful act.¹³⁴ Also, on two occasions, the ILC used the term "intent," noting first that a "State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct."¹³⁵ It then seemingly coupled intent with knowledge in connection with the specific example of assisting human rights violations:

132. It is clear that the ILC is referring only to the assisting State's intent to facilitate the wrongful act, not to sharing the wrongdoing State's intent to commit the wrongful act. In other words, *A* can logically have intent to facilitate *B*'s wrongful conduct without actually sharing *B*'s intent regarding its wrongful conduct or any particular result of that conduct. See also Moynihhan, *supra* note 11, at 20.

133. See ILC ASR, *supra* note 4, art. 16 cmt. ¶¶ 1, 3, 5.

134. *Id.* cmt. ¶¶ 6, 7, 10.

135. *Id.* cmt. ¶ 5.

Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid *was aware of and intended* to facilitate the commission of the internationally wrongful conduct.¹³⁶

Here the ILC seems to be saying that knowledge and intent are cumulative requirements, which it did not expressly say in any other part of the commentary. The interaction between knowledge and intent is a more complex issue, as I will momentarily explain. But I hope to have demonstrated by now that the only thing consistent about the commentary to Article 16 is its inconsistency. This is also evident from the ILC's commentary to Article 41(2), where it explains the absence of any reference to the assisting State's knowledge that it is assisting the maintenance of a situation caused by a serious violation of *jus cogens* by saying that it saw "no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State."¹³⁷ While it is justifiable in principle to have a sliding scale of culpability that would depend on the seriousness of the underlying violation (indeed, this is precisely the argument that I wish to put forward later on), it makes little sense to have strict liability for complicity.¹³⁸ It is one thing to say that elements of knowledge and intent can be inferred more easily and even presumed¹³⁹ when serious violations of *jus cogens* are at stake, but dispensing with any form of culpability (even negligence, for example) seems excessive.¹⁴⁰ The assisted State may be capable of concealing a breach of *jus cogens*. The assisting State may well be fully aware of the existence of a serious breach of *jus cogens* but unaware that its assistance would facilitate the maintenance of the situation.¹⁴¹ While it remains unclear to what extent Article 41(2) reflects customary law (although it is arguably more accepted as such in 2021 than it was in 2001),¹⁴² the culpability element of this enhanced complicity rule is, I would submit, even less clear, except that it is lower than that of Article 16.

136. *Id.* cmt. ¶ 9 (emphasis added).

137. *Id.* art. 41 cmt. ¶ 11.

138. This leaves aside the problems with the notion of a "serious breach" of *jus cogens*, which implies that there are some breaches of *jus cogens* that are not "serious," e.g., isolated acts of torture.

139. See LANOVOY, *supra* note 11, at 116.

140. *But see* AUST, *supra* note 6, at 421.

141. *See also* de Wet, *supra* note 21, at 308–9.

142. *See* Moynihan, *supra* note 11, at 22–23; AUST, *supra* note 6, at 342–44.

That said, it is striking that the commentary to Article 41 appears to see the culpability in Article 16 in purely cognitive terms (“notice”) rather than volitional ones, as intent. The terminological confusion is good evidence that the culpability elements of neither provision were thought through by the Commission thoroughly enough. In particular, the ILC never really explains what it means by intent,¹⁴³ a concept that is legally ambiguous without further definition.¹⁴⁴ In other words, the proposition that *A* intends to facilitate *B*’s wrongful act could easily capture purpose/direct intent, oblique or indirect intent, and *dolus eventualis*. It is also perfectly possible—indeed only natural—that the various members of the ILC had read the references to intent from the perspectives of their respective legal systems and cultures. In short, the ultimate problem with the ILC’s work on Article 16 is not the contradiction between the text and the commentary but an overall lack of coherence and clarity, which sets the stage for the false dilemma between knowledge and intent as the culpability element of the complicity rule.

2. The False Dilemma between Knowledge and Intent

How is this dilemma a false one? Let us consider a simple complicity scenario. State *A* assists State *B* by sharing intelligence. *B* then uses this information to interrogate and torture individual *X* in its custody (assume that the causal nexus element is satisfied).¹⁴⁵ In trying to understand how the Article 16 complicity rule would apply to this scenario, we first need to clarify what exactly State *A* (i.e., an official acting on its behalf) knew and intended with regard to State *B*’s wrongful act and with regard to its own action of providing assistance to *B*. There are several permutations:

(i) *A* can know (i.e., be practically certain) that *B* is torturing *X* or intends to do so in the future *and* know (i.e., be practically certain) that if it shares intelligence with *B*, *B* will use the information to torture *X*, *and* have the

143. See Moynihan, *supra* note 11, at 18.

144. In fact, even when writing academically, the ILC’s last Special Rapporteur on State responsibility, James Crawford, did not offer any definition of intent but rather used imprecise terms such as “actual intent” and “outright intent.” See CRAWFORD, *supra* note 9, at 407–8.

145. For one such case, in which an Australian national detained and tortured by U.S. authorities complained that Australian authorities were complicit in the torture, *inter alia* through the sharing of information, see *Habib v. Commonwealth of Australia* [2010] FCAFC 12, §§ 17–18, 66–67.

purpose of facilitating the torture, this being the conscious object of its action of providing assistance.

(ii) *A* can know (i.e., be practically certain) that *B* is torturing *X* or intends to torture *X*, and *not* be practically certain that the information it is providing *B* will facilitate the torture of *X* yet still have the purpose of assisting *B* in the torture. (For example, *A* is not sure how useful its intelligence actually is or whether *B* will choose to rely on it.)

(iii) *A* might believe that there is only a possibility of some degree (but not certainty) that *B* is torturing or intends to torture *X* yet nonetheless be certain that the information it provides would facilitate the torture if it took place and still have the purpose of facilitating the act.

(iv) *A* might believe that there is only a possibility of *B* torturing *X* and a possibility of *A*'s assistance being used to torture *X* but nonetheless have the purpose of facilitating the torture. (Variants (ii)–(iv) raise the question of whether the direct intent/purpose to facilitate compensates for deficits of knowledge/foresight.)

(v) *A* can know (i.e., be practically certain) that *B* is torturing *X* or intends to do so in the future and also know (i.e., be practically certain) that if it shares intelligence with *B*, *B* will use the information to torture *X* and yet not have the purpose to facilitate torture, though being aware of its virtual inevitability and the inevitability of its intelligence sharing facilitating the torture and reconciling itself with that inevitability by choosing to provide the assistance.

(vi) *A* might believe that there is only a possibility (but not certainty) that *B* is torturing or intends to torture *X*, yet nonetheless be certain that the information it provides would facilitate the torture if it took place while reconciling itself with this possibility.

(vii) *A* can know (i.e., be practically certain) that *B* is torturing *X* or intends to torture *X*, and yet not be practically certain that the information it is providing *B* will facilitate the torture of *X* though aware of the risk that it may do so while reconciling itself with the possibility that the information it provided could facilitate the torture.

(viii) *A* might believe that there is only a possibility (but not certainty) that *B* is torturing or intends to torture *X* and only a possibility that the information it is providing *B* will facilitate the torture of *X* but be aware of and reconciling itself to both of these risks.

Again, it is simply unclear where on this spectrum the ILC thought the line of culpability under Article 16 should be drawn, except that at a minimum, it would include variant (i) and that in none of these scenarios would *A* need to share *B*'s own purpose. Note how the knowledge (foresight) of the two relevant sets of facts (that *B* would commit a wrongful act and would use the aid *A* provided to commit it) vary through the scenarios, depending on whether *A* is practically/virtually certain that such facts exist or will exist or only appreciates a possibility or risk that they might exist. In terms of knowledge, the scenarios could be differentiated even further by degrees of possibility, for example, on a scale ranging from merely possible through to a real risk and likelihood, up to high likelihood. As for intent, all of the scenarios above can be regarded as intentional under some legal understanding of intention—the action of providing intelligence is always intentional under some description, while in (i)–(iv) *A* has purpose/direct intent, in (v) indirect/oblique intent, and in (vi)–(viii) *dolus eventualis* as to the consequence (facilitation of torture) of that action.¹⁴⁶

How then should the mental element of Article 16 be interpreted? First, as to the knowledge requirement, it should be uncontroversial that this requirement will not be met only when an agent of State *A* has actual knowledge in the orthodox sense of justified true belief that State *B* is in the process of committing an internationally wrongful act but will also be met when *A* is subjectively practically or virtually certain that *B* is committing that act (or intends to commit it in the future).¹⁴⁷ Again, because of the impossibility of having actual knowledge about the future actions of another person, the only type of knowledge that one can have about such actions is a probabilistic one (foresight). Because Article 16 must, if it is to serve any useful purpose, cover not only ongoing wrongful acts but also future and contingent wrongful acts, the level of knowledge required has to be a realis-

146. Scenario (vi) may also be seen as one of conditional indirect intent, rather than *dolus eventualis*.

147. To be clear, the knowledge in question is that of the circumstances making the act of the assisted State wrongful. It does not require that either the assisting State or the assisted State subjectively believe that the act is unlawful. Thus, if State *A* assists State *B* in the objectively unlawful invasion of State *C*, *A* would be responsible under Article 16 regardless of whether either *A* or *B* subjectively assessed that the invasion would be lawful. Error of law is no excuse, and this is equally the case in situations in which the law is clear and in those in which it is underdetermined and reasonable persons (and States) can disagree about its content and application. See also Moynihan, *supra* note 11, at 11–12.

tically obtainable, practical one rather than one requiring absolute certainty.¹⁴⁸ The second aspect of the knowledge requirement relates not to *A*'s assessment of *B*'s intent to commit a wrongful act but rather to its assessment of *B*'s intent to use the assistance that *A* will have given it in its commission of the wrongful act. *A* needs to know not only that *B* is committing or intends to commit a wrongful act but also that *B* will use *A*'s assistance to facilitate its commission. Again, because this is an assessment by *A* of a future action by *B*, an independent moral agent, it can only be contingent and probabilistic and would be satisfied by a practical, virtual or near-certainty standard.¹⁴⁹

Second, a more difficult problem is how to distinguish between knowledge to the level of practical certainty and knowledge to a very high degree of likelihood. The issue is one of labeling or characterization—if we are happy to say that *A* *knows* that *B* is torturing or intends to torture *X* because *A* is 95 percent certain that this is the case, would we be as happy to treat as knowledge in the context of Article 16 a 90 or 75 percent level of certainty? In other words, if the knowledge in question is inherently probabilistic, as it must be with regard to events and conduct that will occur only in the future, it is infeasible to draw bright lines demarcating the levels at which probability amounts to knowledge. Such an assessment will always be contextual and, in reality, may well be driven by moral intuitions about culpability, owing, for example, to the gravity of the wrongful act that was being assisted. This is especially the case if the assessment of what *A* knew is being done *ex post facto* by an independent actor (e.g., a court) that can draw inferences about practical certainty from high likelihood.¹⁵⁰

Third, an intent requirement would clearly be satisfied if *A* acted with purpose/direct intent—that is, with the conscious object of facilitating the

148. See *supra* Section II.C.

149. See also de Wet, *supra* note 21, at 304–5.

150. Cf. MPC, *supra* note 69, § 2.02(7) (“Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”) Note, however, that this MPC definition extends only to the knowledge of a fact that constitutes a material element of an offense or its attendant circumstances, *not* to the results of one’s actions, as otherwise the MPC’s definition of acting knowingly would collapse into its definition of acting recklessly. See Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE LAW JOURNAL 2231, 2236 (1993). See also *infra* Part IV.

commission of the wrongful act.¹⁵¹ The key issue here is the relationship between intent and knowledge. Recall in that regard how the ILC, in its final remark on culpability in the commentary to Article 16, appeared to couple the two when it asserted that the assisting State needed to be “aware of and intended to facilitate” the wrongful act.¹⁵² But this is a misconception. Purpose/direct intent is the most culpable possible mental state.¹⁵³ There is no reason of principle why it would have to be augmented by knowledge to a level of certainty for the same element of a wrong (e.g., the prohibited consequence, such as facilitation).¹⁵⁴ An assisting State’s purpose, if present, to facilitate the wrongful act would compensate for any deficits in knowledge.¹⁵⁵

For instance, if *A* provided assistance (e.g., intelligence) to *B* believing that it was unlikely that *B* would torture *X* or would use the assistance provided in torturing *X*, but nonetheless did so with the purpose of helping *B* torture *X*, which *B* then actually did, there seems to be no legitimate reason why *A* should not be held responsible under Article 16 for the assistance it provided. *A* is no less blameworthy in this scenario than if it had been practically certain that the wrong would be committed—it provided assistance with the purpose of facilitating the wrongful act, and this purpose was ultimately realized, however unlikely this may have seemed *ex ante*. This is essentially the same situation as that of our unlikely sniper hypothetical above—if *A* shoots at *B* from half a mile away with the purpose of killing *B*, knowing that it was extremely unlikely that the bullet will hit him, but in fact

151. Again, under no interpretation of Article 16 would *A* also need to have the purpose (want, hope, desire) that *B* actually commit the wrongful act, e.g., to torture *X*.

152. See *supra* note 136.

153. See SIMESTER ET AL., *supra* note 51, at 134–35.

154. Cf. MPC, *supra* note 69, § 2.02(5) (“When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.”). In other words, proving purpose obviates any need for proving knowledge with regard to that same element of the crime. See also DUBBER, *supra* note 67, at 60 (“Purpose is the ‘highest’ mode of culpability—purposeful action is more culpable and punished more severely than any other type of action, including knowing action. Yet along the probabilistic axis, knowledge lies far ahead of purpose; purpose, when it comes to conduct and result, is defined without respect to probability. What matters is whether the actor had the ‘conscious object(ive)’ of acting in a certain way or bringing about a certain result. It does not matter how likely it is that he will succeed in realizing his conscious object(ive).”).

155. Consider also the complicity rule in Article 25(3)(c) of the Rome Statute, which requires the purpose to facilitate but does not impose any additional knowledge requirement.

the bullet does hit B, we would hold *A* liable for murder.¹⁵⁶ Similarly, if *A* provides assistance to *B* with the purpose of facilitating *B*'s killing *C* while knowing that it was unlikely that the assistance would actually be useful—for example, *A* gives *B* a poorly maintained gun with only one (very old) bullet in the chamber—but *B* manages to kill *C* with it, we would regard *A* as an accomplice precisely because he acted with purpose/direct intent.

In short, the culpability requirements would, in my view, be met not only in scenario (i) above but also in scenarios (ii)–(iv). If it could be demonstrated, for example, by reference to internal government memoranda or from appropriate inferences, that State *A* purposely facilitated the wrongful act of State *B*, it should not matter whether *A* was less than certain that *B* would commit the act or would use the assistance provided to do it, if in fact eventually *B* does commit the wrongful act and does use the assistance provided to it by *A* for that purpose. It does not seem sensible to require a showing of *both* purpose *and* practical certainty as to the consequence of facilitating a wrongful act.¹⁵⁷ Purpose may be said to require some belief that the action is in principle capable of causing the result (facilitation of the wrong)¹⁵⁸ but no more than that.¹⁵⁹ For example, if State *A* appreciates a degree of possibility that its ally State *B* will invade State *C*, provides *B* open-ended permission to use its airspace for an assault on *C*, and does so with the purpose of facilitating *B*'s conduct if it chooses to go through with its plan (“We are with you no matter what”), *A* will be liable under Article 16 ASR if *B* invades *C* and uses *A*'s airspace to do so *even if A* thought *ex ante* that there was a significant possibility that the invasion would not occur (e.g., because *C* would give in to *B*'s demands).

Fourth, a different question is whether the intent requirement would also be satisfied if *A* were practically certain that *B* intended to torture *X* and practically certain that the assistance *A* provided would facilitate *B*'s torture of *X*—that is, if *A* acted with oblique or indirect intent, as in scenario (v) above. Again, it is commonplace in numerous legal systems that consequences that result from one's actions and that were subjectively foreseen

156. See also FLETCHER, *supra* note 78, at 448–49.

157. See also RESTATEMENT (THIRD) OF TORTS, *supra* note 87, § 1 cmt., at 7 (“A purpose to cause harm makes the harm intentional even if harm is not substantially certain to occur.”).

158. See BLOMSMA, *supra* note 95, at 67–69.

159. See DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY *supra* note 60, at 55–59. But see SIMESTER ET AL., *supra* note 51, at 235–38 (discussing knowledge of the essential elements of the crime as a prerequisite for accessory liability, as in *Jogee*, but failing to distinguish between the different scenarios of direct and indirect intent to facilitate).

with practical certainty are treated as having been intended, or that such certainty creates an almost inescapable evidentiary inference that they were intended.¹⁶⁰ If *A* blows up an airplane with the purpose of killing *B* and there are other people on the airplane at the time who *A* is practically certain will die as a result of the explosion, then *A* indirectly intends to kill those people.¹⁶¹ If similarly, *A* provides *B* with an explosive while practically certain that *B* will use the explosive to blow up the airplane and is reconciled to this course of events, there is no great difficulty in saying that *A* intended to facilitate *B*'s crime. Again, numerous legal systems that require *intent* to facilitate wrongful conduct as the mens rea of complicity would find that indirect or oblique intention satisfies that requirement—that is, they do not limit intent to purpose.¹⁶² It is difficult to regard *A* as substantially less culpable in this situation as in the one in which *A* is acting with purpose/direct intent.¹⁶³ Here *A* not only knows (foresees) with practical certainty that *B* will commit a wrongful act but also that the assistance it provides will facilitate it and

160. See also ORMEROD & LAIRD, *supra* note 83, at 92–94 (discussing English case law and uncertainty regarding the nature of oblique intent).

161. See *supra* Section II.D.

162. This is, for example, the position under English law. See ORMEROD & LAIRD, *supra* note 83, at 198, 200–203 (oblique intent to assist sufficient; evidentiary inference of intent can also be made with regard to the further requirement that the accessory intend that the principal commits the crime with the requisite mens rea). See also SIMESTER ET AL., *supra* note 51, at 229–30; *supra* note 126 and accompanying text; J.C. Smith, *Criminal Liability of Accessories: Law and Law Reform*, 113 LAW QUARTERLY REVIEW 453, 465 (1997) (“If it were to be decided that intention should be required [for complicity], the jury would be told that they should not find D guilty of murder unless they were sure that D either *wanted* P to act as, and with the intention which, he did, or knew that it was not merely a “real possibility” but *virtually certain* that he would do so.”).

163. See, e.g., *Rosemond v. United States*, 572 U.S. 65 (2014) (The majority of the Court, per Kagan J., ambiguously using the terminology of intent for the federal aiding and abetting statute that could include both acting purposely and acting knowingly in MPC terms—that is, both direct and oblique intent. Alito J. noting in his dissent that “[t]he Court refers interchangeably to both of these tests and thus leaves our case law in the same, somewhat conflicted state that previously existed. But because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern.” *Id.* at 85.

proceeds regardless.¹⁶⁴ Indirect intent should therefore be regarded as one of the modes of culpability under Article 16 ASR.¹⁶⁵

Fifth, and finally, it would be going too far to include *dolus eventualis*—foresight and conscious acceptance of some lesser degree of risk than certainty—as satisfying the intent requirement of Article 16.¹⁶⁶ This is in part because, unlike with oblique intent, common law systems do not traditionally regard *dolus eventualis* as a species of intent.¹⁶⁷ Primarily, however, it is because Article 16 is a rule of general scope, applying to *all* rules of international law regardless of their importance or the values they enshrine. The complicity-in-torture scenario that we have used is therefore somewhat misleading in the Article 16 context since this complicity rule would equally apply to (say) the intelligence provided by *A* to *B* facilitating breaches of obligations under international trade or investment law vis-à-vis *C* or facilitating a cyber operation potentially violating *C*'s sovereignty. Moral intuitions about the scope of complicity rules do not necessarily operate identically when the violation at issue is not something as grave as torture or crimes against humanity. Inhibiting inter-State cooperation in all situations in which a State is aware of (some degree of) risk would most likely be harmful to, rather than beneficial for, the general welfare.¹⁶⁸ It is therefore perfectly sensible to leave any purely risk-based liability to context-specific primary rules, which can better take into account the particular needs and values of the branch of international law in question and do so through bespoke rules on complicity (a negative duty of refraining from providing assistance) and prevention (a positive duty to prevent or mitigate harm). Indeed, both in domestic and international law, we can observe that the gravity or seriousness of the potential violation and its consequences affect framing complicity and prevention rules. In that regard, we will turn shortly to the relevant rules of IHL and IHRL.

The ICJ's *Bosnian Genocide* judgment provides an instructive example. Recall how the Court found that the FRY knew of a serious risk that the Bosnian Serbs would commit genocide in Srebrenica but was not certain they would do so.¹⁶⁹ The Court also found that the magnitude of the aid the FRY

164. Cf. DUBBER, *supra* note 67, at 54 (noting that the MPC drafters considered the distinction between acting purposely and acting knowingly as to a consequence (i.e., acting with indirect intent) to be of limited significance in the criminal context, a point that can be made even more emphatically in the noncriminal context).

165. See Moynihan, *supra* note 11, at 19–20; de Wet, *supra* note 21, at 307.

166. See Moynihan, *supra* note 11, at 20–21.

167. See Ohlin, *supra* note 95, at 103–6.

168. See AUST, *supra* note 6, at 239–40.

169. See *supra* notes 35–39 and accompanying text.

provided to the Bosnian Serb war effort made it inevitable that this assistance would (as in fact it did) facilitate the Srebrenica genocide.¹⁷⁰ The FRY's decision to continue providing the aid despite being subjectively aware that it might be used for genocide would have satisfied a *dolus eventualis* threshold, but the Court required more—that the FRY had supplied “aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.”¹⁷¹ The Court thus found that the culpability element for complicity under the Genocide Convention, which it had (but need not have) equated with complicity under Article 16 ASR, was not met. Crucially, however, reaching this finding was in practice facilitated by the existence of an obligation of prevention under Article 1 of the Genocide Convention, which was purely risk-based and applied to *all* States regarding *any* genocide in the world, an obligation that Serbia was found to have violated.¹⁷² In some other context, the complicity analysis might turn out differently in the absence of such a broad prevention obligation.

3. Willful Blindness, Constructive Knowledge, and Negligence

Let us now turn to the question of whether the Article 16 culpability requirement could be satisfied in the absence of direct or indirect intent to facilitate the wrongful act. A strand of scholarship argues in favor of importing into Article 16 the common law doctrine of willful blindness, which could in some rather exceptional cases compensate for the lack of practical certainty.¹⁷³ Other scholars argue in favor of an objectivized, constructive knowledge standard that would deem the assisting State to have “knowledge of the circumstances of the wrongful act” even when it cannot be proven that it had the relevant knowledge subjectively if objectively it *should have* been had it acted as some kind of “reasonable” State.¹⁷⁴ There are problems with both positions. The first is defensible in principle but relies on a concept that stems from only one legal tradition and is subject to much confusion and dispute even within that tradition. The second effectively reduces the

170. The Court did not, however, carefully distinguish between the certainty of genocide and the certainty of how the aid would be used, nor did it make an express finding of the FRY's knowledge of the latter. See *Bosnian Genocide*, *supra* note 7, ¶ 422.

171. *Id.* ¶ 423.

172. See further Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 669, 680–88 (2007).

173. See, e.g., Moynihan, *supra* note 11, at 14–15; JACKSON, *supra* note 8, at 53.

174. See André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 EUROPEAN JOURNAL OF INTERNATIONAL LAW 15, 40–43 (2020).

culpability requirement in Article 16 to negligence when, as explained above, even *dolus eventualis* would be an overbroad fault standard for a complicity provision that is general in scope and is meant to apply to *all* rules of international law, regardless of their purpose or importance.

The willful blindness doctrine finds its origins in English case law, later traveling across the Atlantic to U.S. state and federal jurisdictions. To simplify a complex story, the doctrine has had three basic forms.¹⁷⁵ First, as a method of establishing subjective, actual knowledge by inference: the jury is instructed that on the evidence before it, it can find that the willfully blind defendant *must have known* the relevant fact. Second, as an imposition of a duty on defendants to pursue inquiries and verify the facts before them once suspicion arises that the relevant facts might exist: here it is effectively a *should have known* constructive knowledge standard, met by a negligent failure to establish the facts fully. Third, it is applied as a requirement of proving (by inference if necessary) that the defendant had the *purpose* of avoiding acquiring information that, had it been acquired, would have constituted actual knowledge.¹⁷⁶

The first of these variants of the willful blindness doctrine is unobjectionable but also does not necessitate the label. International courts often draw inferences about what a State (i.e., its officials) knew about relevant circumstances;¹⁷⁷ the classic example is the ICJ finding in the *Corfu Channel* case that Albania “must have known” that a third party had mined its waters.¹⁷⁸ If the evidence so warrants, there is no reason of principle why international courts (or other bodies) cannot do the same when applying Article 16 ASR in establishing whether the assisting State knew (was practically certain) that the wrongdoing State would commit the wrongful act and that the assisting State knew (was practically certain) that its assistance would facilitate the act.¹⁷⁹ The willful blindness label does not add much explanatory power to this process. What the fact finders are doing in such instances is

175. See generally Marcus, *supra* note 150.

176. See SIMESTER ET AL., *supra* note 51, at 157–59.

177. See, e.g., JAMES DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 72, 170–77, 199–217 (2016); Michael P. Scharf & Margaux Day, *The International Court of Justice’s Treatment of Circumstantial Evidence and Adverse Inferences Evidence and Adverse Inferences*, 13 CHICAGO JOURNAL OF INTERNATIONAL LAW 123 (2013); C.F. Amerasinghe, *Presumptions and Inferences in Evidence in International Litigation*, 3 LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 395 (2004).

178. *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 19–20 (Apr. 9).

179. See also Boutin, *supra* note 1, at 537.

drawing an inference from the circumstantial evidence available to them, including the relevant party's evasive attitude towards the truth.¹⁸⁰

The second variant is tantamount to using negligence as the fault element of Article 16—the assisting State (objectively) *could have known*, to a practical certainty, what the assisted State would do but (subjectively) *did not know* this, because it failed to take the steps that would have led it to such knowledge. Scholars assembled at the University of Amsterdam's SHARES Project had thus proposed that the complicity rule should apply to aid and assistance provided “knowingly” and that this criterion would be met by constructive knowledge—that is, “when an international person knew or should have known the circumstances of the internationally wrongful act.”¹⁸¹ But this position was, in fact, expressly considered and not taken up by the ILC during the drafting of Article 16.¹⁸² In any event, it is not, in my view, normatively desirable. Constructive knowledge presumes a positive *duty* of the relevant party to make inquiries, to behave according to some objective standard, such as reasonableness, in verifying the facts.¹⁸³ While such a duty may be appropriate in specific contexts, it is hardly appropriate across the board for complicity in *all* possible violations of international law regardless of their role and importance.¹⁸⁴ As a policy matter, such a duty would be so burdensome and overbroad, and inhibit so much potentially beneficial cooperation, that acceptance by States is extremely unlikely. On a more formal level, the authorities cited in favor of this position by its proponents are hardly impressive—a third party *submission* in a case before the Inter-American Commission on Human Rights (i.e., not the Commission's decision itself),¹⁸⁵ and the ICJ *Corfu Channel* case, which the proponents of the constructive knowledge standard misconstrue.¹⁸⁶ As explained above, the Court in *Corfu Channel* drew an evidentiary inference that Albania must have known—that is, *did, in fact, know*—about the mines. It never applied a constructive

180. For a detailed argument in favor of willful blindness being conceptualized in U.S. criminal law solely as a method of proof, see Gilchrist, *supra* note 64.

181. Nollkaemper et al., *supra* note 174, at 42.

182. See CRAWFORD, *supra* note 9, at 406; Moynihan, *supra* note 11, at 12; JACKSON, *supra* note 8, at 161.

183. See Moynihan, *supra* note 11, at 15–16. See also JACKSON, *supra* note 8, at 162; de Wet, *supra* note 21, at 302.

184. For a discussion in the context of European Convention on Human Rights Articles 2 and 3, see Stoyanova, *supra* note 40, at 607–8.

185. See Nollkaemper et al., *supra* note 174, at 42 nn. 114–15.

186. *Id.* at 42 n. 118.

knowledge standard, by which Albania did *not* subjectively know about the mines but objectively should have.¹⁸⁷

Finally, the advocates of the constructive knowledge position fail to appreciate a fundamental point. In many situations, the assisting State could not acquire actual knowledge *even if* it acted reasonably according to some objective standard. Practical certainty may not be obtainable even after all due, feasible verification. These are cases neither of willful blindness nor of negligence in acquiring knowledge but of genuine uncertainty and risk. What matters in such cases are rules imposing responsibility on the basis of risk and measures mitigating such risk, rules and measures that can only be sector- or even issue-specific within, say, IHL or IHRL.

Therefore, the only variant of the willful blindness doctrine that really deserves the label and is potentially defensible in the Article 16 context is the third one, requiring proof of a purpose to avoid the truth.¹⁸⁸ Again, this is not about drawing an inference as in *Corfu Channel* (although the purpose of evasion could be established inferentially) or about holding the State to some kind of diligence, reasonableness standard. It is about demonstrating that the assisting State's officials actively took measures designed to shield themselves from problematic information, information that would establish with certainty that the wrongful act would be committed and that the aid provided would facilitate it. In other words, only if the knowledge deficit on the part of *A* (*A* is not practically certain either that *B* intends to torture *X* or that *B* intends to use the assistance provided by *A* to do so) is because *A* has deliberately avoided acquiring information that would have produced practical certainty, then *A*'s willful blindness would compensate for its lack of

187. See *Corfu Channel*, *supra* note 178, at 18–20 (Noting that Albania “constantly kept a close watch over the waters;” that “its intention [was] to keep a jealous watch on its territorial waters;” that “the [mining] operation was carried out during the period of close watch by the Albanian authorities;” that an indicator of Albania’s knowledge was that it “did not notify the presence of mines in its waters, at the moment when it must have known this” and that this “attitude does not seem reconcilable with the alleged ignorance of the Albanian authorities that the minefield had been laid in Albanian territorial waters. It could be explained if the Albanian Government, while knowing of the minelaying, desired the circumstances of the operation to remain secret.”). This reasoning has nothing to do with negligence or constructive knowledge—the Court simply drew inferences about what Albania actually knew from the evidence before it and did so completely appropriately. See also AUST, *supra* note 6, at 245, who refers to the inference-drawing process as a modification of the intent standard, when it is in reality simply a method of proof.

188. For a psychological account of deliberate ignorance as a mental state, see Ralph Hertwig & Christoph Engel, *Homo Ignorans: Deliberately Choosing Not to Know*, 11 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 359 (2016).

knowledge. The deficit in the cognitive element would be overcome by the existence of an additional volitional element—the purpose of avoiding inconvenient information since the State is normatively regarded as being equally culpable.¹⁸⁹ Such a conception of willful blindness is defensible but requires proof of a different kind of ulterior purpose, one that elevates the accomplice's overall culpability.¹⁹⁰

Therefore, willful blindness could arguably be used as a general principle of law supporting a limited departure from requiring practical certainty in cases in which it can be reliably proven that the assisting State deliberately chose to ignore available information in order to avoid having actual knowledge. The principle simply seeks to close a loophole susceptible to abuse. The principle is entirely irrelevant to scenarios (i)–(iv) above; as explained, if it can be shown that the assisting State acted with the purpose/direct intent of facilitating the wrongful act, any deficits in its knowledge are immaterial. Willful blindness is relevant really to scenarios (vi)–(vii) only as a method of upgrading them to scenario (v), one of indirect or oblique intent. But for willful blindness, a proven purpose of avoiding the truth, State *A* would have been *practically certain* that *B* would commit the wrongful act and use *A*'s aid to do so—that is, *A* would have been acting with indirect intent.

4. Conclusion on Article 16 ASR

To summarize, the culpability requirement of Article 16 ASR should properly be interpreted as follows:

(1) If the assisting State provides to a wrongdoing State assistance that materially facilitates the commission of the internationally wrongful act, which is then in fact committed, and does so with the purpose/direct intent of facilitating that act—that is, it has the facilitation of the wrongful act as a conscious object of its action—it will be responsible under Article 16 even if prior to providing the assistance it thought that the commission of the wrongful act and its facilitation by the assistance provided were merely possible, rather than certain. The purpose/direct intent to facilitate will compensate for deficits in knowledge.

189. See also de Wet, *supra* note 21, at 302–3. It is also possible to argue for a willful-blindness doctrine that encompasses *dolus eventualis* or recklessness as to the facts (as opposed to purpose on one extreme and mere negligence on the other). See Alexander F. Sarch, *Beyond Willful Ignorance*, 88 UNIVERSITY OF COLORADO LAW REVIEW 97 (2017).

190. See also Moynihan, *supra* note 11, at 14–15; JACKSON, *supra* note 8, at 53.

(2) If, on the other hand, the assisting State acts without such purpose, it will still be responsible under Article 16 if it was practically certain that the wrongdoing State would commit the wrongful act, practically certain that its own action of providing the assistance would facilitate its commission and chose to provide the assistance despite this practical certainty. In such cases, the assisting State is acting with indirect or oblique intent.

(3) If, in the absence of a purpose to facilitate the wrongful act, the assisting State is less than practically certain either that the wrongdoing State intends to commit a wrongful act, or that the provision of assistance would facilitate the act, it will be responsible under Article 16 only if the deficits in knowledge are caused by its own willful blindness—that is, if it purposely avoided relevant information that would have dispelled any real uncertainty, so that it would have acted with indirect intent.

(4) In all other situations, the assisting State will not be responsible under Article 16 but may be responsible under other primary rules of international law.

To be clear, the argument presented here does not reduce the culpability requirement of Article 16 to knowledge, actual or constructive, of the circumstances of the wrongful act. I am *not* arguing that a State will be responsible for providing assistance whenever it knows (is practically certain) of the existence or future existence of these circumstances. The State must also intend to facilitate the wrongful act, as the ILC asserts in the commentary. But this intent is construed either as the purpose to facilitate in the sense of a conscious object to do so or as foresight to the level of practical certainty that the assistance provided will facilitate the wrongful act, coupled with a decision to proceed with the assistance nonetheless, consciously accepting that the assistance provided will facilitate the wrongful act (indirect or oblique intent). Again, the assisting State need not share the assisted State's intent, however defined.

This conception of the fault requirement is coherent and workable, and it does not excessively inhibit inter-State cooperation.¹⁹¹ In particular, there is nothing wrong with the culpability requirement having multiple, alternative forms of fault, nor does the inclusion of indirect or oblique intent in the

191. *Cf.* CRAWFORD, *supra* note 9, at 409 (Noting that the primary reason behind the intent requirement in Article 16 is to obtain support from States, defining its scope “in a manner acceptable generally to governments. It was sensible not to advance a relatively novel principle potentially detrimental to state sovereignty in its broadest possible form.”).

culpability requirement lead to overly burdensome, unreasonable outcomes.¹⁹² It will be relatively rare for State *A* to have been *practically certain* that State *B* intended to commit a wrongful act and also *practically certain* that *B* would use assistance *A* provided to commit that act. Even with the further inclusion of situations of willful blindness but for which practical certainty would have existed, the scope of inhibited State cooperation remains limited. Moreover, because under Article 16 the assisting State is being held responsible for its own conduct of assisting a wrongful act and *not* for the wrongful act itself—that is, this mode of complicity is not imputational—there is justification for a degree of culpability lower than purpose/direct intent.¹⁹³ Finally, a mental requirement that would include both direct and indirect intent, as well as elements of willful blindness, would be more practicable and operational, especially in situations of external assessment (e.g., judicial review or parliamentary scrutiny), and it would allow us to move beyond the dilemma between intent and knowledge.

That said, the culpability requirement as defined above does not capture situations of assistance in which there is only a risk (up to some high threshold of probability) that the assisted State will commit a wrongful act or use the assistance given to it to commit the act. Nor does it capture situations in which the assisting State was *negligent* in acquiring and assessing information that could have, and should have, led it to practical certainty. The imposition of such a broad culpability requirement, essentially motivated by concerns that proving any intent element would be unworkable,¹⁹⁴ can be appropriate only in context-specific settings, not for all possible violations of international law. Moreover, the difficulty of establishing intent, direct or indirect, should not be exaggerated; domestic and international courts do so routinely.¹⁹⁵ Nor must intent be proven according to some criminal law beyond

192. For example, the draft Criminal Code for England and Wales in section 27(1)(a) provides that intention is required for culpability in accessory liability, but the commentary to the Code makes clear that intention can be either direct or indirect: “D will intend his act to assist E if he does the act in order to assist E or if he knows that its effect in the ordinary course of events will be to assist him (and similarly with encouragement). A motive to assist or encourage the principal is not necessary.” 2 CRIMINAL LAW: A CRIMINAL CODE FOR ENGLAND AND WALES, *supra* note 94, ¶ 9.25, at 207.

193. *Cf.* JACKSON, *supra* note 8, at 87–88 (discussing the imputational nature of complicity in international criminal law, by contrast to the law of State responsibility).

194. *See* Nollkaemper et al., *supra* note 174, at 43.

195. *See also infra* Part IV.

a reasonable doubt standard of proof—international courts generally apply flexible evidentiary rules and draw inferences when appropriate.¹⁹⁶

Finally, I should clarify that the argument presented above is normative and conceptual. It does not purport to be discovering custom. State practice and *opinio juris*, which are often context-specific, simply lack the required degree of granularity, at least for the time being, to draw firm conclusions about the content of the customary rule. The best one can say is that the proponents of broader forms of culpability have a greater burden of proving that the rule includes such an element than those who argue for narrower positions, already logically included within the broader ones and therefore by definition more likely to garner acceptance from a larger number of States. That said, the authority of the interpretation of the culpability requirement of Article 16 presented above will depend, as will any such interpretation, on how it is received by those applying the rule.

Let us now turn to two bodies of international law that do (or may) contain primary, context-specific complicity rules that are tailored to the specific values and interests that they seek to protect, and which will apply in multinational military operations—IHL and IHRL. Three important preliminary points should be kept in mind. First, to the extent that they apply in the inter-State context, such regime-specific rules have the character of *lex specialis* to the general, residual rule in Article 16 ASR, something for which the ILC Articles expressly allow.¹⁹⁷ Second, unlike the purely inter-State rule in Article 16 ASR, these special complicity rules can cover interactions between States and non-State actors, such as organized armed groups.¹⁹⁸ Third, there is absolutely no necessity of logic or practicality that these specific rules have culpability elements identical to the one in Article 16.¹⁹⁹

196. See also Moynihan, *supra* note 11, at 21–22.

197. See ILC ASR, *supra* note 4, art. 55. See also de Wet, *supra* note 21, at 290.

198. For an argument that there is a rule of general applicability on State complicity in the wrongful acts of non-State actors, see Richard Mackenzie-Gray Scott, *State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups*, 24 JOURNAL OF CONFLICT AND SECURITY LAW 373 (2019).

199. See also Duff, *Intention Revisited*, *supra* note 111, at 172–74 (arguing for a variable culpability element for complicity, depending on the severity of the principal's offense).

B. *Complicity under International Humanitarian Law*

1. A Negative Duty under Treaty and Customary IHL

While IHL does not specifically regulate the collection or sharing of intelligence as such, it does impose obligations on States regarding their relationships with third parties. Under Common Article 1 (CA1) of the four 1949 Geneva Conventions, all “High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”²⁰⁰ In the words of the authoritative Pictet *Commentary*, this overarching obligation

applies to the respect of each individual State for the Convention, but that is not all: in the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.²⁰¹

A substantially similar duty exists under customary IHL. Thus, Rule 139 of the International Committee of the Red Cross’s (ICRC) customary IHL study provides that “[e]ach party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control,”²⁰² while under Rule 144 “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.”²⁰³

The overarching conventional and customary obligation to “respect and ensure respect” for IHL has been much debated. It is generally regarded as having both a positive and a negative component (as do IHRL obligations addressed below). The scope of the former is more controversial than that

200. *See, e.g.*, Convention (III) Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

201. COMMENTARY ON THE THIRD GENEVA CONVENTION OF 12 AUGUST 1949, at 18 (Jean Pictet ed., 1960).

202. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 139 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY IHL STUDY].

203. *Id.* r. 144.

of the latter, provoking division among both scholars and States.²⁰⁴ The basic tenet of the expansionist camp, whose most notable proponent is the ICRC, is that States have a positive duty to exert influence on third parties engaging in an armed conflict to stop their violations of IHL—for example, the United States or the United Kingdom would have a positive obligation to exert influence on Saudi Arabia to prevent Saudi violations of IHL in its conflict in Yemen.²⁰⁵ On the other hand, the more restrictive camp argues that broad interpretations of the positive obligation under CA1 are not grounded in its drafting history or in State practice.²⁰⁶

For our purposes, however, this debate is largely beside the point. We are concerned not with the positive obligation of States to influence other actors but with the *negative* obligation incumbent on States *not to assist* other actors in their violations of IHL. This obligation is categorically different from any positive duty to exercise influence because it simply requires *restraint* on behalf of the (potentially) assisting State—for example, the United States or the United Kingdom *not* selling weapons to or sharing intelligence with Saudi Arabia if these would be used for violations of IHL.²⁰⁷ While there may be some debate on whether this obligation should be grounded in the “respect” or the “ensure respect” language of CA1 or the corresponding

204. For an overview, see Brian Finucane, *Partners and Legal Pitfalls*, 92 INTERNATIONAL LAW STUDIES 407, 417–19 (2016).

205. See, e.g., Robin Geiß, *The Obligation to Respect and Ensure Respect for the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 109 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2016); Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 96 TEXAS LAW REVIEW 539, 569–77 (2017); Marten Zwanenburg, *The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation*, 97 INTERNATIONAL LAW STUDIES 621 (2021).

206. See, e.g., Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (1999); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125 (2010); Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INTERNATIONAL LAW STUDIES 674 (2020).

207. Even Frits Kalshoven, who wrote the classic skeptical account of the expansive interpretation of the “ensure respect” language in Common Article 1, had fewer misgivings about *negative* duties of restraint. See Kalshoven, *supra* note 206, at 56 (1999) (“[T]here is a considerable distance between the negative duty to refrain from encouraging people on your side to disregard the law, and a positive duty to induce people on the other side of the fence to respect the law.”).

customary rule,²⁰⁸ there is little debate that this obligation actually exists.²⁰⁹ According to an instrument endorsed by the European Union Council:

Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party States not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations²¹⁰

The broad language of CA1 and the object and purpose of the Geneva Conventions can easily accommodate a negative duty not to encourage or assist. Although it has not been extensively discussed, it also seems reasonably clear that the negative duty has not provoked the kind of opposition on the part of some States that the wide-ranging positive duty to prevent has.²¹¹

208. The ICRC's view, for example, is that the negative duty stems from the "ensure respect" limb of CA1. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 153–61 (2016) [hereinafter COMMENTARY OF 2016]. See also Nottingham Workshop Report, *supra* note 10, at 16.

209. See Geiß, *supra* note 205, at 130.

210. See General Secretariat of the European Council, *User's Guide to Council Common Position 2008/944/CFSP*, COUNCIL OF THE EUROPEAN UNION 56 (2019), <https://www.consilium.europa.eu/media/40659/st12189-en19.pdf> (hereinafter EU User's Guide) (defining common rules governing the control of exports of military technology and equipment).

211. See also Moynihan, *supra* note 11, at 26–27; AUST, *supra* note 6, at 388; Nottingham Workshop Report, *supra* note 10, at 12–14. Helmut Aust, *Complicity in Violations of International Humanitarian Law*, in INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW 442 (Heike Krieger, ed., 2015); Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 401, 412–13 (2002); Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 707, 726–27 (2014); Tom Ruys & Luca Ferro, *The Enemy of My Enemy: Dutch Non-lethal Assistance for "Moderate" Syrian Rebels and the Multilevel Violation of International Law*, 50 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 333 (2019); Cornelius Wiesener, *Taking One for the Team: Legal Consequences of Misconduct by Partners*, 3 SCANDINAVIAN JOURNAL OF MILITARY STUDIES 45, 48 (2020); AMNESTY INTERNATIONAL, *supra* note 3, at 34; John Hursh, *International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale*, 7 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 122, 149 (2020); Boutin, *supra* note 1, at 538; LANOVOY, *supra* note 11,

2. The ICJ's Encounter with Complicity in *Nicaragua*

In short, treaty and customary IHL contain a primary negative obligation of States *not* to encourage or assist third parties in their violations of IHL.²¹² This primary, IHL-specific complicity rule exists in parallel with the secondary, generally applicable complicity rule in Article 16 ASR. Also, unlike the latter, it clearly applies to State assistance being provided to non-State armed groups. As the ICJ held in *Nicaragua*:

[T]here is an obligation on the United States Government, in the terms of Article I of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances,” since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation *not to encourage persons or groups engaged in the conflict in Nicaragua* to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.²¹³

The existence of the IHL-specific negative complicity rule may not be in doubt, but its exact parameters are, for example, with regard to any mental element in respect of the assisting State. This element, again, need not align

at 208. *But see* Verity Robson, *The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions*, 25 JOURNAL OF CONFLICT AND SECURITY LAW 101, 111 (2020) (arguing that Article 16 ASR is the only relevant complicity rule—that is, that no such rule exists under IHL).

212. *See* COMMENTARY OF 2016, *supra* note 208, ¶ 158 (“Pursuant to common Article 1, the High Contracting Parties have certain negative obligations, which means they must abstain from certain conduct. In particular, they may neither encourage, nor aid or assist in violations of the Conventions. It would be contradictory if common Article 1 obliged the High Contracting Parties to ‘respect and to ensure respect’ by their own armed forces while allowing them to contribute to violations by other Parties to a conflict.”). *See also id.* ¶¶ 158–63; Geiß, *supra* note 205, at 130–31.

213. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 220 (June 27) [hereinafter *Nicaragua*]. *See also id.* ¶ 255 (“[G]eneral principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949.”).

with the requirements of Article 16 ASR. For instance, it is entirely possible for CA1 to require a lower level of fault than Article 16.²¹⁴

The text of IHL treaties provides no guidance on the elements of the IHL-specific complicity rule. In *Nicaragua*, the Court's examination of U.S. complicity in violations of IHL by the "contras" was confined solely to the U.S. production of a manual on psychological operations, which the Court framed in terms of U.S. *encouragement* or *incitement* of the violations.²¹⁵ This language is particularly interesting because States are generally not seen to bear responsibility simply for encouraging or inciting violations by others.²¹⁶ The Court said nothing about the degree of culpability required for encouraging violations of IHL. It did, however, find the United States responsible for encouragement by providing the manual, while noting that it was "material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was *likely or foreseeable*."²¹⁷ This appears to be a reference to purely objective likelihood or foreseeability rather than subjective foresight on the part of U.S. authorities. But it is unclear whether the Court simply regarded this objective element as cumulative with an implied subjective element. To put it mildly, it is unlikely that the Court thought that *any* provision of assistance that was objectively likely to lead causally to further IHL violations would count as "encouragement."

It is difficult to draw any reliable conclusions from *Nicaragua* as to what the Court would have thought on the fault element of the IHL complicity rule for providing to a non-State actor (or a State) assistance that does not qualify as encouragement or incitement. In particular, Nicaragua did not ask the Court to rule on whether the U.S. provision of weapons, money, and logistical assistance (which included the sharing of some intelligence)²¹⁸ to the contras violated IHL because it facilitated the contras' violations of IHL.²¹⁹ Its submissions (and the Court's analysis) framed these acts of assistance as violations of the prohibitions on the use of force and intervention.²²⁰ The only IHL-specific complicity finding was that regarding the Central Intelligence Agency (CIA) manual on psychological operations.

214. See COMMENTARY OF 2016, *supra* note 208, ¶¶ 160–61.

215. *Nicaragua*, *supra* note 213, ¶ 256.

216. See ILC ASR, *supra* note 4, general cmt. to pt. 1, ch. IV, ¶ 9; AUST, *supra* note 6, at 388. See further Miles Jackson, *State Instigation in International Law: A General Principle Transposed*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 391 (2019).

217. *Nicaragua*, *supra* note 213, ¶ 256 (emphasis added).

218. *Id.* ¶ 243.

219. *Id.* ¶¶ 216–17.

220. *Id.* ¶¶ 195, 205, 228, 241.

3. Fault Standards in the Arms Trade Treaty

To my knowledge, the only treaty in which States expressly set out culpability standards regarding obligations similar, but not equivalent, to the IHL-specific complicity rule is the Arms Trade Treaty (ATT),²²¹ which does so in two different provisions. First, Article 6 ATT categorically prohibits arms exports in certain circumstances; in particular, Article 6(4) provides that a State party

shall not authorize any transfer of conventional arms . . . 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 (emphasis added).

Article 7 then further provides that in situations in which a transfer is not categorically prohibited by Article 6, the State shall “assess the potential” that, if transferred, the arms “could be used” to commit or facilitate serious violations of IHL or human rights. If, after making this assessment and adopting any available mitigating measures, the State party determines there is an “overriding risk” of such consequences occurring, it shall not authorize the export.²²²

The key difference between these ATT rules and the IHL-specific complicity rule is that the ATT prohibitions are entirely inchoate. They do not require that the harmful consequences of the arms transfer actually occur. Rather, a State that authorizes an export of weapons contrary to Articles 6 or 7 ATT violates the treaty by the mere act of export, even if no violations of IHL are ultimately facilitated by it.²²³ The IHL complicity rule, by contrast, *does* require the prohibited consequence to occur—that is, the responsibility of the accomplice cannot arise without the principal committing the wrong,

221. Arms Trade Treaty, Apr. 2, 2013, 3013 U.N.T.S. 52373. For a standard reference work on the treaty, see STUART CASEY-MASLEN ET AL., *THE ARMS TRADE TREATY: A COMMENTARY* (2016). As of July 1, 2021, the ATT has 110 States parties, and a further 31 signatories that are yet to finally express their consent to be bound by the treaty.

222. This regime of course only applies to weapons that can in principle be used lawfully and whose export is not categorically banned by some specific treaty.

223. See CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 6.85, 6.92. This is the same position as with State non-refoulement obligations under IHRL discussed below.

and without the accomplice's conduct actually facilitating the wrong, to some degree of causal contribution.²²⁴

But even if the ATT rules are different from those of IHL, they are sufficiently similar in their basic purpose for the ATT to serve as an instructive example, especially in light of its drafting history. A draft text of Article 6, originally proposed by the United States, prohibited transfers only when these would be done “for the purpose of facilitating” international crimes, borrowing the complicity *mens rea* language from Article 25(3)(c) of the Rome Statute.²²⁵ This purpose formulation was met with pushback from other States, who considered it to be too narrow,²²⁶ and was replaced with a knowledge requirement that was left undefined.²²⁷ As in the ASR context, the Article 6 ATT knowledge requirement must be dual—the transferring State must know (i.e., be practically certain) that the recipient State is committing or will commit international crimes, and it must know (i.e., be practically certain) that the recipient State *would use* the arms provided to commit these crimes.²²⁸ Again, as in the ASR context, this “knowledge” is inherently a probabilistic assessment of contingent events in the future, if at a high level of certainty.

The probabilistic nature of the assessment is even more apparent in Article 7 ATT, which speaks of the “potential” that the arms “could be used to commit or facilitate” a serious violation of IHL, then refers to measures that might “mitigate risks” and to refuse to proceed with the export in case there remains an “overriding risk” despite such measures. The provision is broader than Article 6 in multiple ways: for instance, it is not confined to international *crimes* but encompasses all serious violations of IHL and IHRL; its causality requirements are arguably lower; and it refers not to *knowledge* (i.e., practical certainty) that transferred arms *would be* used for the proscribed harms but to the *risk* that they *could be* so used.²²⁹ However, it bears reiterating yet again

224. To be clear, one form of responsibility does not exclude the other—it is entirely possible for the State to first violate the inchoate ATT prohibition by authorizing the weapons transfer and for it to subsequently also violate the IHL complicity rule, if the weapons facilitate a violation of IHL.

225. *See id.* ¶ 6.12.

226. *Id.* ¶ 6.13 (Mexico arguing that no government would accept internally that it was acting for the purpose of facilitating international crimes and that therefore a purpose standard would be devoid of practical effect).

227. *Id.* ¶ 6.14.

228. *See id.* ¶¶ 6.93–94.

229. *Id.* ¶¶ 7.02, 7.31, 7.35–38.

that the difference between practical or near certainty and mere potential or risk is one of degree, not of kind.

4. Minimum Standards for IHL-specific Complicity

The culpability element of the IHL complicity rule remains substantially uncertain. The same can be said of the causal contribution element. There is simply no binding authority as to what their contents are or should be. Standards employed elsewhere, such as in the ATT context, cannot simply be transplanted wholesale, however instructive they are. An attempt to arrive at such standards from State practice is, in my view, bound to fail since that practice simply lacks the necessary coherence and granularity. The argument I propose is, therefore, like most of this article, conceptual and normative.

What *can* be said with certainty is that the applicability of the IHL-specific complicity rule, which is rooted in CA1 and custom, does *not* depend on whether the assisting State is a party to an armed conflict or on the classification of that conflict as an international armed conflict (IAC) or non-international armed conflict (NIAC).²³⁰ States parties to the Geneva Conventions must respect them and ensure respect for them “in all circumstances.” There is no reason of principle why the complicity rule, which demands abstention only from the assisting State, should apply differently depending on its involvement in the conflict or the nature of that conflict.²³¹ Indeed, we have seen in *Nicaragua* how the ICJ had no issue with applying its encouragement analysis to the U.S. supply of the manual to the contras, who were involved in a NIAC against the Nicaraguan government. Of course, the somewhat different content of IHL in IACs and NIACs might lead to relatively rare occasions in which the same kind of assistance would be wrongful in IACs but lawful in NIACs, but this turns on the wrongfulness of the principal’s conduct, not on differing applicability of the IHL complicity rule.²³²

We can also say with certainty that, whatever the exact parameters of the IHL-specific complicity rule, it has added value when compared to Article

230. See Legal Consequences of the Construction of a Wall, 2004 I.C.J. 136, ¶ 158 (July 9). See also Moynihan, *supra* note 11, at 32–33; Geiß, *supra* note 205, at 116.

231. See also COMMENTARY OF 2016, *supra* note 208, ¶ 185; Geiß, *supra* note 205, at 132–33.

232. See also Nottingham Workshop Report, *supra* note 10, at 15–16.

16 ASR, *at least* in covering State assistance to non-State armed groups.²³³ Article 16 does not by its own terms apply to non-State actors, and there appears to be little evidence of such a secondary rule of general applicability that would be divorced from the relevant primary rules, unless Article 16 was regarded simply as one instantiation of a broader, general principle of law.²³⁴ We can also say that the CA1 complicity rule is broader than Article 16 in that it covers not only assistance but also “mere” encouragement.²³⁵

But what should the culpability element of the IHL-specific complicity rule look like?

First, at a minimum, the culpability element of IHL complicity should include all the modes of fault in the general customary rule in Article 16 ASR. If States were prepared to accept those culpability standards for complicity in *all* existing rules of international law, regardless of the importance of the interests they protect, then surely the same standards would constitute the limit above which no IHL-specific complicity rule could go. In other words, because its primary purpose is to prevent particularly grave harms against individuals (and States), it is justified for IHL to impose *lower*, less stringent culpability requirements that would inhibit more potentially harmful interactions between and among States and non-State armed groups.²³⁶ But it could certainly not impose *higher*, more stringent culpability requirements than Article 16 ASR, especially because the IHL-specific complicity rule does not impose consequences any more burdensome for the complicit State than does Article 16.²³⁷

233. See COMMENTARY OF 2016, *supra* note 208, ¶¶ 158–59 (referring to prohibited State assistance to “a Party to a conflict,” which is the standard formulation used to include non-State armed groups in non-international armed conflicts, as opposed to States—that is, the High Contracting Parties).

234. In the *Bosnian Genocide* case the ICJ did apply Article 16 by analogy to Serbia’s provision of aid to non-State actors, the Bosnian Serb forces. But it only did so because the Genocide Convention expressly prohibits complicity in genocide—that is, contains an (undefined) bespoke complicity rule, whose content the Court had to fill. See also JACKSON, *supra* note 8, at 220–21 (discussing *Bosnian Genocide* and arguing that there is no conceptual bar to rules prohibiting State complicity in the wrongful conduct of non-State actors).

235. See CUSTOMARY IHL STUDY, *supra* note 202, r. 144; Geiß, *supra* note 205, at 131–32; Théo Boutruche & Marco Sassòli, Expert Opinion on Third States’ Obligations vis-à-vis IHL Violations under International Law, with a Special Focus on Common Article 1 to the 1949 Geneva Conventions 21 (Nov. 8, 2016), <https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl--boutruche---sassoli---8-nov-2016.pdf>.

236. See COMMENTARY OF 2016, *supra* note 208, ¶ 160. See also AUST, *supra* note 6, at 388; Boutin, *supra* note 1, at 539; Boutruche & Sassòli, *supra* note 235, at 20.

237. See Geiß, *supra* note 205, at 131.

This point was broadly accepted at the Nottingham workshop on intelligence sharing. In particular, even experts vocal in their advocacy of a purpose/direct intent standard under Article 16 ASR were comfortable applying a standard lower than purpose under CA1 and customary IHL.²³⁸ This only makes sense from a policy perspective—the importance of the interests protected by IHL can warrant a departure from default, generally applicable standards, and one such departure could be in less demanding culpability requirements. An IHL-specific rule to that effect would not excessively inhibit potentially beneficial cooperation in the way the same rule would do if it applied to *all* possible violations of international law.

Thus, at a minimum, the IHL complicity rule would cover State assistance to other States or non-State actors if such assistance was done:

(1) With the purpose/direct intent to facilitate a violation of IHL, regardless of whether the assisting State knew (was practically certain) that the violation would occur or that its aid would, in fact, facilitate it. Again, deficits in knowledge are compensated for by the existence of purpose as the most culpable form of fault.²³⁹

(2) With the oblique/indirect intent to facilitate a violation of IHL—that is, if the assisting State was practically certain that a violation of IHL was occurring or would occur, was practically certain that its assistance would facilitate the violation and had reconciled itself to this virtual inevitability.²⁴⁰

(3) With willful blindness, in the sense that the assisting State would have been acting with oblique intent but for its purpose to avoid acquiring information that would have led it to practical certainty.²⁴¹

Second, above that minimum the fault element of the IHL complicity rule ultimately might best be conceptualized as a sliding scale, depending on the importance of the IHL rule that is implicated. Put differently, CA1 and its customary equivalent can employ a culpability requirement that varies with the severity or seriousness of the principal's IHL violation. Thus, for example, the Article 16 ASR standards might be perfectly appropriate for complicity in violations of “vanilla” rules of IHL, such as the Article 38 Geneva Convention III rule that the detaining power shall provide prisoners of war with opportunities for taking physical exercise, including sports and

238. See Nottingham Workshop Report, *supra* note 10, at 14–15.

239. See *supra* Section III.A.2.

240. *Id.*

241. See *supra* Section III.A.3.

games,²⁴² or the Article 71 rule that prisoners of war must be allowed to send and receive correspondence.²⁴³ But less demanding requirements might be appropriate for complicity in *serious violations* of IHL, for instance, those that constitute grave breaches of the Geneva Conventions, deliberate attacks on civilians, or subjection of civilians to torture or inhuman treatment.²⁴⁴ It is in principle perfectly sensible to vary the content of complicity rules depending on the importance of the underlying interests, as we could see, for example, from the various gradations of liability in Articles 6 and 7 ATT or indeed from the ILC's (imperfect) implementation of the idea in Article 41(2) ASR.²⁴⁵ This is as true internally, within regime-specific complicity rules as in IHL, as it is for complicity for violations of different rules of unequal importance within the same regime. The absence of any hard text specifically regulating culpability in most specific regimes and the ensuing interpretative discretion formally enable such a variable conception of fault.

This leads us to what is, in my view, the main outstanding issue—should there be a risk-based culpability rule for complicity in serious violations of IHL?

5. Risk-based Culpability for IHL-Specific Complicity

Let us assume a situation in which State *A* provides assistance (e.g., intelligence) to State or non-State actor *B* without the direct or indirect intent that *B* use this assistance to commit a serious violation of IHL (e.g., attack civilians). *A* is only aware of a *risk*, to some degree of probability, that *B* would commit the violation and use the assistance *A* provides to do so. If, in this scenario, *A* provides the assistance to *B* despite the risk and *B*, in fact, proceeds to use that assistance to commit a serious violation of IHL, should *A* be responsible for complicity in *B*'s wrongful act under the IHL-specific complicity rule?

We should carefully distinguish this scenario from other possible forms of culpability. This would *not* be responsibility for the inchoate act of creating

242. GC III, *supra* note 200, art. 38.

243. *Id.* art. 71.

244. I deliberately do not provide a more detailed definition of the notion of a serious violation of IHL, because the exact parameters of that definition are not central to my argument here and because the concept is otherwise frequently used, e.g., in Article 7 ATT. I would just note that a violation of IHL can be serious (e.g., an act of torture or unlawful killing) even without being widespread or systematic. For a discussion, see CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 7.39–49.

245. See also Moynihan, *supra* note 11, at 23.

risk or exposing the possible victim to risk, responsibility of the kind that exists under Article 7 ATIT, where the violation is consummated simply by exporting arms despite an overriding risk. Nor is it responsibility like that under the non-refoulement rule in IHRL and refugee law, whereby a State can violate the right to life or the prohibition of torture or inhuman treatment simply by deporting or extraditing a person to another State, despite a real risk that they would be ill-treated there, even if the ill-treatment never actually occurs.²⁴⁶ In the scenario above *A* is *not* responsible for complicity simply by providing aid to *B* despite the risk of harm; it can be responsible only if *B* actually commits the wrongful act and the aid *A* had provided causally contributed to that act.²⁴⁷ In the absence of such causal contribution *A* can only be responsible for violating some other, positive duty of prevention (e.g., ensuring respect for IHL), but not for complicity proper.

Nor is the scenario above one of so-called *constructive* knowledge. That is a situation in which a person (or State) did not subjectively know to practical certainty something that *could have been known* to such certainty; the fact was knowable in principle and *should have been known* to such certainty, so that the person (or State) is culpable, to some standard such as negligence, for not knowing. In other words, had one acted with care and done all that a reasonable person could be expected to do in such circumstances to verify all relevant information, one would have arrived at practical certainty. As previously explained, the notion of constructive knowledge implies a positive obligation to make such inquiries.²⁴⁸

But our scenario is different. It is one where even the most diligent of States could not have (probabilistically) known to near certainty what the recipient of the aid would do. This is, in short, a “pure” situation of risk—even after making all possible inquiries, the assisting State knows that there is some possibility that the assisted party would commit a serious violation of IHL and would use the aid provided to do so, but it cannot be certain whether or not this will be the case.²⁴⁹

246. See AUST, *supra* note 6, at 393–401. See further Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

247. See JACKSON, *supra* note 8, at 7–8.

248. See *supra* Section III.A.3.

249. It is also possible to apply an objectivized, constructive standard not to actual, near-certain knowledge but to knowledge of a degree or risk—that is, the State *should have known* (but did not know) that there was a *risk* that its aid would be misused; it may not have

This is, in practice, by far the most common scenario of States providing assistance to third parties, including in military operations. Assisting States are rarely practically certain what the recipients of their aid will do with it, but they frequently discern a degree of risk that their aid will be misused. As a normative matter, the first question is whether responsibility for complicity is desirable when the assisting State is *not* practically certain—and *cannot* be certain—about what the assisted party will do, but nonetheless appreciates some degree of risk and consciously disregards that risk by continuing to provide the assistance.

In the ATT context, States have already answered that question essentially in the affirmative for serious violations of IHL and IHRL, even if the responsibility is inchoate and not one of complicity proper. That treaty, however, is not necessarily reflective of customary law and is confined to the transfer of weapons—a type of assistance that is manifestly capable of causally contributing to grave violations of international law. That said, numerous other treaties and instruments regarding arms transfers use risk-based formulations to prohibit certain transfers.²⁵⁰ If the causal contribution to the wrong of other forms of assistance, such as intelligence sharing, is as substantial as that of weapons and the seriousness of the underlying wrong (e.g., a deliberate attack against civilians) remains the same, it is difficult to see why they should be treated differently. It is not the type of assistance but the importance of the interests and values implicated by the underlying violation that justifies resort to a risk-based form of culpability.²⁵¹

If this mode of culpability is desirable in principle, the even more difficult question would be how the relevant risk threshold should be defined. On one end of the spectrum we could require a very high likelihood of the harm occurring, but such a threshold would be impossible to differentiate

subjectively foreseen the risk, but such a risk was *foreseeable*. To be clear, the argument I am making for risk-based culpability in complicity for serious violations of IHL and (below) IHRL is based on a subjective approach—that is, the State *did* foresee a risk—even though I am not excluding the possibility that objective approaches might be appropriate in some specific instances. The argument is so confined to avoid overinclusiveness concerns.

250. See INTERNATIONAL COMMITTEE OF THE RED CROSS, ARMS TRANSFER DECISIONS: APPLYING INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW CRITERIA—A PRACTICAL GUIDE 5–6 (2d ed. 2016) [hereinafter ARMS TRANSFER DECISIONS—A PRACTICAL GUIDE].

251. See AUST, *supra* note 6, at 239 (“Risk-based responsibility for complicity may be justified where particularly important legal values are at stake.”). See also Nottingham Workshop Report, *supra* note 10, at 16–17.

from actual knowledge—that is, practical, virtual near certainty.²⁵² On the other end of the spectrum we could require merely the *possibility* of the harm occurring, but such a low threshold would be overinclusive and would inhibit far too much potentially beneficial cooperation. There is always a possibility that almost any kind of aid will be misused.

Occupying the middle ground would be formulations requiring the State's awareness of a real, significant, or substantial risk, such as, for example, those used in the IHRL non-refoulement context.²⁵³ Such formulations imply that the risk is neither low nor negligible, without implying that the violation is more likely to occur than not. Alternatively, the rule could explicitly require the level of risk to be likely or probable, i.e., that the assisting State would be culpable had it assessed it as more likely than not that the assistance it provided would be used for a serious violation of IHL, and the assistance later was in fact so used.

The current state of the law is such that it is difficult to know exactly where the risk threshold lies; this certainly cannot be discerned with mathematical precision. However, what can be said is that comparative practice in both criminal and tort law is replete with examples of risk-based modes of culpability, such as recklessness, *dolus eventualis*, gross negligence, or conscious (advertent) negligence.²⁵⁴ The boundaries between these forms of fault are porous, but the forms all have subjective awareness of some degree of risk in common.²⁵⁵ And in various international legal contexts, States have been comfortable with the regulation of their conduct on the basis of anticipated risk, as for instance, with the precautionary principle in international environmental law.²⁵⁶

It is therefore difficult to see how, precisely, States could reasonably object to the notion that *A* would be acting contrarily to its obligation to respect and ensure respect for IHL if, knowing it to be *likely* that the assistance it provided to *B*, including weapons, money, or intelligence, would be used to commit war crimes or other serious violations of IHL, it chose to provide the assistance anyway, and *B*, *in fact*, committed the wrongful act, the aid provided contributing materially. This would probably be the case even if

252. See *supra* Section II.D.

253. See, e.g., LANOVOY, *supra* note 11, at 210.

254. As opposed to inadvertent, unconscious negligence, where the person is not subjectively aware of the risk but objectively should have been aware of it.

255. See JACKSON, *supra* note 8, at 52–53.

256. See further Sonia Boutillon, *The Precautionary Principle: Development of an International Standard*, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 429 (2002).

the risk threshold were somewhat lower than likelihood if it was (say) clear, real, or substantial. The ICRC is thus of the view that irrespective of any obligations under the ATT or other arms transfer instruments, all States have a CA1 “negative obligation [that] would require a State to assess whether the recipient is likely to use the weapons to commit IHL violations and, if there is a substantial or clear risk of this happening, to refrain from transferring the weapons.”²⁵⁷ And as explained above, there is no reason of principle why this rule would be confined to weapons transfers—other forms of assistance that can substantially causally contribute to the wrongful act, such as the sharing of intelligence, must be equally covered. Nor is there any reason of principle why this complicity rule would apply any differently to assistance provided by States to non-State actors.²⁵⁸

In conclusion, the CA1 and customary duty to refrain from assisting third parties in committing serious violations of IHL can also reasonably encompass those situations in which the assisting State is aware only of a risk that its aid would be used to facilitate the violation but nonetheless chooses to provide it.²⁵⁹ The State providing assistance despite the risk would not be acting unlawfully at that precise moment; its provision of assistance would only become unlawful if it was later in fact used to commit, and made a substantial contribution to, a serious violation of IHL. By providing the aid despite the risk, the assisting State would be exposing itself to *legal* risk. It would be taking a gamble that its aid would not, in the end, be misused, and it would be liable, to the extent of its own causal contribution to the harm, if it judged poorly. And it would in any event be making its decisions dynamically, in light of the possibly changing circumstances and information available to it.

C. *Complicity under International Human Rights Law*

1. Generally

Let us turn now to IHRL, whose applicability to multinational military operations and intelligence sharing within such operations raises numerous issues. First, as with IHL, IHRL obligations can stem from both customary and conventional international law. But the source of obligation matters more for IHRL than for IHL for a number of reasons. On the one hand,

257. ARMS TRANSFER DECISIONS—A PRACTICAL GUIDE, *supra* note 250, at 13.

258. *Id.* at 11.

259. *See also* Dörmann & Serralvo, *supra* note 211, at 734; Letts, *supra* note 1, at 13.

customary IHRL is vaguer in content than customary IHL—and there is no IHRL equivalent of the ICRC’s customary IHL study.²⁶⁰ On the other hand, human rights treaties possess dedicated independent enforcement mechanisms that are lacking for customary IHRL and for both customary and conventional IHL. The subject-matter jurisdiction of these mechanisms (such as the European Court of Human Rights) is normally limited to their founding treaty.²⁶¹ An applicant cannot use (say) the individual complaints mechanism of the European Court by alleging a violation of some treaty other than the European Convention on Human Rights (ECHR).

Today all States are parties to at least some human rights treaties. The treaties that are most relevant for the question of intelligence sharing in multinational military operations are those on civil and political rights, which have some significant gaps in ratifications. For example, to engage with China on these issues regarding purported violations of freedom of expression or privacy, one would have to rely on customary IHRL, since China is not a party to the International Covenant on Civil and Political Rights (ICCPR),²⁶² the UN treaty that protects these rights. Both customary and conventional IHRL could be enforced before domestic courts, depending on domestic (constitutional) rules on the incorporation of international law into the municipal legal order. Dedicated enforcement mechanisms, whether international or domestic, inevitably make IHRL more appealing than IHL to activists and potential litigants and equally inevitably lead to court cases or other kinds of procedures in which questions of intelligence sharing will be scrutinized. This is an emerging trend that will likely only grow.

260. See further Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1 (1996); Hugh Thirlway, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, 28 LEIDEN JOURNAL OF INTERNATIONAL LAW 495 (2015); Michael Wood, *Customary International Law and Human Rights* (European University Institute Working Paper AEL 2016/03, 2016), https://cadmus.eui.eu/bitstream/handle/1814/44445/AEL_2016_03.pdf.

261. The one major exception is the African Court, whose jurisdiction extends to all human rights instruments accepted by a State party. See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 3, June 10, 1998, OAU Doc. OAU/LEG/AFCHPR/PROT (III). Human rights bodies can, of course, take into account other legal rules in interpreting their own respective treaties.

262. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

Second, IHRL, like IHL, imposes both negative and positive obligations on States. States must not only respect IHRL themselves but must also exercise due diligence to prevent and suppress violations by third parties within their jurisdiction.²⁶³ However, the key question of principle for our purposes is whether the negative duty to respect human rights also includes an IHRL-specific obligation not to be complicit in human rights violations by third parties. As with IHL, the answer to that question appears to be in the affirmative, but the jurisprudence of human rights bodies on this issue is embryonic. And if the obligation exists, the even more difficult question, afflicted by indeterminacy, is that of its content, specifically as to its culpability element.

Third, even if the IHRL-specific complicity rule exists, as it does in my view, it is controversial to what extent that rule would operate *extraterritorially*—that is, to State assistance to actors committing violations outside its borders.²⁶⁴ The extraterritoriality problem is likely the greatest impediment to the wider application of the IHRL complicity rule for the time being.

Fourth is the important systemic question of the relationship between IHL and IHRL. Here too the overall trend has also been towards an increasing acceptance that IHRL applies in armed conflict, but numerous controversies remain, for example, about the utility, coherence, and meaning of the *lex specialis* principle.²⁶⁵ That said, the most important question is not *whether*

263. See generally Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562 (Dinah Shelton ed., 2013).

264. See generally EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); MARK GIBNEY & SIGRUN SKOGLY, UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (2010); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2009); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011); KAREN DA COSTA, THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES (2012).

265. See generally Marco Sassòli & Laura Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 599 (2008); William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISRAEL LAW REVIEW 592 (2007); Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 27 (2005); Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 78 (Jens David Ohlin ed., 2016).

IHRL applies to military operations but *how* it applies, and specifically how the normative demands of human rights can be reconciled with practical operational requirements and realities on the ground.²⁶⁶ At the very minimum, we could say that human rights bodies would likely find violations of IHRL due to intelligence sharing if these violations would simultaneously also be violations of IHL (e.g., torture or directing attacks against civilians). More difficult would be those cases in which the demands of IHL and IHRL potentially conflict, such as the targeting and detention of combatants, on which IHL rules are more permissive than those of IHRL (for example, IHL would permit the killing of combatants even if it was possible to capture them instead and they posed no immediate threat, whereas IHRL would normally require the exhaustion of non-lethal options). However, the latter cases will be far less common than the former, and I will not examine this issue further here.

In short, while the jurisprudence on the applicability of human rights treaties extraterritorially and in times of armed conflict is very much in flux, it seems unlikely that the increasing trend towards applying human rights law to such situations will reverse itself. Human rights case law specifically addressing extraterritorial intelligence sharing is also embryonic.²⁶⁷ However, State responsibility for intelligence sharing and related matters, such as electronic surveillance, has increasingly been raised in human rights terms. Intelligence operations generally have been subjected to increased public scrutiny since the Snowden revelations of the electronic surveillance capabilities of agencies such as the U.S. National Security Agency and UK Government Communications Headquarters. This has in turn provoked litigation domestically and internationally, as well as such important activity within the UN system as the adoption by the UN General Assembly and the Human Rights Council of a number of resolutions on the right to privacy in the digital age.²⁶⁸

266. See further PRACTITIONERS' GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT (Daragh Murray et al. eds., 2016).

267. See *infra* Section V.B.

268. See generally Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARVARD INTERNATIONAL LAW JOURNAL 81 (2015). On tensions between the United States and the United Kingdom due to concerns that shared intelligence may be misused, see Bradley Bamford, *The United Kingdom's "War against Terrorism,"* 16 TERRORISM AND POLITICAL VIOLENCE 737 (2004); Richard J. Aldrich, *US-European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion*, 11 BRITISH JOURNAL OF POLITICS AND INTERNATIONAL RELATIONS 122 (2009).

Some States in multinational military operations, such as the United States and Australia, may, as a matter of fact, be subject to less exacting scrutiny of their compliance with relevant human rights treaties than others, such as Belgium, France, or the United Kingdom, which have accepted the compulsory jurisdiction of the European Court of Human Rights. Even so, because of the close relationships inherent in cooperation in multinational operations, it is inevitable that the increased level of scrutiny by the European Court will also have effects even on non-European partner States.²⁶⁹ The same will increasingly be true for other human rights systems, such as the Inter-American one. Questions of intelligence sharing in multinational military operations will undoubtedly be litigated more frequently before both domestic courts and international institutions applying human rights law, generating significant legal risks for States.²⁷⁰

In the remainder of this Section, I will, therefore, first look at whether an IHRL complicity rule exists and then examine its culpability element. Finally, I will discuss the extraterritoriality issue in more detail. These are, in my view, the key pivots on which the practical relevance of this rule will turn.

2. Is There an IHRL-Specific Complicity Rule?

The question of the existence of an IHRL-specific complicity rule is very similar to that of the IHL rule examined above. As with IHL, an IHRL complicity rule is not explicit in the text of any treaty but could, in principle, apply not only in the inter-State context but also to State assistance to non-State actors.²⁷¹ As with IHL, the architecture of IHRL recognizes both negative and positive obligations of States, viz., the duties to respect, protect, and fulfill human rights. Unlike the IHL duty to “ensure respect,” however, the IHRL duty of protection is both broad and incontestable; indeed, it has generated so much jurisprudence that there is less need for a negative complicity rule.²⁷² Also, unlike IHL, which for the most part possesses unity at least as

269. See Letts, *supra* note 1, at 14.

270. See Nottingham Workshop Report, *supra* note 10, at 39.

271. Various examples in emerging jurisprudence are discussed below. Note that an IHRL-specific complicity rule does not logically require that non-State actors must themselves be directly bound by IHRL, which is a topic of some complexity—in other words, there is no need for a parallelism of obligations requirement of the kind found in Article 16 ASR, whose purpose is to safeguard State sovereignty and the *pacta tertiis* rule. See further Andreas Th Müller, *Human Rights Obligations of Armed Groups*, in THE “LEGAL PLURIVERSE,” *supra* note 2, at 444; Boutin, *supra* note 1, at 541.

272. See generally Shelton & Gould, *supra* note 263.

a matter of customary law, IHRL is a fragmented regime, with different treaties with different sets of parties and different authoritative interpreters, and its customary substrate is less clear. It is thus to an extent a misnomer to speak of an *IHRL*-specific complicity rule—variants of such a rule can be specific to and differ in their elements between treaties such as the ICCPR, the ECHR, the American Convention on Human Rights, the Convention Against Torture (CAT), and so forth. That said, the “respect,” “ensure,” “secure,” or “protect” language of all these treaties is broad enough to be easily interpreted as including a negative duty of States *not* to be complicit in human rights violations by third parties.²⁷³

A State violates the negative duty to respect human rights if an *action* infringing on human rights is attributable to it. A State violates the positive duty to protect on the basis of an (attributable) omission—that is, a failure of the State’s organs or agents to exercise due diligence and take all reasonably feasible measures to prevent or stop an infringement on human rights by another State or by a non-State actor. The vast majority of human rights violations litigated before international human rights bodies are of the negative duty to respect.²⁷⁴ However, human rights bodies have developed a long-standing, sophisticated jurisprudence on the substantive positive duty to protect (or ensure) human rights, pioneered by the Inter-American and European Courts.²⁷⁵ That case law contains rules on, for example, the thresholds of knowledge of the risk of harm that trigger a protective duty, rules that have been applied broadly, from risks to the lives of specific persons to pervasive environmental harms.²⁷⁶

But the sheer breadth of these positive obligations has meant that human rights bodies have generally not found it necessary or useful to articulate

273. See, e.g., JACKSON, *supra* note 8, at 198 (no reason why Article 1 ECHR “cannot be interpreted to include a prohibition on participation in rights violations carried out by other actors”); AMNESTY INTERNATIONAL, *supra* note 3, at 32; Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ¶ 48 U.N. Doc A/HRC/25/60 (April 10, 2014).

274. See Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 INTERNATIONAL LAW STUDIES 295, 315–16 (2020).

275. See, e.g., Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988); Osman v. United Kingdom, App. No. 23452/94, ¶¶ 115–16 (1998) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-58257>; Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶¶ 18–22, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment No. 36].

276. See further Stoyanova, *supra* note 40.

theories of complicity. This is compounded by the tendency of some of these bodies—primarily the European Court—to elide the distinction between negative and positive obligations when dealing with situations in which immediate human rights violations *prima facie* appear to be committed by non-State actors.²⁷⁷ For example, to this day it remains unclear whether the European Court’s case law on northern Cyprus directly holds Turkey responsible for the conduct of the separatist pro-Turkish authorities, that is whether a negative violation of the duty to respect is being attributed to Turkey or whether Turkey is being held responsible for failing to secure human rights and prevent violations by the separatist entity. The same goes, for instance, for the relationship between Russia and the Transnistrian separatists in Moldova and Abkhazian and South Ossetian separatists in Georgia.²⁷⁸

In short, human rights bodies have yet to produce a line of cases that unambiguously adopt a complicity theory stemming from the negative duty to respect human rights as the responsibility frame distinct from both the direct attribution of the human rights violation and the responsibility for failing to prevent it.²⁷⁹ But that jurisprudence appears to be emerging. For instance, in its General Comment No. 36 the Human Rights Committee held that States “have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.”²⁸⁰ But even though this looks like the articulation of an ICCPR complicity rule, the Committee, in fact, said nothing about the fault and causality elements of this rule, while the footnote at the end of that sentence refers readers to Article 16 ASR and the ICJ’s examination of complicity in the

277. See further James Crawford & Amelia Keene, *The Structure of State Responsibility under the European Convention on Human Rights*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW* 178 (Anne van Aaken & Iulia Motoc eds., 2018).

278. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995); *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1; *Ilaşcu and Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179; *Catan and Others v. Moldova and Russia*, 2012-V Eur. Ct. H.R. 309. See further Milanovic, *Special Rules of Attribution*, *supra* note 274, at 342–47.

279. For an argument that IHRL could develop such a rule, focused on torture but generalizable to all human rights violations, see Miles Jackson, *Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction*, 27 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 817 (2016).

280. General Comment No. 36, *supra* note 275, ¶ 63.

Bosnian Genocide case.²⁸¹ To my knowledge, no individual case of the Committee deals with complicity directly.²⁸²

On the other hand, in the European Court, a developing line of cases deals with States assisting violations by other States or by non-State actors with “acquiescence or connivance.” This line of cases originated in the Court’s 2001 judgment in the inter-State case of *Cyprus v. Turkey*, in which it held that “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention.”²⁸³ That case and its progeny used the “acquiescence or connivance” language in describing the relationship between a State and a prima facie non-State actor directly committing the human rights violation at issue.²⁸⁴ But in the 2012 Grand Chamber *El-Masri* judgment and four subsequent Chamber judgments, the Court used that same language in describing the behavior of Macedonia, Poland, Lithuania, and Romania in providing assistance to U.S. rendition and torture of suspected terrorists during the “war on terror.”²⁸⁵ As a doctrinal matter, these judgments are hardly a model of clarity; the Court seems to be vacillating between attributing the conduct of U.S. agents to the assisting States, finding them at fault for failing to prevent the wrongful conduct of third parties, and grounding responsibil-

281. *Id.* at 20 n.254.

282. I will not be discussing here complicity-type scenarios (such as rendition) addressed by the Committee in its consideration of State party reports, because these do not sufficiently articulate and develop formal complicity doctrines. *See, e.g.*, Concluding Observations on the Fifth Periodic Report of Romania, ¶¶ 33–34, U.N. Doc. CCPR/C/ROU/CO/5 (2017).

283. *Cyprus v. Turkey*, *supra* note 278, ¶ 81.

284. *See further* Marko Milanovic, *State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights*, in *SECONDARY RULES OF PRIMARY IMPORTANCE: ATTRIBUTION, CAUSALITY, STANDARD OF REVIEW AND EVIDENTIARY RULES IN INTERNATIONAL LAW* (Gabor Kajtar, Basak Cali & Marko Milanovic eds., forthcoming 2021) (manuscript), <https://ssrn.com/abstract=3454007>.

285. *See* *El-Masri v. the former Yugoslav Republic of Macedonia*, 2012-VI Eur. Ct. H.R. 263, ¶ 206; *Al Nashiri v. Poland*, App. No. 28761/11, ¶¶ 452, 517 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146044>; *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ¶¶ 449, 512 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146047>; *Al Nashiri v. Romania*, App. No. 33234/12, ¶¶ 594, 676–77, 690 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-183685>; *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶¶ 581, 641–42, 656 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-183687>.

ity in complicity. Indeed it is probably complicity that provides the best conceptual frame here, as is most evident from the four Chamber judgments, which expressly speak of Poland's, Lithuania's, and Romania's responsibility for *complicity* and for *enabling* the wrongful conduct of U.S. authorities.²⁸⁶ The European Court thus seems to be applying an emerging ECHR-specific complicity doctrine that covers State assistance to both State and non-State actors committing human rights violations, even if the exact parameters of that doctrine remain unclear.²⁸⁷

The complicity jurisprudence of other human rights bodies is even less clear. For example, an older Human Rights Committee case appeared to use State acquiescence as an attribution rule rather than as a separate type of complicity-based responsibility.²⁸⁸ The Inter-American Commission's and Court's jurisprudence similarly seem to be vacillating between conceptualizing State support to the wrongful conduct of third parties as a failure to prevent violations²⁸⁹ and as a basis for attribution.²⁹⁰ The same goes for the African Commission.²⁹¹ Generally speaking, it is only those treaties dealing with human rights violations that constitute international crimes, such as tor-

286. *Al Nashiri v. Poland*, *supra* note 285, operative paras. 5–6; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 285, operative paras. 5–6; *Al Nashiri v. Romania*, *supra* note 285, operative paras. 5–6; *Abu Zubaydah v. Lithuania*, *supra* note 285, operative paras. 6–7.

287. For an extended analysis, see Milanovic, *State Acquiescence or Connivance*, *supra* note 284. See also Nina Jørgensen, *Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases*, 16 CHINESE JOURNAL OF INTERNATIONAL LAW 11 (2017).

288. U.N. Human Rights Committee, Communication No. 1416/2005, Mohammed Alzery v. Sweden, ¶ 11.6, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

289. See *Velásquez Rodríguez v. Honduras*, *supra* note 275, ¶ 173.

290. See *Mapiripán Massacre v. Colombia*, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, Judgment, ¶¶ 120–23 (Sept. 15, 2005). See further JACKSON, *supra* note 8, at 190–99; LANOVOY, *supra* note 11, at 328.

291. See African Commission on Human and Peoples' Rights, General Comment No. 3 on The African Charter on Human and Peoples' Rights: The Right to Life, (Article 4), ¶ 9 (2015), <https://www.achpr.org/legalinstruments/detail?id=10> [hereinafter African Commission, General Comment No. 3] (“A State can be held responsible for killings by non-State actors if it *approves, supports or acquiesces* in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation and accountability.” (emphasis added)).

ture and enforced disappearance, that specifically mention (individual) complicity,²⁹² but the relevant treaty bodies have not articulated clear doctrines of State complicity.²⁹³

However, *all* human rights bodies have produced voluminous and substantially similar jurisprudence on the IHRL non-refoulement principle, particularly in the context of the right to life and the prohibition of torture and other forms of ill-treatment.²⁹⁴ As explained above, liability in such cases accrues merely from the State transferring an individual to some other State or entity despite a real risk of harm, even if the harm ultimately does not materialize.²⁹⁵ The IHRL non-refoulement rule is thus inchoate and not one of complicity as such, but it is nonetheless relevant. If States are prepared to accept that exposing individuals to the risk of serious harm can in and of itself violate human rights even if the risk does not materialize, then a fortiori they would accept that providing to a third-party assistance that causally contributes to harms also violates human rights.

To conclude, an IHRL-specific (or treaty-specific) complicity rule is supported by emerging (if insufficiently clear) case law.²⁹⁶ That human rights bodies have not yet systematically articulated and applied such a doctrine is best explained by the breadth of the positive duty of prevention, which is long established in their jurisprudence.²⁹⁷ But no reason of principle would

292. For example, Article 1 CAT requires “torture” for the purpose of the Convention to be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” while Article 4 requires States to criminalize torture and any “act by any person which constitutes complicity or participation in torture.” Similarly, Article 2 of the Convention for the Protection of All Persons from Enforced Disappearance requires the offender to be “acting with the authorization, support or acquiescence of the State,” while Article 3 requires States to investigate such conduct and under Article 6 punish anyone who is an “accomplice” to the offense.

293. *See, e.g.*, Committee against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, ¶ 18, U.N. Doc. CAT/C/GC/2 (2008) (referring in one breath to complicity by State officials and their failure to exercise due diligence).

294. *See, e.g.*, *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) 439 (1989); African Commission, General Comment No. 3, *supra* note 291, ¶ 40. *See further* JACKSON, *supra* note 8, at 198–99; EMAN HAMDAN, *THE PRINCIPLE OF NON-REFOULEMENT UNDER THE ECHR AND THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (2016).

295. *See* AUST, *supra* note 6, at 396.

296. *See also* Nottingham Workshop Report, *supra* note 10, at 29.

297. On the other hand, IHRL complicity discourse has been very prominent in an area marked by an absence of “hard” legal obligations, *viz.* *corporate* complicity in human rights

militate against it. On the contrary, such a rule could lead to greater descriptive and conceptual accuracy and hence to greater certainty and predictability. It could enhance human rights bodies' ability to apportion blameworthiness, providing them with the language to express variability in the stigma attached to human rights violations as a midway point on a spectrum that ranges from the "mere" failure to diligently protect an individual to the direct attribution of the violation to the State.²⁹⁸ It could also feed more rigorously into their decision-making on the apportionment of damages and other forms of reparation. Finally, and crucially for our purposes, the extraterritorial scope of application of an IHRL-specific complicity rule (on which more below) that requires States only to refrain from assisting third parties committing human rights violations could be different—and broader—than that of the otherwise far more onerous positive obligation to prevent such violations.

3. Culpability in IHRL Complicity

Once IHRL complicity rule or rules become established, the question would immediately arise of how to define the constituent elements of such rules, in particular the culpability element. Here the analysis can reasonably follow that of the IHL-specific complicity rule.²⁹⁹ First, at a minimum, the culpability element must include all of the modes of fault in the generally applicable Article 16 ASR rule: purpose/direct intent, oblique or indirect intent, and situations of willful blindness but for which the State would be acting with oblique intent. An IHRL culpability rule cannot be stricter than the generally applicable one.

Second, that default culpability element should extend to complicity in all possible human rights violations, regardless of the nature of the right affected or the magnitude of the violation.

Third, complicity in *serious* human rights violations, the level of seriousness depending on either the nature of the right protected or possibly the systematic character of the violation, could warrant a lower, risk-based form of fault.³⁰⁰ We have seen how the IHRL non-refoulement rule already provides for such a risk-based form of fault but only for exposures to a real risk

abuses. See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 195–268 (2006).

298. See JACKSON, *supra* note 8, at 198.

299. See *supra* Sections III.B.4–5.

300. Cf. AUST, *supra* note 6, at 397; Boutin, *supra* note 1, at 541.

of grave harm to the person. This is a good example of how risk-based responsibility goes hand in hand with the severity of the underlying violation. That rule has only exceptionally been applied outside the contexts of the right to life and the prohibition of torture and other forms of ill-treatment. When it has been so applied, the human rights bodies doing so have generally elevated the threshold of violation, for example, requiring risk of a *flagrant* violation of the right to a fair trial.³⁰¹

Culpability on a sliding scale for complicity in IHRL violations that would depend on their severity or systematic character would thus be consistent with prior jurisprudence and would strike a reasonable balance between preventing harm and the risk of inhibiting beneficial cooperation between States (and non-State actors).³⁰² Therefore, a State would be liable if it actively assisted a violation of the right to life, the right to health, or the prohibition of ill-treatment by another State or a non-State actor if the assisting State knew³⁰³ of a real risk that such a violation would happen and that its assistance would be used in it and the violation does, in fact, happen and the assistance does contribute to it.³⁰⁴ A State would similarly be liable

301. See, e.g., *Othman (Abu Qatada) v. United Kingdom*, 2012-I Eur. Ct. H.R. 159, ¶¶ 231–35, 263–67 (holding that a non-refoulement obligation arises under Article 5 ECHR (liberty of person) and Article 6 (fair trial) but only for flagrant breaches of these rights).

302. See also JACKSON, *supra* note 279, at 829. See also Méndez, *supra* note 273, ¶ 52 (importance of the prohibition of torture warrants a different, more lenient, culpability standard than the generally applicable one).

303. See *supra* note 249 on why the test should at least primarily be subjective rather than objective—that is, what the State should have known. For a good example of relevant State officials not knowing (early enough) subjectively of a risk of serious human rights violations by their partner that they should have been aware of objectively, see New Zealand’s engagement with the CIA. OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY, INQUIRY INTO POSSIBLE NEW ZEALAND INTELLIGENCE AND SECURITY AGENCIES’ ENGAGEMENT WITH THE CIA DETENTION AND INTERROGATION PROGRAMME 2001–2009: PUBLIC REPORT, ¶¶ 116–21 (2019), <https://cryptome.org/2019/09/NZ-CIA-Detention-Programme.pdf> [hereinafter NZOIGIS REPORT]. For an argument that the relevant standard should be constructive knowledge, see Méndez, *supra* note 273, ¶ 53, endorsed tentatively in the REPORT OF THE GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS 308 (July 2020), <https://operationburnham.inquiry.govt.nz/inquiry-report/>.

304. See ARMS TRANSFER DECISIONS—A PRACTICAL GUIDE, *supra* note 250, at 10.

if it assisted the systematic violation of other rights, such as the freedom of expression or privacy.³⁰⁵

4. Extraterritorial IHRL Complicity

As things stand, the principal problem regarding the practical utility of an IHRL complicity rule is not its lack of determinacy but its extraterritorial scope. Scenarios in which a State provides assistance to State or non-State actors operating on its own territory, as in the Strasbourg extraordinary rendition and CIA black site cases examined above, are relatively straightforward—the issue is how to label them (as complicity or as a breach of due diligence) and with what consequences for reparation, not whether a violation would exist. The genuinely difficult scenarios are those in which a State facilitates the commission of a human rights violation outside its own territory. Consider, for example, the facts of the *Belhaj* case. In 2004, the UK secret services shared intelligence about Mr. Belhaj with the CIA and Libya, information that led to his arrest by Malaysian officials in Kuala Lumpur, transfer to and arrest by Thai authorities in Bangkok, and subsequent rendition by U.S. authorities to Libya, where he and his pregnant wife were detained and tortured.³⁰⁶ The violations of their human rights were committed in an extended causal chain in which at least five separate States participated. Some of that participation (e.g., arbitrary arrest and detention) would separately constitute human rights violations.

But other contributions, such as the UK act of sharing intelligence, can only be conceptualized as complicity. After prolonged domestic litigation,³⁰⁷ the UK government settled out of court with Mr. Belhaj and his wife and

305. Again, as with IHL, I do not wish to engage further in developing a precise definition of serious violations of IHRL. A single act of torture or unlawful killing would constitute such a violation, whereas a single violation of privacy would not; however, a systematic violation of privacy (e.g., through a mass surveillance program without any safeguards) could be classified as serious. For a much more extended discussion of the notion, see *supra* note 244; CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 7.50–82.

306. See Ian Cobain & Owen Bowcott, *Settlement in Abdel Hakim Belhaj Rendition Case to Be Announced*, THE GUARDIAN (May 9, 2018), <https://www.theguardian.com/world/2018/may/09/settlement-in-abdul-hakim-belhaj-rendition-case-to-be-announced>.

307. For two of the cases in this multifaceted set of proceedings that had actually reached the UK Supreme Court, see *Belhaj & Another v. Straw & Others* [2017] UKSC 3 and *Belhaj & Anor v. DPP* [2018] UKSC 33. Neither deals with issues directly relevant to our discussion.

apologized for its participation in the wrongs they suffered.³⁰⁸ In doing so, however, the UK government admitted no legal liability and framed its (not necessarily unlawful) wrongdoing merely as a failure adequately to mitigate risk: “The UK Government’s actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part.”³⁰⁹

This (one imagines heavily lawyered) statement appears to be using the language of complicity with a risk-based mode of fault but again admits no legal liability. In particular, the UK government did not admit that relevant human rights treaties, such as the CAT and the ECHR, even applied extraterritorially to someone in Mr. Belhaj’s situation—that is, that they cover a situation of State complicity through the sharing of intelligence when the person at risk of harm is located outside the State’s territory.³¹⁰

The extraterritoriality issue is absolutely pivotal for addressing complicity scenarios in multinational military operations. At least from the perspective of powerful, interventionist States, the majority of operations in which States may share intelligence with State and non-State partners will take place outside their borders. Human rights bodies are yet to deal expressly in their case law with such extraterritorial complicity scenarios.³¹¹ Note in that regard that

308. See 640 Parl Deb HC (6th ser.) (2018) col. 926 (UK), <https://hansard.parliament.uk/commons/2018-05-10/debates/B9AD50CD-9D54-41DA-A18B-1526E7658593/BelhajAndBoudcharLitigationUpdate> (statement of UK Attorney General, Jeremy Wright; the government agreed to pay Mr. Belhaj’s wife £500,000 in compensation; Belhaj himself requested no compensation).

309. *Id.*

310. A similar example is the United Kingdom’s involvement in the extraordinary rendition of Binyam Mohamed, which allegedly included the sharing of intelligence and the feeding of questions to the officials of States using torture or other forms of ill-treatment. See further *Binyam Mohamed*, THE RENDITION PROJECT, <https://www.therenditionproject.org.uk/prisoners/binyam-mohamed.html> (last visited Sept. 15, 2021). See also *Binyam Mohamed v. Secretary of State for Foreign Affairs* [2010] EWCA (Civ) 65 (Court of Appeal decision allowing the publication of intelligence material shared by the United States with the United Kingdom confirming that Mohamed was ill-treated).

311. There is to my knowledge only one isolated exception, an obscure admissibility decision of the now-defunct European Commission on Human Rights in *Tugar v. Italy*, which dealt with an Italian sale of land mines to Iraq, and which the Commission found to be inadmissible as the arms sale was causally too far removed from the injury to the applicants. *Tugar v. Italy*, App. No. 22869/93, Eur. Comm. H.R. Dec. (1995), <http://hudoc.echr.coe.int/eng?i=001-2342>. The decision has not been cited in any subsequent judgment or admissibility decision of the European Court. In a similar vein, see the judgment of

the non-refoulement cases are not genuinely extraterritorial (nor, again, are they strictly about a form of complicity). The individual being transferred is actually located within the territory of the transferring State—it is the risk to the individual that is extraterritorial, but the violation is the act of transfer.³¹² The issue, therefore, is how the principles developed in the jurisprudence so far can be applied to scenarios of extraterritorial complicity.

The extant extraterritoriality jurisprudence of human rights bodies has coalesced around two basic tests that revolve around the interpretation of the concept of State jurisdiction in human rights treaties. The treaties are regarded as applying outside a State's territory when, first, the State exercises effective overall control over a portion of the territory of some other State, and second, its agents exercise authority, power, or control over an individual.³¹³ In the context of military operations, in particular, case law is clear that any individual detained by a State outside its territory will be protected by IHRL, but it is less clear when it comes to purely kinetic operations without territorial control (e.g., aerial bombardment or drone strikes). The overall trend in the case law has been towards a more expansive and factual approach, but the jurisprudence (especially that of the European Court) remains internally inconsistent and riven with arbitrary distinctions. The expansive trend has also encountered some resistance among States, especially powerful, interventionist States.³¹⁴

Under current case law, State assistance to State or non-State actors who are operating in a territory controlled by that State, even if it is not the lawful sovereign of that territory, would clearly be covered by the spatial conception of jurisdiction. Thus, for example, if Russia, with the requisite degree of culpability, provided money, weapons, or intelligence to separatists in Abkhazia

the High Court of England and Wales holding that the transfer of a lethal drug from the United Kingdom to the United States, where it would be used for the execution of an individual sentenced to death, does not trigger the applicability of the ECHR. *R (Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills and Another* [2010] EWHC (Admin) 3110 [57].

312. *See Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 68. There are, however, genuine cases of extraterritorial non-refoulement, for example when the individual is located in an embassy, military prison abroad, or a vessel on the high seas of the returning State. *See, e.g., Al-Saadoon v. United Kingdom*, 2010-IV Eur. Ct. H.R. 61; *Hirsi Jamaa v. Italy*, 2012 Eur. Ct. H.R. 97.

313. *See generally Al-Skeini and Others v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99; sources cited in *supra* note 264.

314. *See further* Marko Milanovic, *Surveillance and Cyber Operations*, in RESEARCH HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS (Mark Gibney et al. eds., forthcoming 2021) (manuscript), <https://ssrn.com/abstract=3708440>.

and South Ossetia on the territory of Georgia that causally contributed to human rights violations by these actors, the ECHR would apply if Russia controlled that territory.³¹⁵ Or, if during the conflicts in Iraq and Afghanistan, U.S. or UK authorities provided assistance to non-State actors operating in areas under their control, which was then used to violate human rights, the relevant human rights treaties would have applied.

But in most complicity scenarios, as in the *Bellhaj* example above, the assisting State will *not* control the territory where the victims of human rights violations are located. In such a situation, complicity could be examined under the personal model of jurisdiction—would the act of State assistance be regarded as authority, power, or control over the victim? The problem with that construction is that it is the direct perpetrator of the human rights violation that is exercising authority, power, or control over the victim, even if such concepts are interpreted broadly.³¹⁶ And under the most restrictive jurisprudence on the personal model, that of the European Court, even dropping a bomb on someone would not constitute an act of control; a fortiori, neither could assisting a third party that then drops the bomb.³¹⁷

But the European Court's restrictive position is not necessarily the correct one even for ECHR purposes; it may change in the future, and it has not been emulated by other human rights bodies. An alternative position, one that I have long advocated, is that the personal model inevitably collapses into the propositions that any State act that substantively violates human rights is an exercise of authority, power, or control over the victim and that negative obligations of restraint—including the duty to refrain from assisting others committing violations—should apply without any territorial

315. See *Ukraine v. Russia (re Crimea)*, App. Nos. 20958/14 & 38334/18 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-207622> (holding that Russia was in control of Crimea and that therefore the ECHR applied in the area).

316. See also JACKSON, *supra* note 279, at 821; Nottingham Workshop Report, *supra* note 10, at 24.

317. See *Bankovic*; *supra* note 312; *Georgia v. Russia No. 2*, App. No. 38263/08 (2021) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-207757> (holding that ECHR does not apply to kinetic operations in the course of the active hostilities phase of an international armed conflict). For further discussion, see Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos*, EJIL:TALK! (Jan. 25, 2021), <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>. See also Human Rights Watch Inc & Ors v. The Secretary of State for the Foreign & Commonwealth Office & Ors, [2016] UKIPTrib 15-165-CH (UK Investigatory Powers Tribunal holding that the ECHR does not apply to UK surveillance activities abroad, relying explicitly on a *Bankovic* analogy).

restriction.³¹⁸ An instructive example in that regard is the recent judgment of the Federal Constitutional Court of Germany in which it held that the privacy guarantees of the German Basic Law apply to any surveillance activities by German security services abroad because the organs of the German State are comprehensively bound to respect fundamental rights.³¹⁹ That rationale would be equally valid for an extraterritorial complicity scenario, even with due caution that the Court's decision was based on a domestic instrument that contains no jurisdiction clause.

A further alternative is the functional model of jurisdiction, which conceptualizes it as control not over the victim but over the victim's ability to enjoy their human rights.³²⁰ The most prominent proponent of this doctrine is the Human Rights Committee,³²¹ although a variant thereof has also been endorsed by the Committee on the Rights of the Child.³²² The Human Rights Committee thus held that under the ICCPR:

a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner. States also have obligations under international law

318. See MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES *supra* note 264, at 124–26, 209–22.

319. Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] May 19, 2020, 1 BvR 2835/17, ¶ 87, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.htm (official English translation) [hereinafter 1 BvR 2835/17] (“The fundamental rights of the Basic Law are binding upon the Federal Intelligence Service and the legislator that sets out its powers, irrespective of whether the Federal Intelligence Service is operating within Germany or abroad. The protection afforded by Art. 10(1) and Art. 5(1) second sentence GG also applies to telecommunications surveillance of foreigners in other countries.”).

320. See Nottingham Workshop Report, *supra* note 10, at 25.

321. See General Comment No. 36, *supra* note 275, ¶ 63; U.N. Human Rights Committee, Communication No. 3042/2017, A.S. and Others v. Italy, U.N. Doc. CCPR/C/130/DR/3042/2017 (Jan. 27, 2021) (Italy bound to rescue shipwrecked migrants in the Mediterranean).

322. See U.N. Human Rights Committee, Communications Nos. 79/2019, 109/2019, L.H. et al v. France, U.N. Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (Nov. 2, 2020) (France has obligations vis-à-vis French children in Kurdish-controlled camps in Syria).

not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.³²³

Note how the Committee immediately follows its holding on extraterritoriality with its position on complicity. We can therefore reasonably assume that the Committee thought that State assistance to a third party that directly and reasonably foreseeably contributes to the third party's violation of the right to life would be within the extraterritorial scope of the Covenant—in essence, that the assisting State *also* has power or control over the victim's enjoyment of the right to life, a power that it can exercise by refraining from providing the assistance. There is, in short, very little daylight between this theory and the one I advocated above, that negative duties of restraint should apply without restriction. Some of the Committee's prior case law seems to support that construction.³²⁴

To conclude, the extraterritoriality jurisprudence of human rights bodies is constantly evolving, and is doing so in a more expansive direction. For example, the Inter-American Court of Human Rights has recently ruled that persons affected by emissions of transboundary environmental harms would be within the jurisdiction of the State from which the emissions came.³²⁵ This trend has met with pushback from some States, and the European Court remains an outlier with its more restrictive jurisprudence, especially in situations of international armed conflict.³²⁶ It seems reasonably clear that extraterritorial complicity scenarios would require at least some departure

323. General Comment No. 36, *supra* note 275, ¶ 63.

324. *See* U.N. Human Rights Committee, Communication No. 1539/2006, *Munaf v. Romania*, ¶ 14.2, U.N. Doc. CCPR/C/96/DR/1539/2006 (July 13, 2009) (A State party “may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.”). *See also* Juan E. Méndez, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 28, U.N. Doc. A/70/303 (August 7, 2015) (“States’ negative obligations under the Convention [Against Torture] are not per se spatially limited or territorially defined”).

325. *See* The Environment and Human Rights (Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser A) No. 23 (Nov. 17, 2017).

326. *See Georgia v. Russia No. 2*, *supra* note 317. For more expansive approaches, see, e.g., General Comment No. 36, *supra* note 275; African Commission, General Comment No. 3, *supra* note 291, ¶ 14. *See further* Milanovic, *Surveillance and Cyber Operations*, *supra* note 314.

from the European Court's current jurisprudence, but that is perfectly possible—and again, other human rights bodies have never embraced Strasbourg's restrictiveness.³²⁷

If, in short, a human rights body was faced with a scenario in which State *A* provided assistance to State or non-State actor *B*, knowing that this assistance would facilitate serious human rights violations and this in fact happens, it seems to me substantially more likely than not that the extraterritoriality issue would be resolved in a more expansive direction—at least eventually.³²⁸ Imagine, for instance, a case in which it could be established that a State supplied hacking tools or other assistance to a non-State hacker group that then used these tools to launch a cyber attack against a hospital in another country. Or, consider the currently pending inter-State case between the Netherlands and Ukraine against Russia before the European Court regarding the downing of the MH17 airliner over Ukraine; the Court may well choose to examine the case from the standpoint of Russia's complicity in providing the pro-Russian rebels in Ukraine with an antiaircraft missile system.³²⁹ And even under its current restrictive approach, the Court has found the positive procedural obligation to investigate to be triggered extraterritorially even if the underlying violation was not regarded as within the State's jurisdiction, a position that the Court could easily adapt by analogy to an extraterritorial complicity scenario.³³⁰

D. Risk, Mitigation, and Balancing

The generally applicable complicity rule in Article 16 ASR and the IHL- and IHRL-specific complicity rules all raise two further important questions.

327. See also JACKSON, *supra* note 279, at 822–28.

328. But see Yael Ronen, *International Human Rights Law and Extraterritorial Hostilities*, in THE "LEGAL PLURIVERSE," *supra* note 2, at 198 (arguing against extraterritorial application).

329. Ukraine and the Netherlands v. Russia, App. Nos. 8019/16, 43800/14 & 28525/20 (case pending before the ECHR).

330. In other words, the Court could say that even if the ECHR did not apply to a State's provision of assistance that materially facilitated a human rights violation, it would apply to the State's duty to investigate whether it was so complicit. See *Georgia v. Russia No. 2*, *supra* note 317, ¶¶ 331–32; *Hanan v. Germany*, App. No. 4871/16, ¶¶ 134–45 (2021) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-208279>. See further Marko Milanovic, *Extraterritorial Investigations in Hanan v. Germany: Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia*, EJIL:TALK! (Feb. 26, 2021), <https://www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germany-extraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-against-russia/>.

First, what precisely is the nature and role of the various measures of mitigation that an assisting State might take to reduce the risk that the assistance it provides to its partners, such as intelligence, would be misused to commit a wrongful act? Second, can the risk of harm caused by the assistance be balanced against the benefits of providing the assistance or against the harm potentially caused by interrupting it?

Turning first to mitigation measures, it is important to note that these can take many different forms. The nature of these measures will depend greatly on whether the assistance is being provided in the context of an isolated, “one-off” situation or is part of a more durable relationship of partnership and cooperation. Diplomatic assurances by the recipient,³³¹ coupled with caveats and conditions from the sender of information, as well as confidential bilateral communications to exert pressure and employ monitoring mechanisms, are standard practice.³³² Also common, especially as part of continuing and wide-ranging cooperation arrangements, are capacity-building measures such as the provision of training by the assisting State, including training for compliance with applicable international law.³³³ The U.S. and UK armed forces, for example, have provided such training to Saudi Arabia in order to promote its compliance with international humanitarian law during the conflict in Yemen.³³⁴ But the indispensable first mitigation measure actually seems to be for the assisting State to adequately train *its own officials*

331. *See, e.g.*, Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, ¶ 189 (2012) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-108629> (assurances must be specific rather than general and vague; must be given by a person vested with sufficient authority; must take into account the issuing State’s record of compliance; should be mechanisms of verification).

332. *See further* NZOIGIS REPORT, *supra* note 303, ¶¶ 223–39; Howard, *supra* note 1, at 46–47.

333. *See further* CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 7.88–7.89; Moynihan, *supra* note 11, at 41–44; Finucane, *supra* note 204, at 425–30; Wiesener, *supra* note 211, at 49–50.

334. *See* Saudi Arabia: Overseas Aid, Ministerial Answer to a Written Question in Parliament (Oct. 19, 2020), <https://questions-statements.parliament.uk/written-questions/detail/2020-10-13/102833>; Dan Sabbagh, *UK Spent £2.4m to Help Saudi Arabia Comply with International Law*, THE GUARDIAN (Jan. 13, 2021), <https://www.theguardian.com/world/2021/jan/13/uk-spent-24m-to-help-saudi-arabia-comply-with-international-law>; Larry Lewis, *Promoting Civilian Protection during Security Assistance: Learning from Yemen* (CNA Research Memorandum, 2019), https://www.cna.org/CNA_files/PDF/IRM-2019-U-019749-Final.pdf.

(intelligence, military or civilian, at all levels) who are making relevant decisions regarding the appreciation of both legal and factual risks.³³⁵ Note, however, that some forms of mitigation, such as the direct involvement in the partner's targeting decisions for the ostensible purpose of reducing civilian casualties, may actually escalate into forms of assistance to the partner's wrongful acts or even amount to the joint commission of such acts.³³⁶

With all of these mitigation measures, which again are frequently employed, the key question will always be effectiveness—do they actually work in practice, in their specific contexts?³³⁷ This is a question of fact. There are many instances in which such measures appear to have been far from effective—none more so than continuing apparent violations of IHL by Saudi-led coalition forces in Yemen,³³⁸ undoubtedly assisted as they are by various forms of aid by third States, including the United States and the United Kingdom, violations that the mitigation measures these States have implemented

335. See NZOIGIS REPORT, *supra* note 303, ¶ 85 (“[I]t is necessary and appropriate for civilians to understand the military processes accompanying their work and its legal framework, together with their responsibilities within it. Without this knowledge they are at a disadvantage in terms of understanding and evaluating the processes they were part of. It is difficult to question something that you do not adequately understand. The omission of adequate and consistent New Zealand LOAC [Law of Armed Conflict] training and/or legal briefings constituted a significant gap in the preparation of those deployed to Afghanistan, and those seconded to partner agencies in support of their military efforts in Afghanistan.”). See also *id.* ¶¶ 110, 333.

336. See Finucane, *supra* note 204, at 430; Wiesener, *supra* note 211, at 50. See also LANOVOY, *supra* note 11, at 157–58. Note that U.S. and UK officials have denied any direct involvement in Saudi targeting decisions. See Phil Stewart, *Exclusive: U.S. Withdraws Staff from Saudi Arabia Dedicated to Yemen Planning*, REUTERS, Aug. 19, 2016, <https://www.reuters.com/article/us-yemen-security-usa-saudi-arabia-idUSKCN10U1TL> (“At no point did U.S. military personnel provide direct or implicit approval of target selection or prosecution”); Answer to a Question in Parliament by The Minister of State, Ministry of Defence (Mar. 7, 2019), <https://questions-statements.parliament.uk/written-questions/detail/2019-03-07/229818> (“The RAF [Royal Air Force] personnel in the Saudi Air Operations Centre are liaison officers, not ‘targeteers.’ They play no part in the targeting processes of the Saudi Arabian Armed Forces.”). See also Nottingham Workshop Report, *supra* note 10, at 10.

337. For an extensive discussion of several case studies in that regard, see Erica L. Gaston, *Regulating Irregular Actors: Can Due Diligence Checks Mitigate the Risks of Working with Non-State and Substate Forces?* (Working Paper 608, 2021), https://cdn.odi.org/media/documents/CSAG_Regulating_irregular_actors_WEB.pdf.

338. See, e.g., Report of the Group of Eminent International and Regional Experts on Yemen, *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020).

have not stopped.³³⁹ But more important than the factual question of effectiveness for my analysis here is the *legal* question of how such measures should be conceptualized.

The answer to that question is reasonably clear. Mitigation measures are relevant for the application of the fault and contribution elements of a complicity rule. As for the latter, the effect of mitigation measures could be such that the assistance provided does *not*, in fact, substantially or materially contribute to the commission of the wrongful act. If mitigation is effective in this sense, the wrongful act may still happen, but it will not be facilitated by the aid provided, and the assisting State will therefore avoid responsibility. But such cases will probably be rare, and the analysis will be fact-dependent. It is primarily with regard to culpability that mitigation measures play a central role; this role will depend on how, precisely, the fault element is defined.

First, if the fault element is one of purpose/direct intent to facilitate, mitigation measures undertaken by an assisting State may provide evidence to some kind of external *ex post facto* reviewer, such as a court,³⁴⁰ that the assisting State did not purposely facilitate the wrong. This determination will necessarily require an examination of whether the mitigation measures were simply a sham that the assisting State engaged in to disguise its ulterior purpose. The eventual ineffectiveness of these measures does not, however, *ipso facto* prove that they were such.

Second, if the culpability element is one of oblique/indirect intent, which requires practical certainty that the assisted party will commit a wrongful act and will use the assistance provided to do so, mitigation measures can lower the probabilistic assessment of the future conduct of the assisted party below

339. For an extensive discussion, see Hursh, *supra* note 211; ÉRIC DAVID ET AL., OPINION ON THE LEGALITY OF ARMS TRANSFERS TO SAUDI ARABIA, THE UNITED ARAB EMIRATES AND OTHER MEMBERS OF THE COALITION MILITARILY INVOLVED IN YEMEN (2019), https://ipisresearch.be/wp-content/uploads/2019/12/191209-Yemen-EN_WEB-2.pdf; Oona A. Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARVARD NATIONAL SECURITY JOURNAL 1 (2019); Arron Merat, “The Saudis Couldn’t Do It Without Us”: The UK’s True Role in Yemen’s Deadly War, THE GUARDIAN (June 18, 2019), <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>; Lewis, *supra* note 334, at 13–14 (Saudi coalition’s risk of civilian casualties per operation has increased over time), 23 (generalized training as to IHL compliance often ineffective); Diane Bernabei & Beth Van Schaack, *State Dept. Inspector General Report: A Troubling Message on Arms Sales*, JUST SECURITY (Aug. 26, 2020), <https://www.justsecurity.org/72188/state-dept-inspector-general-linick-saudi-arms-sales/>.

340. See further *infra* Part IV.

a practical certainty threshold. Internally, from the perspective of the relevant decision makers within the assisting State, they could assess that with adequate mitigation, there would no longer be practical certainty that the assisted State or non-State actor would engage in the wrongful conduct and misuse the aid provided.³⁴¹ Similarly, from the external perspective of reviewing how the assisting State made its decisions, the reviewing person or body can determine that the mitigation measures sufficiently lowered the probability of the wrongful conduct occurring and its facilitation by the aid provided, such that the assisting State did not subjectively act with practical certainty. This determination will require an assessment of how effective the mitigation measures were in practice, especially in the context of a continuing relationship. However, the mere implementation of mitigation measures is in itself sufficient evidence that the State actually did subjectively appreciate a risk of violations by its partner to some degree of possibility.³⁴²

Third, if the culpability element is one of willful blindness but for which oblique intent would have existed, the question to be decided would be whether the assisting State acted with the purpose of avoiding relevant information. Genuine mitigation measures could then be evidence that it did not act with such purpose.

Fourth, if the fault element is one of appreciation of risk below the level of practical certainty, however precisely defined, then (as with indirect intent above) mitigation measures could lower the subjective probabilistic assessment of the future conduct of the assisted party below the prescribed threshold of risk.³⁴³ In other words, if the threshold was one of likelihood, mitigation might mean that the wrong was perceived by the assisting State as no longer likely; if it was one of a real or substantial risk, mitigation might mean that the risk of the wrong occurring was no longer real or substantial. Again, the key question would be one of the effectiveness of the measures implemented in reducing the risk, as subjectively perceived by the officials of the assisting State. If, because of mitigation, the risk (at the level prescribed) is no longer there, the State can continue providing its assistance. If, however,

341. See also Nottingham Workshop Report, *supra* note 10, at 19.

342. See Hursh, *supra* note 211, at 144–45.

343. See NZOIGIS REPORT, *supra* note 303, ¶ 242 (“Only after identifying likely or actual circumstances, assessing the risk, and, if necessary, considering options for mitigation, should a decision be taken on whether to proceed with the intelligence exchange or proposed assistance (e.g., at a detainee interview). If, despite taking appropriate steps in mitigation, there remains a real risk of torture, then best practice dictates that the exchange or cooperation should not proceed. The information sharing or participation in a detainee interview should be suspended, deferred or cease altogether.”).

mitigation measures are unable to lower the appreciated risk below the proscribed threshold, the State must discontinue the assistance, such as the provision of intelligence.³⁴⁴

In sum, mitigation is tied inextricably with the fault element of the complicity rule, and its exact effects will also depend on whether the potential fault of the assisting State is being assessed *ex ante*, before it provides its assistance, or *ex post*, after it has already provided the assistance that did, in fact, facilitate the wrongful act of its partner.³⁴⁵ In the context of a continuing relationship both kinds of assessments will be made repeatedly, for each new instance of facilitation.

A different question, however, is whether the practical certainty or a risk below certainty that the aid will facilitate a wrongful act can, once established, be *balanced* against other considerations—that is, against the possible harms that could arise from the suspension of assistance or the possible benefits that the State could obtain from continuing the assistance. Put differently, the question would be whether continuing with the assistance despite the certainty or risk of harm that mitigation measures are unable to adequately lower could ever be *justified*, for example, on the basis that the assisting State would earn money from arms sales or would enhance the overall security and welfare of its people by assisting its partner.

This type of justifiability problem is frequent, explicitly or implicitly, in comparative practice when dealing with such modes of culpability as recklessness or *dolus eventualis*. The Model Penal Code, for example, defines recklessness as the conscious disregard of “a substantial and unjustifiable risk . . . that involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”³⁴⁶ This clearly calls for some kind of value judgment as to whether the risk taking was *objectively* justifiable or reasonable³⁴⁷ (a task that in common law systems will generally be performed by lay juries) and, in turn, leads to all sorts of fundamental moral problems. Consider, for example, the actions of a surgeon who is performing an operation to separate a pair of conjoined twins. If the operation is not performed, both twins will certainly die. If it is performed, only one

344. See also de Wet, *supra* note 21, at 311–12.

345. See further *infra* Part IV.

346. MPC, *supra* note 69, § 2.02(2)(c).

347. See SIMESTER ET AL., *supra* note 51, at 148 (“[In the recklessness context the] question of what is reasonable is an objective question, and it is not an issue of whether the defendant thought the risk was reasonable[.] . . . defendants cannot be permitted to judge what is right for themselves.”).

has a chance of survival; the other will certainly die. Is the surgeon *intending* (in a legal sense) to kill the latter sibling by performing the operation because she is practically certain that this twin will die and reconciles herself to this inevitability in order to save the other? Is her action intentional but nonetheless justified by circumstances of necessity?—and so forth.³⁴⁸ Or, in a different scenario in which the surgeon is operating with the knowledge that there is a very high risk that the person would die during surgery because of bleeding, but also that there is no other way of saving their life beyond the short term, is the surgeon consciously disregarding a substantial risk that the patient would die—that is, is she acting recklessly in potentially depriving the patient of the remaining days, weeks, or months of life?³⁴⁹ The same scenarios could also be postulated from a complicity perspective—for example, that of a nurse assisting the surgeon.

In the philosophical literature, such hard cases expose the fault lines between different approaches to ethics. A consequentialist approach (e.g., utilitarianism) will look at the morality of the action on the basis of the consequences it produces—for example, whether more lives will be saved in the process, or suffering minimized. A deontological approach will look at whether harms are intended either as ends in themselves or as means to an end or are mere side effects and may employ such notions as the doctrine of double effect.³⁵⁰ The moral intuitions of ordinary people will be all over the place with regard to the different permutations of the hard cases, which the philosophical literature continues to examine to this day.

In the criminal law context, such cases are normally dealt with either by objective assessments of whether risk taking was unreasonable (i.e., during the assessment of the existence of the elements of the offense) or through

348. See, e.g., *A (Children)* [2000] EWCA (Civ) 254. For a short account of the case, in which two of the appellate judges relied on necessity and one judge on arguments about intention in authorizing the procedure, see Catherine Baksi, *Landmarks in Law: The Moral Dilemma of Separating Conjoined Twins*, THE GUARDIAN (Feb. 1, 2021), <https://www.theguardian.com/law/2021/feb/01/landmarks-in-law-the-moral-dilemma-of-separating-conjoined-twins>. The judge presiding over the case said that it was the “most difficult decision I had to make in my 24 years on the bench.” *Id.* See further Henry Brooke, Address at the Seventh Worldwide Judiciary Conference, Washington, D.C.: A Life and Death Issue in English Law (Oct. 12, 2015), <https://sirhenrybrooke.me/2015/10/12/my-talk-about-the-conjoined-twins-case/> (written by one of the other judges in the Court of Appeal).

349. See DUBBER, *supra* note 67, at 60. See also SIMESTER ET AL., *supra* note 51, at 144, 149.

350. See further Alison McIntyre, *Doctrine of Double Effect*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed, 2019), <https://plato.stanford.edu/archives/spr2019/entries/double-effect/>; Ohlin, *supra* note 95, at 116–23.

the prism of justifications and excuses.³⁵¹ To take a good example that has not aged terribly well:

Weigend raises the question whether a person, who has a cold, repeatedly sneezes in a bus, being aware there may be a 95% chance of infecting another passenger with the flu virus, is reckless as to the bodily injury. As Spencer pointed out, “it is not reckless for a person who is suffering from an illness that is curable and minor, like a cold, or ordinary flu, or even mumps or measles, to run the risk of transmitting it to others if it would seriously disrupt the affairs of himself or other people to avoid it.”³⁵²

What a difference a pandemic makes! In a new social context, with a more serious and disruptive disease, what *objectively* looked like trivial harms to others balanced out by substantial disruption to the infected individual could today very well be regarded as reckless behavior. But the point I hope is clear—some forms of risk taking will be regarded as reasonable and justifiable, depending on a normative assessment balancing competing harms and interests. A surgeon attempting to save somebody’s life despite a risk of bleeding would not generally be regarded as reckless. A driver on the highway exceeding the speed limit in order to rush a person in distress to the hospital might also not be regarded as acting recklessly, and so on.³⁵³ Even in conditions of normalcy, people are not considered to be acting recklessly when they drive their car, even though we all appreciate that there is always a measure of risk in driving a car; the social utility of car-driving is regarded as justifying the risk.³⁵⁴

In international law, we may also address such cases either through explicit or implicit balancing rules within particular sub-regimes or through the generally applicable circumstances precluding wrongfulness in the law of State responsibility. Thus, for example, in IHL we accept that civilians may be justifiably killed if the principles of distinction, precautions, and proportionality are complied with.³⁵⁵ In IHRL, we may also permit certain deaths of innocents as unwanted side effects in operations to save many more lives,

351. See SIMESTER ET AL., *supra* note 51, at 683–93; JACKSON, *supra* note 8, at 49.

352. BLOMSMA, *supra* note 95, at 138 (citing Weigend and Spencer).

353. See *id.* at 138–39.

354. This assessment is contingent—the societal assessment of the utility of the practice may well evolve. If, for example, computer-driven cars in time become demonstrably safer than human-driven ones, a driver taking control over the vehicle may eventually be regarded as reckless.

355. See CUSTOMARY IHL STUDY, *supra* note 202, rr. 7, 14–16.

for instance, those of hostages held by terrorists, but again only if all feasible measures are taken to minimize the loss of human life (including among the terrorists).³⁵⁶ Even in the context of absolute rules, such as the prohibition of torture, implicit balancing may be at play at the stage of defining the categorically prohibited conduct—we would therefore say that a police officer shooting a detainee in the leg during an interrogation would be committing torture, but would not think the same if the officer shot the detainee to prevent him from escaping arrest.

For our purposes, the question is whether some form of balancing is admissible if a State provides assistance to its partner while appreciating certainty or some level of probability that the assistance will be used to commit a wrong but is acting in order to prevent some other harm from materializing. Think, for example, of U.S. and UK authorities sharing intelligence with militias in Iraq and Syria engaged in combat against the Islamic State while being either practically certain or appreciating a substantial risk that this intelligence would be used to capture and torture detained ISIS fighters.³⁵⁷ The United States and the United Kingdom are acting not with the purpose of facilitating the torture but of defeating ISIS and thus protecting the lives of their soldiers and their allies, their own peoples, and the peoples of Iraq and Syria. If the United States and the United Kingdom continue sharing the intelligence, it is possible, likely, or inevitable that some captives will be tortured and that the intelligence will facilitate the torture. If they stop sharing the intelligence, it is possible or likely that the war effort against ISIS will be less effective and that more innocents may die as a result. Or, to go back to the Saudi intervention in Yemen, the United States and the United Kingdom could argue that their provision of weapons and intelligence to the Saudis reduced the number of violations that would have happened in any event,

356. *Cf. Finogenov and others v. Russia*, 2011-VI Eur. Ct. H.R. 365 (Dealing with the siege of a Moscow theater in which hundreds were taken hostage by terrorists. The European Court ruling that there was no violation of the right to life on account of Russian security forces pumping the theater with an anesthetic gas, resulting in the deaths of many hostages, but that there was a violation due to inadequate medical relief efforts.); *Tagayeva & Others v. Russia*, App. No. 26562/0 (2017) (EctHR), <http://hudoc.echr.coe.int/eng?i=001-172660> (Russia responsible for poorly planned rescue operation during the Beslan school siege, which, for example, included the use of flamethrowers by the security forces, resulting in the deaths of hostages).

357. *See, e.g., Margaret Coker, U.S. Takes a Risk: Old Iraqi Enemies Are Now Allies*, NEW YORK TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/world/middleeast/iraq-iran-election-enemies.html> (reporting on U.S. sharing of intelligence with Iraqi forces and Shiite militias).

and that the suspension of assistance could lead to more and not less harm to the Yemeni civilian population.

When confronting such a scenario, the one thing we can confidently say is that neither IHL nor IHRL allow for purely utilitarian balancing across the board, even if they allow for balancing within the confines of specific rules. Allowing States to rely on some kind of “lesser evil” reasoning in all contexts would be a recipe for chaos, legal and moral. For example, even if we accepted the premise that in a given conflict respecting the targeting rules of IHL would prolong a war and cost more lives in the long run, we would still insist that the rules of IHL be respected. That said, there is very little existing authority on whether the various complicity rules of international law, general or specific, should internalize some method of balancing.

The European Court confronted this question in the somewhat analogous non-refoulement context, and its answer was negative—once a real risk of torture or other ill-treatment of a transferee to some other State is established, the transfer is categorically prohibited. Countervailing considerations, such as that the transferee might be a dangerous terrorist and that by not proceeding with the transfer the State increases the risk of harm to its own population, have been disregarded as legally (and morally) irrelevant.³⁵⁸ In short, when faced with the risk of serious harm to the life or bodily integrity of a person, the Court adopted a categorical, deontologically grounded prohibition against the exposure to such risk. By contrast, when faced with that same basic issue, the Supreme Court of Canada, expressly using the language of balancing, held that under Canadian constitutional law the State could deport an individual despite a serious risk of torture, but only in (undefined) exceptional circumstances, bearing in mind that the prohibition of deportation was only *virtually* categorical.³⁵⁹ Indeed, in refugee law, where the non-refoulement principle was first developed, the duty not to deport to harm is expressly qualified.³⁶⁰

358. See *Chahal v. the United Kingdom*, App. No. 22414/93, ¶¶ 79–81 (1996) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-58004>; *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 2007, ¶¶ 137–41. See further Daniel Moeckli, *Saadi v. Italy: The Rules of the Game Have Not Changed*, 8 HUMAN RIGHTS LAW REVIEW 534 (2008).

359. See *Suresh v. Canada*, 2002 SCC 1, ¶¶ 77–78. The Court so ruled despite concluding that international law would not permit deportation in such circumstances. *Id.* ¶¶ 71–75.

360. See Article 33(2) of the Refugee Convention, providing that the benefit of non-refoulement may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been con-

Another useful example is Article 7 ATT, whose use of the notion of an “overriding risk” of harm arguably implies balancing.³⁶¹ The meaning of that provision appears to be that a State can proceed with an arms transfer if, after an incommensurable calculus of some kind, the State finds that the possible positive consequences for peace and security outweigh the possible negative ones. Yet, although the choice of the term “overriding risk” was deliberate, some States have interpreted it as *not* implying balancing at all but solely as a synonym for a criterion of non-negligible possibilities, such as substantial risk.³⁶² Note, however, that even if the balancing conception of Article 7 is regarded as correct, the inchoate wrong at issue is the authorization of the arms transfer as such. In our complicity scenarios by contrast, responsibility arises only if the aid provided actually contributed to a serious violation of IHL or IHRL that was in fact committed. That is, the harmful consequences of the aid materialized and are serious.

The balancing question is not obvious. Here we might again resort to a sliding-scale type of rule, depending on both the nature of the fault element and the importance of the interests at stake. If the fault element is one of purpose and a State is found to have acted with the purpose of facilitating the violation of *any* rule of international law, it would go against the very logic of a rule-based order to allow for some kind of balancing in complicity if such balancing is irrelevant for the actual commission of the wrong.³⁶³

If, however, the assisting State’s fault is indirect intent (including situations of willful blindness) or based on a subjective or objective appreciation of risk, the balancing problem is more complicated. Conceivably, for example, a State could be practically certain that the assistance it provided would assist the partner in a violation of the human right to privacy of specific individuals yet provide the assistance for the purpose of protecting the lives of others. The diversity of possible interests affected is such that it would, in my view, be difficult to accommodate any balancing within complicity rules as such. Rather, the assisting State could potentially rely on a form of justification internal to a specific regime, such as IHL or IHRL, with regard, for example, to necessary and proportionate interferences with privacy. Or, the

victed by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” Convention Relating to the Status of Refugees art. 33(2), July 28, 1951, 189 U.N.T.S. 137.

361. See CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 7.17, 7.20, 7.90–95.

362. *Id.* ¶¶ 7.92–94. See also David et al., *supra* note 339, at 89–90 (using an exclusively probabilistic approach).

363. See SIMESTER ET AL., *supra* note 51, at 156.

State could invoke a circumstance precluding wrongfulness, such as distress³⁶⁴ or necessity³⁶⁵ under general international law, subject to the very strict conditions of these rules,³⁶⁶ and subject to the State's potential liability for violating some other applicable duty, such as a positive obligation of prevention.

If we are dealing with purely risk-based forms of fault, the assisting State can find itself in the position of gambling on which of two equally unappealing outcomes will occur. Its assistance may or may not facilitate the wrongful act, and its suspension of assistance may or may not lead to other bad consequences down the line. As argued above, in my view, a risk-based form of fault is most appropriate for serious violations of IHL and IHRL.³⁶⁷ The moral gravity of these violations is such that either a balancing argument should be categorically impermissible, as in the IHRL non-refoulement context, or the burden of making such an argument should be exceptionally high. Exposing the population of some other country to the risk of war crimes certainly cannot be justified simply because the assisting State wanted to make money by selling weapons.³⁶⁸ The more difficult example would, of

364. See ILC ASR, *supra* note 4, art. 24 (only way of saving life of persons in the care of the State, admissible only if the wrongful act does not create a comparable or greater peril).

365. See *id.* art. 25 (safeguarding an essential interest of the State invoking necessity from a grave and imminent peril, without harming other such interests, inadmissible for rules that already incorporate necessity criteria of their own, as with military necessity in IHL). See *id.* art. 25 cmt. ¶ 20.

366. See generally CRAWFORD, *supra* note 9, at 274–324. Note that Article 25(2)(a) ASR does not permit resort to necessity when such reliance is implicitly or explicitly excluded by the international obligation in question, as is the case with many rules of IHL. Similarly, Article 26 ASR does not allow for the invocation of circumstances precluding wrongfulness regarding breaches of *jus cogens*. The International Law Commission reiterated this position in its 2019 Draft Conclusions on peremptory norms (*jus cogens*), which it adopted on first reading. International Law Commission, Report on the Work of Its Seventy-first Session, U.N. Doc. A/74/10, at 145, conclusion 18 (2019). See further Helmut Aust, *Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) 227 (Dire Tladi ed., 2021). This however does not solve the balancing problem for our purposes even for complicity in serious violations of IHL and IHRL. That the prohibition of some conduct, such as torture, is *jus cogens*, does not necessarily entail that the prohibition on State complicity in that conduct, however defined and under whatever general or special rule, is also *jus cogens*—it may but need not be.

367. See *supra* Sections III.B.5, III.C.3.

368. Cf. Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008, art. 10, 2008 O.J. (L 355) 99 (Providing that “[w]hile Member States, where appropriate,

course, be the one in which the assisting State is providing its assistance, such as intelligence, with the aim of saving the lives of others.³⁶⁹

To conclude, while assisting States may find themselves choosing between “lesser evils” in their relationships with their partners, including with regard to the provision of intelligence, it is difficult to accommodate such concerns by introducing a balancing element directly into complicity rules. (To be clear, this discussion assumes that the assisting State has taken whatever mitigation measures were at its disposal, but that these measures are assessed as ineffective so that the fault element of the complicity rule cannot be negated on the basis of lowered probability—the issue is rather whether the State can balance the irreducible real risk of harm that it appreciates from continuing the assistance against the harm it appreciates from stopping the assistance.) The potential for States to rely on a balancing exception abusively would entirely swallow up the rule. Such considerations may, however, be exceptionally accommodated by the justificatory logic of regime-specific rules or by generally accepted circumstances precluding wrongfulness.³⁷⁰ Even if a balancing argument regarding assistance to serious violations of IHL and IHRL were not categorically inadmissible, the space for making

may also take into account the effect of proposed [arms] exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria [regarding a clear risk of serious violations of IHL and IHRL].”).

369. *Cf. Elgizouli v. Secretary of State for the Home Department* [2020] UKSC 10 [hereinafter *Elgizouli v. Home Secretary*]. UK Supreme Court finding that the United Kingdom’s transfer of an individual’s personal data to the United States, which exposed the individual to the risk of the death penalty, was in violation of applicable data protection law; on the balancing issue discussed above note Lady Hale’s *obiter* view (*id.* ¶ 15) that the transfer of data would have been allowed “if it was urgently necessary to save life or prevent an imminent crime.” *See also id.* ¶ 233 (per Lord Hodge):

It is not difficult to envisage circumstances in which the Secretary of State might want to provide intelligence to the government of another country to avert serious loss of life in a planned terrorist attack and that intelligence might expose a person in the custody of the foreign state to criminal charges which may carry the death penalty. The United Kingdom’s international obligation to protect the right to life under article 2 of the European Convention on Human Rights, which section 1 of the 1998 Act introduced into our domestic laws, would, it appears to me, require the Secretary of State to balance the necessity of providing information to save lives against the possibility of facilitating the imposition of the death penalty on that person.

370. In a similar vein, but with a focus on criminal complicity, see Miles Jackson, *Virtuous Accomplices in International Criminal Law*, 68 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 817 (2019). For defenses to complicity in the private law context, see DAVIES, *supra* note 102, at 222–54.

such an argument would appear to be small. In particular, the assisting State could never offset a causally proximate risk of the assistance facilitating a serious violation of IHL or IHRL by invoking a causally distant and inherently more speculative assessment that maintaining cooperation would save more lives in the long run. Nor could balancing ever be acceptable if the assisting State did not first employ all feasible mitigation measures that could have reduced the probability and the magnitude of the two competing harms.

E. Conclusion

The generally applicable complicity rule in Article 16 ASR has by now achieved acceptance from States, despite its lack of determinacy. I have argued here that debates about its fault element have too often been stuck in a false dilemma of intent versus knowledge. I have also argued that culpability in complicity should better be thought of as a set of different options than as a singular requirement. First, an assisting State would be sufficiently culpable if it acted with the purpose/direct intent of facilitating the wrongful act of another State despite any deficits in knowledge—that is, even if it thought that the wrongful act was unlikely to be committed or that its aid would not be used to commit it. Second, an assisting State would be sufficiently culpable if it acted with oblique/indirect intent—that is, if it was practically certain that the assisted State would commit the wrongful act and would use the aid provided to do so and chose to provide the assistance nonetheless. Third, an assisting State would also be culpable if it acted with willful blindness, with the purpose of avoiding acquiring information but for which it would have been acting with oblique intent.

This tripartite fault element is workable, normatively coherent, and does not pose a risk of excessively inhibiting potentially beneficial inter-State cooperation. The culpability element of Article 16 ASR also provides a normative baseline for other, primary rules prohibiting complicity, which would be specific and tailored to sub-regimes of international law, such as IHL and IHRL, the two regimes most relevant to issues of intelligence sharing in multinational military operations. In principle, the culpability elements of other complicity rules that protect particularly compelling interests can only be identical to or lower, but not higher, than that of Article 16.

The constituent elements of regime-specific complicity rules will always depend on the architecture of State obligations within that regime, in particular on the nature and scope of other negative and positive obligations. The

existence of negative duties that impose inchoate liability for exposing third parties to the risk of harm or of wide-ranging positive duties of prevention will lessen the need for regime-specific complicity rules or for their variation from Article 16 ASR. For example, in the *Bosnian Genocide* case the ICJ simply imported the requirements of Article 16 into the Genocide Convention-specific complicity rule. It had little need to do otherwise since it interpreted the positive duty to prevent genocide in an exceptionally broad way and found Serbia liable for failing to comply with that duty.

But even in such regimes, as in human rights law, regime-specific complicity rules can be useful. First, they can be helpful for the purposes of fair labeling and the assigning of blameworthiness—a State that was complicit in genocide is more culpable than one that has merely failed to prevent it, a distinction that may also have consequences for the scope of its responsibility, as to, for example, reparations.³⁷¹ This is evident, for example, from the European Court’s “acquiescence or connivance” cases, especially those on extraordinary rendition.³⁷² Second, unlike the generally applicable rule in Article 16, regime-specific rules can cover State assistance to non-State actors, such as armed groups or corporations. Third, regime-specific complicity rules can have a wider scope of application than even regime-specific positive obligations. For example, the negative duty to refrain from assisting violations of IHRL is more likely than the positive duty of prevention to be regarded as applying extraterritorially.³⁷³ Fourth, negative obligations of restraint under regime-specific complicity rules may be less contested than more onerous positive duties with regard to the conduct of third parties; this is the case with IHL, where States are much more likely to accept the proposition that they are restrained from assisting other actors from committing serious violations of IHL than that they are bound to prevent such actors from committing such violations regardless of their own involvement.³⁷⁴

Finally, special complicity rules can use broader, risk-based forms of culpability when very important interests are affected, in particular regarding

371. Thus, for example, in *Bosnian Genocide* the Court held that its own finding that Serbia violated the positive duty to prevent genocide constituted sufficient satisfaction for Bosnia and that no further reparation was due. That certainly would not have been the case had the Court found Serbia to have been complicit in the Srebrenica genocide. See further Milanovic, *State Responsibility for Genocide*, *supra* note 172.

372. See *supra* Section III.C.2.

373. See *supra* Section III.C.4.

374. See *supra* Section III.B.1.

the basic protections due to the human person. In cases of assistance to serious violations of IHL and IHRL, it is appropriate to resort to modes of liability akin to *dolus eventualis* or recklessness, where a State is aware of a risk that the assisted party would commit such violations that the assistance would facilitate but consciously disregards the risk and chooses to provide the assistance nonetheless. The risk threshold could be calibrated differently—for example, one of likelihood, or a substantial risk, or a real risk—depending on the context and the interests at stake. In the human rights context in particular, it is perfectly possible for different human rights bodies to come up with different risk thresholds. But the precise formulation of the risk threshold is, I would submit, less important in practice than is the acceptance of the general idea. Responsibility grounded in conscious risk taking, pursuant, say, to a culpability standard such as recklessness, is so commonplace in municipal legal systems in both civil and criminal contexts that it is difficult to see what a principled objection to it for complicity in serious violations of IHL and IHRL would normatively be. States already accept a cognate of such responsibility in the ATT context, for example. To reiterate, the assisting State is responsible in this risk-taking scenario only if the risk actually materializes—that is, the assisted party actually commits the wrongful act and uses the aid provided to do so.

It would be more problematic, however, to base a State's responsibility for complicity in its *negligence* in acquiring or analyzing relevant information—that is, in some kind of “should have known,” constructive knowledge standard. Such a standard could, in principle, apply not just to constructive knowledge to the level of practical certainty—the State *could have had* actual knowledge but did not because it failed to make the necessary inquiries. It could apply to some level of risk—the State did not know but should have known that there was a likelihood/a substantial risk/a real risk of the harmful result occurring; that is, the risk was not foreseen but was foreseeable. As explained above, the problem with this approach is that it assumes a duty of diligence in acquiring and processing information. Such a duty simply cannot apply across the board to all possible violations of international law, although it may be appropriate in specific settings.³⁷⁵ Even there, however, it may be more appropriate for positive duties of prevention than for negative rules on complicity, because the latter connote a higher degree of blameworthiness. For example, in the *Bosnian Genocide* case, the ICJ absolved Serbia of responsibility for the Srebrenica genocide on the basis that it was not conclusively

375. *But see* LANOVOY, *supra* note 11, at 339–40.

established that Serbian authorities “supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.”³⁷⁶ By contrast, it found Serbia responsible for failing to comply with the positive obligation to prevent genocide, which arose once Serbia “was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed,”³⁷⁷ the ICJ employing both a risk-based form of culpability *and* a constructive knowledge standard as to that risk. On the facts, however, the Court found that Serbia *did* subjectively know about the serious risk. It did not rely on the constructive knowledge prong of the test—that is, Serbia’s possible negligence in appreciating the existence of a serious risk.³⁷⁸ Even so, a more relaxed constructive knowledge standard may be appropriate precisely because a State that has failed to prevent genocide is to be regarded as less blameworthy than a State actively complicit in it.³⁷⁹

Both IHL and IHRL can comfortably be interpreted as containing regime-specific complicity rules, with risk-based forms of fault for complicity in serious violations. Thus, for example, Serbia may not have been complicit in genocide by providing assistance (including money, weapons, and intelligence) to the Bosnian Serbs, but it *was* complicit in serious violations of IHL and IHRL (and not just in Srebrenica) because it was fully aware of the pattern of previous violations and thus of the serious risk (or even certainty) that the Bosnian Serbs would use the aid provided to commit such violations and nonetheless chose to continue providing it. In short, by contributing to these violations while consciously disregarding the risk, Serbia failed to comply with its duty to respect and ensure respect for IHL and its duty to respect IHRL—the greater strictness of the culpability element of the complicity rule in the Genocide Convention could arguably be justified by fair-labelling concerns, due to the greater comparative gravity of the underlying violation and its criminal character. Also, while the extraterritoriality problem specific to

376. *Bosnian Genocide*, *supra* note 7, ¶ 423. This was at least partly due to the fact that the decision to carry out the genocide was made shortly before it was actually implemented.

377. *Id.* ¶ 432. The Court speaks of the “serious risk” that genocide will be committed. *Id.* ¶ 431.

378. *Id.* ¶¶ 436–38.

379. *Cf.* LANOVOY, *supra* note 11, at 233–34 (arguing that this position is paradoxical because it entails that the duty not to be complicit in genocide is less important than the duty to prevent it). But this is not the case. It is because the complicit State will be regarded as more blameworthy and the reputational and legal consequences of its responsibility will be more severe that a stricter culpability standard is appropriate.

IHRL³⁸⁰ somewhat decreases the practical import of complicity under IHRL for assisting States,³⁸¹ the long-term trend is towards a broad approach to extraterritoriality. States will find themselves increasingly exposed to legal risk and litigation before domestic and international courts on this basis.³⁸² That said, due to the strictness of Article 16 ASR there is a real risk of an accountability gap if the IHRL-specific complicity rule or rules do not ultimately consolidate in the manner which I have suggested. One remedy for that gap would be to lower the fault requirements of Article 16 itself, but, as I have argued, the normatively more desirable position is to utilize regime-specific rules with risk-based forms of fault.

As explained above, responsibility for complicity will be excluded if, through effective mitigation measures, the assisting State reduces below the prescribed risk threshold the possibility of its assistance facilitating the violation.³⁸³ But the fault of the assisting State remains a subjective one. That mitigation measures ultimately did not prove to be effective does not ipso facto mean that the assisting State did not honestly think that they would be. However, the objective unreasonableness of any such belief in light of the prevailing facts may enable the inference that the belief was not in fact held honestly, or put differently, that the mitigation measures were a sham.

Finally, it remains unclear whether, the prescribed risk threshold having been crossed and remaining unaffected by any mitigation measures, the state can ever be justified in taking that risk of rendering assistance in order to prevent some other risk of harm from materializing. Can, in other words, the assisting State ever be absolved from disregarding a risk (even a certainty) of harm and contributing to a violation of IHL and IHRL because it assessed that discontinuing the assistance would create a risk of harm to its own population or some other comparable interest? As explained, such balancing would likely either be categorically excluded or exceptionally difficult to make out when risks of serious violations of IHL or IHRL are at play.³⁸⁴

380. See *supra* Section III.C.4.

381. See, e.g., *Elgizouli v. Home Secretary*, *supra* note 369 (various opinions noting that, as Strasbourg jurisprudence currently stands, the ECHR does not cover the extraterritorial facilitation of the death penalty through the sharing of information).

382. For an instructive analysis on this point with regard to domestic litigation on Germany's possible complicity in allegedly unlawful U.S. drone strikes in Yemen, see Leander Beinlich, *Drones, Discretion, and the Duty to Protect the Right to Life: Germany and Its Role in the United States' Drone Programme before the Higher Administrative Court of Münster*, 62 GERMAN YEARBOOK OF INTERNATIONAL LAW 557 (2021).

383. See *supra* Section III.D.

384. *Id.*

IV. A QUESTION OF PERSPECTIVE

A. *Ex Ante and Ex Post, Internal and External*

Before looking more closely at various scenarios of intelligence sharing in multinational military operations, it is important to discuss the question of perspective in making assessments about an assisting State's culpability. As we have seen, State responsibility will largely depend on how the fault element of general or specific complicity rules is construed and applied. However, the assessment of what the assisting State knew or intended can happen at different points in time, for different purposes, and by different actors—and this matters greatly.

First, it is the assisting State itself that must assess what it exactly “knows” at the time it is deciding to provide or continue providing assistance, such as the sharing of intelligence. The abstraction of the State cannot, of course, know anything; rather, the assisting State's relevant organs and agents, those individuals who are, in fact, tasked with making this decision, need to make an assessment of the information at their disposal.³⁸⁵ The precise circle of individuals making such a decision and the process whereby they do so will vary from State to State.³⁸⁶ That circle may be wide and the process formalized and bureaucratic, with input from legal advisers at vari-

385. See *supra* Section II.B.

386. For a more extended discussion, see Moynihan, *supra* note 11, at 38–41.

ous points, or the decision making may be opaque, not rule-bound, and concentrated in only a few people.³⁸⁷ For example, U.S. and Russian governments and intelligence agencies will not make their decisions in remotely the same ways.³⁸⁸

That said, it is these individuals who first need to assess, from an *ex ante* perspective, whether it is practically certain that their partner would commit a wrongful act and would use the aid provided to do so or whether there is simply some level of risk of this occurring. Such judgments will benefit from direct access to all the information the assisting State has at its disposal, including its confidential intelligence. They will also include assessments about

387. Perhaps the best-known process formalized by statute for vetting foreign security partners for risk of serious human rights violations is the one set by the “Leahy law” in the United States. *See, e.g.*, Gaston, *supra* note 337, at 7–9. For an example of a State policy document, grounded in legal obligations, dealing specifically with the sharing and receipt of intelligence with partners in situations of risk of serious harm to detained individuals and setting out various procedural and substantive requirements in that regard, e.g., by requiring escalation of decisions to ministerial level when a serious risk emerges, see HM Government, *The Principles Relating to the Detention and Interviewing of Detainees Overseas and the Passing and Receipt of Intelligence Relating to Detainees* (July 2019), <https://www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations> [hereinafter *UK Principles*]. A previous iteration of that document, the Consolidated Guidance, similarly applied to intelligence and military officers engaging in relevant activity. The UK Investigatory Powers Commissioner (a former judge) concluded in his 2019 review that the UK services generally acted in compliance with the Consolidated Guidance. *See* Annual Report of the Investigatory Powers Commissioner 2019, ¶¶ 8.59–62; 9.42–53; 10.54–55 (Dec. 15, 2020), <https://www.ipco.org.uk/publications/annual-reports/>. For a critical overview of the complicity of UK agencies in torture and other forms of ill-treatment in the “war on terror,” including an assessment of their practice in applying the Consolidated Guidance, see Ruth Blakeley & Sam Raphael, *Accountability, Denial and the Future-Proofing of British Torture*, 96 INTERNATIONAL AFFAIRS 691 (2020). For an authoritative (but incomplete) account of British complicity, see INTELLIGENCE AND SECURITY COMMITTEE, *DETAINEE MISTREATMENT AND RENDITION: 2001–2010*, 2018, HC 1113 (UK). For another example, see Canada’s Avoiding Complicity in Mistreatment by Foreign Entities Act S.C. 2019, c. 13, s. 49.1. The ministerial directions issued thereunder are focused on processes to be followed in situations in which the sharing or receipt of intelligence would result in a substantial risk of the mistreatment of an individual. *See further* National Security and Intelligence Review Agency, NSIRA Review 2020-03, Review of Departmental Implementation of the Avoiding Complicity in Mistreatment by Foreign Entities Act for 2019 (Dec. 16, 2020), https://nsira-ossnr.gc.ca/wp-content/uploads/2021/05/NSIRA_Review_2020-03.pdf.

388. For an overview of U.S. processes regarding decisions to share intelligence in support of potentially lethal operation, see Howard, *supra* note 1, at 36–46.

the legal risk the assisting State would be exposed to if it provided the assistance.

In this *ex ante* perspective, purpose-based forms of culpability, including willful blindness, are essentially irrelevant. No sane State official will openly admit to acting with an improper purpose, certainly not while a decision is being made.³⁸⁹ Conceivably a legal adviser or some kind of independent commissioner might conclude that a minister or a lower-ranking executive official is acting with such a purpose, but this is highly unlikely.³⁹⁰ And in those States whose officials directly intend to facilitate violations of international law or are willfully blind to them, it is implausible in the extreme to think that purpose-based culpability tests would be of any practical relevance from their own internal perspective.

When it comes to knowledge to the level of practical certainty or some level of possibility or risk, from an *ex ante* perspective this will always, as explained above, be a probabilistic assessment, based, for example, on the sharing State's own intelligence.³⁹¹ In particular, there is little practical difference (and no categorical one) between a State's officials thinking that a future event or the future behavior of a third party is nearly certain or only highly likely. An instructive example in this regard is how U.S. intelligence doctrine instructs analysts to "indicate and explain the basis for the uncertainties associated with major analytic judgments, specifically the likelihood of occurrence of an event or development, and the analyst's confidence in the basis

389. As an example, the *UK Principles*, *supra* note 387, refer only to the relevant official's knowledge, belief, or appreciation of risk of harm. The possibility that a UK official is acting with a purpose to facilitate the harm is never mentioned.

390. *See also* CASEY-MASLEN ET AL., *supra* note 221, ¶ 6.13 (discussing ATT drafting history and noting that the representatives of Mexico and the ICRC remarked that the use of a purpose standard in an early draft of Article 6 ATT would render that provision practically inoperable; this standard was subsequently replaced with a knowledge one).

391. *See supra* Section II.C. *See also* R (Campaign Against the Arms Trade) v. Secretary of State for Business, Innovation and Skills [2019] EWCA (Civ) 1020 [94] (UK government arguing in judicial review proceedings challenging export of weapons to Saudi Arabia that the "exercise [of assessing what the partner would do with the aid given] is predictive and involves the evaluation of risk and as to the future conduct of Saudi Arabia in a fluid and complex situation"), [165] (Court of Appeal agreeing that this was a "prospective and predictive exercise").

for this judgment³⁹² and to use the following scale to express degrees of (un)certainty, without mixing the terms from each row:³⁹³

almost no chance	very unlikely	unlikely	roughly even chance	likely	very likely	almost certain(ly)
remote	highly improbable	improbable (improbably)	roughly even odds	probable (probably)	highly probable	nearly certain
01–05%	05–20%	20–45%	45–55%	55–80%	80–95%	95–99%

The appreciation of likelihood can be distinguished from the analysts' confidence that the assessment is correct,³⁹⁴ which is based on the quality of the information available and may range from high, to moderate, to low.³⁹⁵

Clearly, in many situations, even in States with very sophisticated governmental and intelligence apparatuses, the relevant officials will not be making their decisions using a probabilistic scale, such as the one above, let alone a numerical one. In any event, their reasoning will be prone to all sorts of biases; in particular, the consumers of intelligence products at the political

392. Office of the Director of National Security, Intelligence Community Directive 203, at 3 (Jan. 2, 2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>.

393. *Id.*

394. "To avoid confusion, products that express an analyst's confidence in an assessment or judgment using a 'confidence level' (e.g., 'high confidence') must not combine a confidence level and a degree of likelihood, which refers to an event or development, in the same sentence." *Id.* There are however numerous instances in actual practice in which degrees of confidence and likelihood are used interchangeably despite this admonition and the relationship between likelihood and confidence is left unexplained. In particular,

[n]one of the extant standards correctly explain that confidence is a second-order judgement that is in fact related to probability judgements. That is, given a stated confidence level (e.g., 95% certainty), the less confident an analyst is in his or her estimate, the wider the confidence interval should be. For example, if two analysts estimate that there is a 75% chance that x will occur in the next 3 months, the analyst who bounds her 95% confidence interval with the values [55%, 95%] is clearly less confident than the analyst who bounds the 95% confidence interval with the values [65%, 85%].

ASSESSMENT AND COMMUNICATION OF UNCERTAINTY IN INTELLIGENCE TO SUPPORT DECISION-MAKING 19 - 14 (David R. Mandel ed., 2020).

395. See MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 178 (6th ed. 2014).

level will often misunderstand the analyst's assessment of uncertainty.³⁹⁶ That said, my main point, I think, stands: if the officials of a State, acting in good faith, appreciate *ex ante* that it is highly probable that their partner would misuse the intelligence provided to commit a wrongful act, for practical purposes their assessment is not categorically different from one of near or virtual certainty.

The position is, however, different when we go substantially down the probabilistic scale. Especially in those situations in which a serious violation of IHL or IHRL may be at play and in which, accordingly, a risk-based form of culpability may apply, the assisting State's officials acting *ex ante* will essentially be gambling on whether to take a calculated risk and provide the assistance. That decision may be constrained by formal internal processes, such as a requirement to obtain legal advice or refer decisions upwards in the hierarchy. They will similarly have to assess probabilistically whether any mitigation efforts would actually be effective in reducing the risk of harm and then decide on which such measures to implement. Recall, however, that the assisting State will be responsible for complicity only if after the assistance, such as intelligence, is provided the harm and facilitation actually occur.³⁹⁷

Second, the assessment of what the relevant officials of the assisting State knew or intended can be done *ex post* after the provision of assistance occurred. It can be done by some actor other than those organs of the assisting State who decided to provide assistance—perhaps a domestic or international court, a UN expert, a political body, a parliamentary committee, an inspector-general, a public inquiry, or authorities of some other State. Such external assessors or reviewers will have the benefit of hindsight—they

396. The recent literature in psychology and decision science strongly suggests that verbal estimates of uncertainty are much less effective in conveying the relevant degree of uncertainty than are numerical probabilities. On this point and biased cognition in intelligence analysis more generally, see Mandeep K. Dhami et al., *Improving Intelligence Analysis with Decision Science*, 10 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 753 (2015); David R. Mandel, *Accuracy of Intelligence Forecasts From the Intelligence Consumer's Perspective*, 2 POLICY INSIGHTS FROM THE BEHAVIORAL AND BRAIN SCIENCES 111 (2015); Mandeep K. Dhami, *Towards an Evidence-Based Approach to Communicating Uncertainty in Intelligence Analysis*, 33 INTELLIGENCE AND NATIONAL SECURITY 257 (2017); Ian K. Belton & Mandeep K. Dhami, *Cognitive Biases and Debiasing in Intelligence Analysis*, in ROUTLEDGE HANDBOOK OF BOUNDED RATIONALITY 548 (Riccardo Viale ed., 2020). See also PHILIP E. TETLOCK & DAN GARDNER, *SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION* (2015) (detailing the findings of the Good Judgment Project, which, *inter alia*, compared the reliability of amateur forecasters who were selected for lower levels of cognitive bias with that of intelligence analysts).

397. See LANOVOY, *supra* note 11, at 238.

will be able to know for a fact whether the violation occurred, to what extent the assistance contributed to it, and to what extent mitigation efforts were effective. They will also have to make inferences about what the officials of the assisting State knew or intended.³⁹⁸ But even though they would have the benefit of hindsight, some *ex post* external assessors may be hampered in their ability to fully establish the facts because, say, they do not have access to relevant evidence. It is unlikely, for instance, that the assisting State would provide its internal intelligence products to an international human rights body. In short, an *ex post* reviewing authority can, perhaps somewhat paradoxically, simultaneously know both more and less than the persons who made the decision to assist knew *ex ante*.

Contrary to arguments sometimes made in the literature against intent or purpose-based culpability tests,³⁹⁹ it will be reasonably practical for an *ex post* external assessor to find that an assisting State acted with the purpose/direct intent to facilitate a wrongful act. After all, in municipal administrative law, domestic courts can find without any “smoking gun” type of evidence that State officials acted with an improper purpose, even if they do so relatively infrequently.⁴⁰⁰ In human rights law, human rights bodies have also increasingly found that States that have restricted human rights for ostensibly legitimate aims, such as the prevention of crime, have in reality acted with ulterior purposes, such as the suppression of dissent.⁴⁰¹ Domestic and international courts both routinely establish the intent of individuals in the criminal context.⁴⁰² Even in that context, it is perfectly standard to use a finding that a person knew to practical certainty or to a very high degree of likelihood that the assistance they provided would be used to commit a crime to draw an inference that the person acted with purpose to facilitate the crime.⁴⁰³

398. See Moynihan, *supra* note 11, at 16. For an example, see NZOIGIS REPORT, *supra* note 303, ¶¶ 116–21.

399. See, e.g., Corten, *supra* note 30; LANOVOY, *supra* note 11, at 338.

400. See, e.g., CHRISTOPHER FORSYTH & WILLIAM WADE, ADMINISTRATIVE LAW 352–56 (11th ed. 2014).

401. See, e.g., Navalnyy v. Russia, App. No. 29580/12, ¶¶ 174–75 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-187605> (restrictions on the rights of Russian dissident Aleksey Navalny imposed for the ulterior purpose of suppressing political pluralism); Selahattin Demirtaş v. Turkey (No. 2), App. No. 14305/17, ¶¶ 436–37 (2020) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-207173> (Court using concordant inferences to establish that the detention of Turkish opposition leader pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate).

402. See AUST, *supra* note 6, at 242–44.

403. See, e.g., Greenawalt, *supra* note 115, at 575–76; SIMESTER ET AL., *supra* note 51, at 144–45.

The key point here is that in the vast majority of situations of State complicity an assisting State's purpose to facilitate does not have to be established to anything approaching a criminal law, "beyond a reasonable doubt" standard of proof.⁴⁰⁴ Similarly, for findings of purpose, as with any finding of fact, a court or any other external assessor can rely on circumstantial evidence, resort to reasonable inferences, or even reverse the burden of proof.⁴⁰⁵ Nor does a court necessarily need to identify by name the specific state officials whose ulterior purpose it has established (although it may choose to do so).⁴⁰⁶ When, for example, the European Court found that Russia was acting with an ulterior purpose of suppressing political pluralism when it subjected Aleksey Navalny to criminal prosecution, it did not specifically identify Vladimir Putin or the relevant executive, prosecutorial, and judicial officials involved in Navalny's case as possessing such purpose.⁴⁰⁷ Thus, while purpose-based culpability standards are of little practical relevance from the *ex ante* perspective, the same simply cannot be said for the *ex post* one.

When it comes to knowledge-based forms of fault, the task of any external *ex post* reviewing entity is always to determine what the assisting State subjectively believed at the relevant time; the temptation to interpret the facts with the benefit of hindsight is, of course, a great one but must be resisted.⁴⁰⁸

A particularly complex problem—and not an uncommon one—arises from the fact that different State officials may be in the possession of information relevant to the State's *ex ante* assessment of risk of harm resulting from the sharing of intelligence, but these officials might themselves not sufficiently exchange information among themselves. The picture of the real level of risk would therefore be incomplete, simply because no individual State official would know everything that they needed to know to make the assessment properly. For example, the CIA and the State Department might not provide all of the relevant information at their disposal to the Department of Defense; a risk assessment by the DoD may then come to the mistaken conclusion that there was no certainty or substantial risk that an assisted partner would commit a wrongful act, and proceed to authorize the

404. See also CASEY-MASLEN ET AL., *supra* note 221, ¶ 6.183. On the European Court's flexible approach to evidence for establishing State fault in due diligence obligations, see Stoyanova, *supra* note 40, at 611–12.

405. See CRAWFORD, *supra* note 9, at 408; Finucane, *supra* note 204, at 417; LANOVOY, *supra* note 11, at 239–40. See also SIMESTER ET AL., *supra* note 51, at 147–48.

406. See Section II.B *supra*.

407. See *supra* note 401.

408. For the same point regarding indirect intent as a subjective mode of fault in criminal law, see BLOMSMA, *supra* note 95, at 72–73.

sharing of intelligence with that partner. In such a scenario no single U.S. official subjectively made the assessment that the risk existed, and then consciously disregarded that risk. The State as a singular entity did possess all the necessary information, but the individual making the specific decision to assist a partner did not.

One approach to this problem would be to aggregate all of the relevant pieces of information at the disposal of the State's various officials and to attribute to the State as a whole the requisite degree of knowledge. This is, in fact, the approach taken by some jurisdictions in the analogous context of corporate liability—a good example would be the U.S. “collective knowledge” doctrine.⁴⁰⁹ But this approach reduces the exercise of assessing the risk of what a partner would do to the mere addition of isolated items of information, when in fact that exercise—even at a purely individual level—requires this information to be processed and analyzed so that a judgment can be made and a risk subjectively be perceived. Employing such a doctrine in effect downgrades the fault requirement to negligence—the State did not know, but should have known, of the certainty or risk of harm, since none of its officials subjectively perceived the requisite degree of risk.⁴¹⁰ As explained above, such objective fault standards are better suited to positive duties of prevention than to negative duties of restraint in a complicity framework.⁴¹¹

The most difficult cases will always be those that are based on an assessment of risk. This will especially be the case when the assisting State's *ex ante* assessment of risk was also based on the anticipated effectiveness of risk-reducing mitigation measures. Considerations of institutional competence may, in such cases, warrant some level of deference to the judgments made by the initial decision maker, but such deference cannot be unlimited. And even if the external assessor's task of establishing whether the assisting State

409. *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987) (holding that corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components, that the aggregate of those components constitutes the corporation's knowledge of a particular operation, and that it is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation). English law does not use a similar doctrine and corporate fault is more circumscribed. *See CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 132–36 (2001).*

410. For a particularly sophisticated discussion in the context of corporate liability, see Mihailis Diamantis, *Functional Corporate Knowledge*, 61 *WILLIAM & MARY LAW REVIEW* 319 (2019).

411. *See supra* Sections III.B.5 and III.C.3.

was culpable when it provided the assistance requires the assessor to determine what the assisting State's official subjectively believed *ex ante*, both the *ex ante* and the *ex post* assessments can be made using rational, objective criteria.

B. Assessing Risk

What then are the factors that the officials of the assisting State should rely on *ex ante* to determine whether their partner will commit a wrongful act and would use the aid provided to do so, and on which any external assessor can also rely to determine *ex post* what the assisting State knew or intended? Two contextual elements are crucial: first, the issue of whether the assistance being provided, such as the sharing of intelligence, is a one-off event or part of a continuing cooperative relationship; and second, whether the future violation of international law that the partner might commit is itself a one-off, isolated event or part of a pattern of similar violations.⁴¹² If there is a durable cooperative relationship the assisting State is more likely to be able to assess reliably what its partner will do. And a pattern of prior behavior in similar circumstances is likely the best possible evidence of what the partner will do in the future.⁴¹³ The same goes for the effectiveness of any proposed mitigation measures—for example, diplomatic assurances that get breached time and again cannot be relied upon as effective forms of mitigation.⁴¹⁴ In any event, the officials of the assisting State making their decisions *ex ante* will do so dynamically, taking into account the evolving circumstances and changes in the information available to them.⁴¹⁵

412. See EU User's Guide, *supra* note 210, ¶ 2.13, at 55 ("Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.").

413. See COMMENTARY OF 2016, *supra* note 208, ¶ 161 ("In the event of multinational operations, common Article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions, as this would constitute aiding or assisting violations.").

414. See also Blakeley & Raphael, *supra* note 387, at 705–76 (discussing ineffective assurances).

415. See also Moynihan, *supra* note 11, at 17.

Here we can again usefully draw on the examples of risk-based culpability in the contexts of arms transfers and IHRL non-refoulement jurisprudence.⁴¹⁶ The ICRC, for example, notes that the three most important indicators for assessing whether the recipient will use transferred weapons to commit serious violations of IHL and IHRL are (1) the recipient's past and present record of respect for IHL and IHRL, including any efforts they have taken to suppress violations that have occurred; (2) their intentions as expressed through formal commitments, including the provision of appropriate training; (3) their capacity to ensure that the assistance provided is used properly, including the existence of accountable authority structures.⁴¹⁷

A particularly instructive example is the judgment of the Court of Appeal of England and Wales in *Campaign Against the Arms Trade*,⁴¹⁸ which dealt with the UK government's continuing grant of licenses for weapons export to Saudi Arabia despite claims that these weapons were used to commit serious violations of IHL, viz., those of the principle of distinction, in the conflict in Yemen. These were judicial review proceedings, which under the public law principles of England and Wales require the courts to determine whether the relevant UK minister acted *irrationally* in determining that there was no "clear risk" that Saudi Arabia would commit serious violations of IHL in Yemen.⁴¹⁹ In other words, this was a very deferential type of external *ex post* review of whether the initial *ex ante* assessment was correctly made. Yet, even so, the Court of Appeal found that the minister did act irrationally because he deliberately chose not to determine whether Saudi Arabia had violated IHL in the past in relation to *any* specific incident of concern:

The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question

416. See further CASEY-MASLEN ET AL., *supra* note 221, ¶¶ 6.94–99.

417. ARMS TRANSFER DECISIONS—A PRACTICAL GUIDE, *supra* note 250, at 14–21. See also EU User's Guide, *supra* note 209, ¶ 2.13, at 55 ("Clear risk. A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law?").

418. R (Campaign Against the Arms Trade) v. Secretary of State for Business, Innovation and Skills [2019] EWCA (Civ) 1020.

419. *Id.* [57], [145].

which required to be faced. Even if it could not be answered with reasonable confidence in respect of every incident of concern . . . it is clear to us that it could properly be answered in respect of many such incidents, including most, if not all, of those which have featured prominently in argument. At least the attempt had to be made.⁴²⁰

Similarly, the Court rightly noted that the partner's pattern of behavior was a key factor for assessing the effectiveness of any risk-reducing measures of mitigation:

[P]erhaps the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities? If the result of historic assessments was that violations were continuing despite all such efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future. It would be likely to help determine whether Saudi Arabia had a genuine intent and, importantly, the capacity to live up to the commitments made.⁴²¹

After the Court's judgment, the UK government conducted a new assessment and (dubiously) concluded that any past Saudi violations of IHL in Yemen were isolated incidents and that "Saudi Arabia has a genuine intent and the capacity to comply with IHL."⁴²²

Whether it is, in fact, true that there is no "clear risk" of serious violations of IHL from weapons transfers to Saudi Arabia is beside the point for our present purposes.⁴²³ Rather, the key point is that there is no reason of principle why the sharing of intelligence should be treated any differently than transfers of arms or technologies, such as cyber tools, when it comes to the making of assessments of whether the assistance provided may be used to commit a wrongful act. The formal rule may be different—the prohibition

420. *Id.* [138].

421. *Id.* [144].

422. See Secretary of State for International Trade, Trade Update, House of Commons (July 7, 2020), <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>.

423. The new decision has also been challenged in judicial review. See *Arms Sales to War in Yemen Back in Court*, CAMPAIGN AGAINST ARMS TRADE (Apr. 22, 2021), <https://caat.org.uk/news/arms-sales-to-war-in-yemen-back-in-court/>; UK Arms Exports to Saudi Arabia: Q&A, House of Commons Briefing Paper (Jan. 29, 2021), <https://researchbriefings.files.parliament.uk/documents/CBP-8425/CBP-8425.pdf>.

of complicity in CA1 rather than the ATT regime or a domestic equivalent—but the nature of the decision-making process is the same. In particular, patterns of prior behavior are the best predictor of how the assisted party will behave in the future (although, of course, there will be exceptions, for example, if there is a change of leadership in the assisted State or entity). Similarly, patterns of mitigation measures failing to work are the best indicator that any further such measures will also be ineffective.

In one sense, however, the sharing of intelligence is somewhat different from other forms of assistance. If the intelligence is genuinely so relevant that it can, in fact, substantially contribute to the commission of a wrongful act, it is almost inevitable that it will be so used—think, for example, of information shared for targeting purposes in a military operation. Once the recipients acquire the information, they cannot unlearn it. And if they are intent on committing a wrongful act, such as torture, the intelligence will invariably get used if relevant.⁴²⁴ In that sense, the *ex ante* risk assessment becomes simpler—the inquiry is going to be focused primarily on whether the partner intends to commit a wrong and less on whether the partner is likely to use the information given since the latter may be a foregone conclusion if the answer to the former question is positive. This also makes mitigation measures that are primarily focused on the intelligence itself less likely to work, although some safeguards may be possible (e.g., conditioning the transfer of information on its compartmentalization, restriction to only specific, more trustworthy, officials of the partner State or entity, or implementing technological safeguards).

V. TWO SCENARIOS OF INTELLIGENCE SHARING IN MILITARY OPERATIONS

A. *Intelligence Sharing That Assists a Wrongful Act*

Let us now discuss the two basic scenarios of complicity on the basis of intelligence sharing in multinational military operations: first, intelligence sharing that assists an internationally wrongful act; second, the sharing and receiving of intelligence that was obtained unlawfully. I will start with the former, which has also percolated through much of the preceding discussion. In this scenario, during a military operation State *A* is sharing intelligence with State or non-State actor *B*, which then facilitates *B*'s commission of an

424. See Nottingham Workshop Report, *supra* note 10, at 20.

internationally wrongful act. That wrongful act can be a serious violation of IHL or IHRL, such as torture, or a less serious violation of either regime. Or it can violate some other rule of international law, such as the sovereignty of a third State, the law of the sea, or diplomatic law. The generally applicable complicity rule in Article 16 ASR would cover all such instances. Regime-specific complicity rules, such as those of IHL and IHRL, would only apply to State assistance to the violation of rules particular to these regimes, such as the prohibition of torture, the right to life, or the principle of distinction.

It is clear that, in the right circumstances, the sharing of intelligence, within or without a multinational military operation, can transgress the general and specific complicity rules in international law.⁴²⁵ For example, among the participants of the Nottingham workshop there was widespread agreement that the sharing of intelligence can significantly or substantially contribute to a wrongful act by a third party.⁴²⁶ In a scenario in which *A* provides intelligence to *B* that is then used to torture *X*, the fulfillment of the causal nexus requirement will depend on the nature of the information provided. For instance, if *A* gave *B* the information that *X* suffers from an irrational fear of insects and that information then leads *B* to put *X* in a cramped wooden box with a choice selection thereof,⁴²⁷ the nexus requirement would be met—the torture would not have been applied in that particular way absent the shared intelligence. The same position would apply if *A* gave *B* information about *X*'s family so as to enable *B*'s agents to threaten *X* with violence to them, or if *A* gave *B* information about *X*'s whereabouts that allowed *B* to detain him or her in the first place. While there will invariably be cases that pose difficulties in assessing the causal contribution of a particular item of intelligence to the wrongful act, most cases will not be particularly hard.

The real difficulty, as explained, lies with the culpability elements of Article 16 ASR and any regime-specific complicity rules. Here there was significant disagreement among the experts assembled at the Nottingham intelligence sharing workshop. Much of that discussion vacillated between intent and knowledge as the two competing models for the assisting State's fault.⁴²⁸

425. See AUST, *supra* note 6, at 198.

426. See Nottingham Workshop Report, *supra* note 10, at 10, 16.

427. See *Husayn (Abu Zubaydah) v. Poland*, *supra* note 285, ¶¶ 52, 57 (detailing interrogation techniques approved by the U.S. Department of Justice).

428. See Nottingham Workshop Report, *supra* note 10, at 6–10.

But as I have argued in this article, that dilemma is largely a false one. International law rules on complicity allow for a variable geometry of forms of fault, which may also depend on the severity of the underlying violation.⁴²⁹

Thus, under Article 16 ASR, an assisting State will be responsible for sharing intelligence with another State that facilitated the wrongful act of the latter if the assisting State (i.e., its organs or agents) did so:

(1) with the purpose/direct intent of facilitating the wrongful act, that is in a situation in which the facilitation of the wrongful act was the conscious object of the assisting State's conduct, regardless of any deficits in the assisting State's knowledge;

(2) with the oblique/indirect intent of facilitating the wrongful act, that is while being practically certain that the assisted State will commit the wrongful act and practically certain that it will use the intelligence provided to do so, and consciously choosing to provide the intelligence despite this practical certainty;

(3) with willful blindness, that is, with the purpose of avoiding acquiring information but for which the assisting State would have acted with indirect intent.

The culpability element of Article 16 would apply to intelligence sharing that contributes to *any* violation of international law, regardless of the subject matter, so long as the same rule binds the two States. This culpability element also forms the minimum baseline for regime-specific complicity rules, the fault requirements of which can only be looser, more expansive than those of Article 16.

As explained, the IHL- and IHRL-specific complicity rules have the added benefit of applying to State assistance, including the sharing of intelligence, to non-State actors. For *serious* violations of IHL and IHRL, they arguably have the further benefit of employing risk-based forms of fault. That is, the State sharing intelligence would be liable under these complicity rules if it was aware of a degree of risk that its assistance would be used to facilitate a serious violation, such as torture, but consciously disregarded that risk and proceeded to provide the assistance nonetheless.⁴³⁰ The risk threshold would certainly be satisfied if it was more likely than not that the assisted partner would commit the wrong and would use the aid provided to do so. It would probably also be satisfied if the risk was below likelihood but was nonetheless serious, substantial, real, or clear. For assistance to nonserious violations

429. See *supra* Sections III.A.4, III.B.5, III.C.3.

430. See *supra* Sections III.B.5, III.C.3.

of IHL and IHRL, the regime-specific complicity rules would employ the Article 16 ASR forms of fault only, but again with the added benefit of applying to State aid to non-State actors as well.

The scenario of intelligence sharing to assist a wrongful act has two basic sub-variants. In the first, the simpler and more focused one, a specific item of intelligence is shared that assists a specific wrongful act. This can either be an isolated occurrence or a whole series or pattern of such acts, normally as part of a durable cooperative relationship. In the second variant, intelligence sharing is part of systematic aid and assistance to a war effort more generally, but under the shadow of a risk that the aid provided would facilitate serious violations of IHL and IHRL—think of, for example, the aid that Serbia provided to the Bosnian Serbs during the conflict in Bosnia, or the aid that the United States provided to the contras in Nicaragua and to various Iraqi and Kurdish forces in the fight against ISIS.

In both of these variants, intelligence sharing as part of a wider, more durable cooperative relationship will enable the assisting State to form more reliable predictions about what its partner would do and implement wider-ranging mitigation measures and assess their effectiveness. As explained above, if these measures bring down appreciable risk below the proscribed threshold, the assisting State may continue providing the assistance.⁴³¹

The emergence of a clear pattern of ongoing violations by the assisted partner will both elevate the assisting State's appreciation of the risk of future violations and constitute evidence that the mitigation measures are ineffective. Thus, for example, the Intelligence and Security Committee of the British Parliament found that between 2001 and 2010 there were "232 cases recorded where it appears that UK personnel continued to supply questions or intelligence to liaison services after they knew or suspected (or, in [the Committee's] view, should have suspected) that a detainee had been or was being mistreated."⁴³² The Committee also found that UK intelligence agencies "also suggested, planned or agreed to rendition operations proposed by others in 28 cases [and that there were] a further 22 cases where SIS or MI5 provided intelligence to enable a rendition operation to take place."⁴³³ In each of these cases specific intelligence facilitated a specific wrongful act. While it is possible that when individual decisions were being made, especially in the early stages of the "war on terror," British officials did not know to practical certainty or appreciated a degree of risk that the intelligence

431. *See supra* Section III.D.

432. INTELLIGENCE AND SECURITY COMMITTEE, *supra* note 387, at 3.

433. *Id.*

would facilitate a wrongful act by third parties, such as the United States, or hoped that mitigation measures would reduce that risk, that notion becomes impossible to sustain after a pattern of behavior emerges over time.⁴³⁴

In the second variant, if the assisting State is aware to practical certainty (for violations of all rules of international law) or to some lower degree of proscribed risk (for serious violations of IHL and IHRL) that its assistance, including intelligence, would be used to commit internationally wrongful acts, it cannot escape responsibility by saying that it was intending to assist the war effort more generally and not any specific violations of international law that took place within that war effort.⁴³⁵ The two are practically inseparable,⁴³⁶ at the very least in those cases in which there is an evident pattern of violations by the recipient partner, as, for example, with regard to ethnic cleansing by the Bosnian Serb military during the Bosnian conflict, the torture and inhuman treatment of high-value terrorist detainees by U.S. forces

434. *Id.* at 4 (Committee finding that “the combination of high-level briefing from the CIA in September 2001, the individual cases of mistreatment and rendition being reported by deployed officers to senior managers in January 2002, and the media reporting of torture, mistreatment and rendition in January/February 2002, make it difficult to comprehend how those at the top of the office did not recognise in this period the pattern of mistreatment by the US. . . . This could indicate that the Agencies were deliberately turning a blind eye so as not to damage the relationship and risk the flow of intelligence. . . . That being said, we have found no ‘smoking gun’ in the primary material to indicate that the Agencies deliberately overlooked reports of mistreatment and rendition by the US as a matter of institutional policy.”).

435. Depending on the circumstances, assistance to the war effort could also violate other rules of international law, such as the prohibition of intervention, a point that I will not deal with here.

436. Cf. *Bosnian Genocide*, *supra* note 7, ¶ 422, where the ICJ held that

the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.

However, Serbia was found not to be responsible for complicity of genocide because it had not been not aware that genocide would be committed. The Court did not have jurisdiction over Serbia’s complicity in any other violation of international law, including the CA1 duty to respect IHL or the appurtenant duty not to provide assistance to serious violations thereof. In other words, it is perfectly possible for Serbia not to have been complicit in genocide on the basis of Genocide Convention-specific complicity rules but to have been complicit in serious violations of IHL committed by the Bosnian Serbs in Srebrenica and elsewhere during the Bosnian conflict.

in the war on terror, or Russia's assistance to the Assad regime in Syria.⁴³⁷ The only way to keep complicity rules from capturing a generalized assistance scenario is to confine them strictly to purpose-based forms of fault.⁴³⁸ But, as explained above, this is inappropriate even for the baseline rule in Article 16 ASR, let alone for regime-specific rules of IHL and IHRL.⁴³⁹ This, of course, assumes that the general assistance to the war effort materially facilitated the specific wrongful acts in question—that is, that the causal nexus element was satisfied.⁴⁴⁰ But so long as it did, States cannot simply say that they were *intending* to help their partner win the conflict and not to assist them in violating international law. Such an approach would, for example, excuse Russia of all liability for assisting the numerous atrocities committed by the Assad regime against its own people in Syria, if purpose/direct intent to facilitate the atrocities could not be inferred.⁴⁴¹

The real difficulty with the assistance to the wider-war-effort scenario is that such assistance normally produces substantial appreciable benefits for the assisting State (and possibly third parties) in terms of advancing its foreign policy, economic, and national security agendas. This can create stark dilemmas. Providing intelligence and other assistance to (say) Iraqi and Kurdish forces in the fight against ISIS had the immediate benefit of helping to dismantle a terrorist regime that has inflicted untold suffering on the peoples of Iraq, Syria, and elsewhere. Yet, the recipients of such assistance may well have committed serious violations of IHL and IHRL to which the assistance causally contributed, such as the torture or other mistreatment of

437. The key factor here would be the application of the causal nexus or contribution element of a complicity rule to specific facts, not that of the mental element. Compare in that regard in the criminal context Greenawalt, *supra* note 115, at 594.

438. Even there, purpose to facilitate could be inferred by some external fact-finder, based on the pattern of violations.

439. See *supra* notes 116–118 and accompanying text (regarding the specific direction tangent in the ICTY complicity jurisprudence, which was also motivated by overinclusiveness concerns). See also JACKSON, *supra* note 8, at 84 (“[W]hat’s lying behind these cases is the question of how legal doctrines of complicity, premised to some degree on individualized connections between accomplice and principal, can deal with large-scale provisions of aid to groups or collections of actors carrying out a mix of lawful and unlawful activities.”).

440. One situation in which generalized assistance would probably not satisfy the nexus requirement is that of the assisting State providing assistance whose receipt enabled the partner to divert its own resources to the commission of the wrongful act. See Moynihan, *supra* note 11, at 9–10.

441. For a discussion thereof, see Robert Lawless, *A State of Complicity: How Russia’s Persistent and Public Denial of Syrian Battlefield Atrocities Violates International Law*, 9 HARVARD NATIONAL SECURITY JOURNAL 180 (2018).

captured ISIS fighters. No mitigation measures may sufficiently curb the risk of such violations, but stopping the assistance may lead to equally bad consequences (say, the resurgence of ISIS or the prolongation of the conflict).

This, therefore, leads to the question I have touched upon above of whether the risks of such harms can be balanced against each other in some kind of lesser-evil, utilitarian calculus.⁴⁴² While it appears inevitable that States will engage in such a calculus as a matter of policy—for example, UK ministers have openly acknowledged doing so⁴⁴³—risk-taking is difficult for the law to accommodate in the face of a causally proximate risk of assistance to serious violations of IHL and IHRL except, perhaps, in the most extreme (and unlikely) situations, through the application of circumstances precluding wrongfulness under the ASR or through any IHL- and IHRL-specific rules that may incorporate balancing. In most situations, it would not be possible to justify proceeding with the sharing of intelligence while appreciating a risk of a serious violation of IHL and IHRL when such a violation subsequently occurs and is facilitated by the shared intelligence. In other words, a State engaging in risk-taking behavior generally must accept the legal consequences of doing so—its responsibility for complicity—if the risk materializes.

B. *Sharing and Receiving Unlawfully Obtained Intelligence*

Let us now turn to the second basic scenario of intelligence sharing in multinational military operations—one where it is the intelligence itself that was

442. See *supra* Section III.D.

443. Under current policy guidance, see *supra* note 387, ministers retain a significant amount of discretion in deciding how to proceed in situations in which the sharing of intelligence creates a risk (but not certainty) of harm. In 2019 an internal Ministry of Defence policy document stated that in such cases intelligence should not be shared “unless ministers agree that the potential benefits justify accepting the risk and the legal consequences that may follow.” See Use of Torture Overseas, 660 Parl. Deb. HC (6th ser.) (2019) col. 504 (question by David Davies MP). Even more interesting are the (somewhat internally inconsistent) testimonies of several ministers before the Intelligence and Security Committee; some of the ministers thought that they could (although none have done so) exceptionally authorize the sharing of intelligence when there was a serious risk it would facilitate torture but doing so would prevent a “ticking bomb” scenario. They were more open to authorizing sharing if the risk was “merely” that of cruel, inhuman or degrading treatment. It was accepted that they could not lawfully authorize the sharing of intelligence if they know or believed (i.e., were practically certain) that torture would occur. See INTELLIGENCE AND SECURITY COMMITTEE, DETAINEE MISTREATMENT AND RENDITION: CURRENT ISSUES, 2018, HC 1114, at 75–77.

unlawfully obtained, and is then shared, received, and used. For example, State *A* tortures a terrorist suspect it has captured into divulging intelligence, subjects its population to systematic electronic surveillance in violation of international privacy standards, or acquires the information from a third State in a manner that violates that State's sovereignty or the inviolability of diplomatic premises. *A* then proceeds to share this information with State *B*, which is either practically certain or aware to some level of probability that the intelligence was acquired unlawfully by *A*. *B* nonetheless uses that information (which is ultimately proven to be reliable, despite its mode of acquisition), for purposes, such as targeting drone strikes, that are otherwise compliant with applicable IHL and IHRL.

In this scenario, *A* undoubtedly acted unlawfully—vis-à-vis some other State or an individual—when *collecting* the intelligence. It will also most likely be acting unlawfully by the further act of *sharing* the intelligence with *B*. This will most clearly be the case if the underlying violation is one of IHRL, for example, if the intelligence was obtained through torture or contrary to the right to privacy.⁴⁴⁴ For example, the jurisprudence of the European Court—very likely to be emulated by other human rights bodies once they have the opportunity to deal with such cases—is clear that State acts beyond the collection of personal information—including its automated and human processing, analysis, and sharing with third parties—each constitutes a separate interference with privacy.⁴⁴⁵ This is also the position of the Federal Constitutional Court of Germany under the German Basic Law.⁴⁴⁶ Indeed, the sharing of information could be a violation even if the collection was not, depending on whether the sharing can separately satisfy the justifiability test under IHRL, that is, it was provided for in law, pursued a legitimate aim, and was necessary and proportionate for the achievement of that aim—and applies safeguards specifically designed for the intelligence sharing context:

444. The same goes in principle for violations of data protection law. See *Elgizouli v. Home Secretary*, *supra* note 369. To be clear, I am not saying that every act of spying, foreign or domestic, necessarily violates IHRL privacy guarantees—on the contrary, much of what States do in the espionage context could be justified under the IHRL necessity and proportionality framework.

445. See *Big Brother Watch v. United Kingdom*, App. Nos. 58170/13, 62322/14 & 24960/15, ¶¶ 324–31, 496–97 (2021) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-210077>.

446. 1 BvR 2835/17, *supra* note 319, ¶¶ 213–14.

[I]t is now clear that some States are regularly sharing material with their intelligence partners and even, in some instances, allowing those intelligence partners direct access to their own systems. Consequently, the Court considers that the transmission by a Contracting State to foreign States or international organisations of material obtained by bulk interception should be limited to such material as has been collected and stored in a Convention compliant manner and should be subject to certain additional specific safeguards pertaining to the transfer itself. First of all, the circumstances in which such a transfer may take place must be set out clearly in domestic law. Secondly, the transferring State must ensure that the receiving State, in handling the data, has in place safeguards capable of preventing abuse and disproportionate interference. In particular, the receiving State must guarantee the secure storage of the material and restrict its onward disclosure. This does not necessarily mean that the receiving State must have comparable protection to that of the transferring State; nor does it necessarily require that an assurance is given prior to every transfer. Thirdly, heightened safeguards will be necessary when it is clear that material requiring special confidentiality—such as confidential journalistic material—is being transferred. Finally, the Court considers that the transfer of material to foreign intelligence partners should also be subject to independent control.⁴⁴⁷

The European Court thus found, for example, that Sweden failed to implement proper safeguards when sharing intelligence with its partners because, *inter alia*, the Swedish domestic legal framework did not provide that agencies had to establish that it was necessary and proportionate to share information implicating the privacy interests of a specific individual and to assess whether their partner had minimum safeguards in place.⁴⁴⁸ The position of the Federal Constitutional Court is substantially similar in the German context.⁴⁴⁹ Most States do not have domestic legal frameworks that reg-

447. *Big Brother Watch*, *supra* note 445, ¶ 362.

448. *Centrum för rättvisa v. Sweden*, App. No. 35252/08, ¶¶ 326–30, 371 (2021) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-210078>.

449. 1 BvR 2835/17, *supra* note 319, ¶¶ 231–64. In particular, the Court held:

Sharing data with other countries is ruled out if there is reason to fear that its use would lead to violations of fundamental principles of the rule of law. Under no circumstances may the State be complicit in violations of human dignity. In particular, it must appear certain that the information will be used neither for political persecution nor for inhuman and degrading punishment or treatment in the receiving State. The legislator must ensure that

ulate the sharing of intelligence in a way that would satisfy IHRL requirements in terms of regulatory quality and clarity and effective domestic oversight.⁴⁵⁰

The more difficult question is whether a State is acting wrongfully not by sharing but by *soliciting*, *receiving*, and *using* unlawfully obtained and shared information, perhaps for targeting purposes in a military operation. It is a question of fact, of course, as to whether the receiving State is aware of some degree of risk that the information was shared or obtained unlawfully; in our scenario above, that knowledge is postulated, but in real life the users of, for example, a fused intelligence product may not actually have any idea about the sourcing of a given item of information.⁴⁵¹ That said, even given the requisite degree of knowledge, this scenario does not in principle engage the general complicity rule in Article 16 ASR, which applies only to prospective assistance to an ongoing or future wrongful act.⁴⁵² Like most domestic legal systems, international law does not contain a general rule on accessories *after* the fact.⁴⁵³ Modern criminal law similarly tends to create such liability only through the legislative creation of specific new offenses, such as the peddling

the sharing of data collected by German authorities with other countries or international organisations does not erode the protections of the European Convention on Human Rights and other international human rights treaties. Given the exceptional nature of surveillance and data sharing measures carried out by intelligence services, which may involve contacts with States not firmly committed to the rule of law, it must be ensured that the information provided is not used to persecute certain ethnic groups, stifle opposition or detain people without due process, kill or torture them in violation of human rights or international humanitarian law. The Federal Intelligence Service itself is responsible for examining and determining which rules of international law have to be observed in this respect. In principle, receiving States must agree to rights to information so that adherence to international human rights standards can be monitored.

Id. ¶ 237 (citations omitted).

450. See generally *Secret Global Surveillance Networks: Intelligence Sharing between Governments and the Need for Safeguards*, PI (Apr. 24, 2018), <https://privacyinternational.org/report/1741/secret-global-surveillance-networks-intelligence-sharing-between-governments-and-need> (reviewing forty-two countries and finding an alarming level of under-regulation).

451. See, e.g., NZOIGIS REPORT, *supra* note 303, ¶¶ 181–83, 323–25 (Inspector-General concluding that a New Zealand government agency inadvertently came into possession of information obtained by U.S. use of torture but disregarded red flags, such as incommunicado detention, that could have pointed to the provenance of the information); Nottingham Workshop Report, *supra* note 10, at 20. To be clear, I am not arguing that the receiving State has a positive duty to check whether every item of information it receives or is given access to was obtained unlawfully—that would be a wholly impracticable requirement.

452. See Nottingham Workshop Report, *supra* note 10, at 20.

453. See JACKSON, *supra* note 8, at 10, 73.

of stolen property.⁴⁵⁴ The ILC expressly excluded the provision of assistance after the wrongful act from the scope of Article 16;⁴⁵⁵ a fortiori, the mere passive receipt of information unlawfully obtained cannot violate that rule either, because it does not actually facilitate the commission of the wrong, which has already been completed.⁴⁵⁶

Article 16 could be engaged, however, if the factual pattern were such that *B* was not a mere passive recipient of unlawfully obtained information but actually provided assistance to *A*'s wrongful act of unlawfully collecting and/or sharing intelligence. This could be the case in, for instance, situations of continuing cooperative relationships in which each party provides the other with some quid pro quo in a revolving cycle of interactions—*B* could be providing money, its own intelligence, or other assistance to *A*, which would continue sharing its intelligence with *B*.⁴⁵⁷ If the underlying violation was a serious breach of *jus cogens*, the rule in Article 41(2) ASR that prohibits States from assisting the maintenance of a situation created by such a breach could potentially be engaged.⁴⁵⁸

Similarly, a pattern of receiving information from a State that acquired it in violation of international law can evolve into an indirect form of prohibited assistance to that State. As noted by the UK Parliament's Joint Committee on Human Rights in the context of information procured through torture:

[I]f the Government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on, systematically receiving and/or relying on the information but not physically participating in the torture, that might well cross the line into complicity. Systematic, regular receipt of information obtained under torture is in our view capable of amounting to "aid or assistance" in maintaining the situation created by other States' serious breaches of the peremptory norm prohibiting torture. As a number of witnesses to our inquiry put it, the practice creates a market for the information produced by torture.

454. FLETCHER, *supra* note 78, at 645–46.

455. See AUST, *supra* note 6, at 221.

456. See also Ahmed & Anor v. The Queen [2011] EWCA (Crim) 184 [42] ("On ordinary principles of English law, if A aids or abets (ie assists) B to commit torture, or if he counsels or procures (ie encourages or arranges) torture by B, then A is no doubt guilty, as is B. But simply to receive information from B which is needed for the safety of A's citizens but which is known or suspected to be the product of torture would not, without more, amount in English law to either of these forms of secondary participation.").

457. See Nottingham Workshop Report, *supra* note 10, at 20–21.

458. See also Moynihan, *supra* note 11, at 22–23; AUST, *supra* note 6, at 339.

As such, it encourages States which systematically torture to continue to do so.⁴⁵⁹

Even if the receipt and possession of unlawfully obtained and shared intelligence do not as such transgress the complicity rules of general international law, they may violate regime-specific rules, such as those of IHRL or diplomatic law. For example, the storage and processing of an individual's private information by the recipient State may constitute a separate violation of the right to privacy of that individual, regardless of the fact that it had no involvement whatsoever in its collection if the receiving State did not satisfy the requirements of the necessity and proportionality test, including an adequate domestic legal framework with sufficient safeguards against abuse.

Applying this approach, the European Court found that the United Kingdom's regulation of the receipt of shared intercept intelligence was compatible with Article 8 ECHR.⁴⁶⁰ That conclusion may be debatable on the facts, in particular because the Court seemed to dispense with the requirement of authorization independent from the executive when it came to the solicitation of intelligence from a partner.⁴⁶¹ It is also not entirely clear how the Court's analysis would apply to standing arrangements whereby the receiving State has direct access to the raw intelligence in the systems and databases of the sharing State or ones operated jointly.⁴⁶² The basic point remains, however, that at least insofar as the sharing and receipt of information that may implicate privacy interests is concerned, the receiving State must have an adequate domestic legal framework with sufficient safeguards in place, including independent oversight. It appears manifest that most States do not have such frameworks and are therefore exposing themselves to a substantial legal risk of violating IHRL.⁴⁶³

459. JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF UK COMPLICITY IN TORTURE: TWENTY-THIRD REPORT OF SESSION 2008-09, HL Paper 152/HC 230, ¶¶ 41-42 (UK).

460. *Big Brother Watch*, *supra* note 445, ¶¶ 500-514.

461. *See id.* annex (joint partly dissenting opinion by Lemmens, J., Vehabović, J., Ranzoni, J., and Bošnjak, J.).

462. *See UK Mass Interception Laws Violates Human Rights and the Fight Continues . . .*, PI (May 26, 2021), <https://privacyinternational.org/long-read/4526/uk-mass-interception-laws-violates-human-rights-and-fight-continues>.

463. *See* Report of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, ¶ 21, U.N. Doc. A/HRC/39/29 (Aug. 3, 2018). *See also Secret Global Surveillance Networks*, *supra* note 450.

But this conclusion comes with two caveats. First, the extraterritoriality problem looms large in intelligence-sharing cases and is yet to be addressed explicitly by human rights bodies. In particular, while it is clear that human rights treaties would apply to *B* if *B* received information from *A* about individuals within *B*'s territory, it remains unsettled whether the treaties would apply if *A* shared with *B* information about individuals in *A*'s own territory or that of a third State.⁴⁶⁴ Second, one would reasonably expect the relevant privacy guarantees to be applied more flexibly in the context of a military operation than in situations of relative normalcy, something that the IHRL necessity/proportionality framework can comfortably allow, but the point remains untested. Again, the privacy guarantees would apply in the first place only if the nature of the shared information was such that it actually implicated the privacy interests of individuals.⁴⁶⁵

Finally, the actual use of the unlawfully obtained and shared information would generally not taint an operation of the recipient State that would otherwise be lawful. For instance, if *B* used information obtained through the use of torture by *A* to target an individual in a drone strike, and that individual turned out to be a combatant, the strike was thus directed against a purely military target. In such a case, there would be no violation of IHL even though *B* relied on information obtained through torture. Similarly, on an IHRL analysis, if a State used lethal force against an individual who in fact posed to others an imminent threat that could not be neutralized in any other way so that the use of force would be compatible with the right to life,⁴⁶⁶ the lawfulness of the use of force would not depend on the fact that some of the relevant information pointing to the threat was obtained unlawfully and

464. The extraterritoriality issue has been avoided by the European Court (so far) on the basis that at least some of the applicants were in the respondent State's territory. See *Big Brother Watch*, *supra* note 445, ¶ 272. See also Marko Milanovic, *The Grand Normalization of Mass Surveillance: ECtHR Grand Chamber Judgments in Big Brother Watch and Centrum för rättvisa*, EJIL:TALK! (May 26, 2021), <https://www.ejiltalk.org/the-grand-normalization-of-mass-surveillance-ecthr-grand-chamber-judgments-in-big-brother-watch-and-centrum-for-rattvisa/>.

465. For example, information about the location of a military facility, weapons schematics or operational plans would not generally implicate individual privacy interests.

466. See, e.g., General Comment No. 36, *supra* note 275, ¶ 12 (setting out IHRL criteria for lawful deprivations of life).

shared with the recipient State—if, again, the information was objectively accurate.⁴⁶⁷

On the contrary, the rules of both IHL and IHRL may positively *require* resort to such intelligence, regardless of the fact that it was collected and shared unlawfully. If, say, the receiving State is put on notice through the shared information that there are civilians in an area that it intends to strike, ignoring that information would put the receiving State in violation of its duty to take all feasible precautions in attack and verify that all targets are military ones.⁴⁶⁸ Or, if the recipient State is put on notice of an imminent terrorist attack against one of its cities, it would act against its positive duty to protect the right to life of its people if it chooses simply to disregard that information on the ground that it was obtained unlawfully.⁴⁶⁹ However, the use of unlawfully obtained and shared information would be prohibited in specific contexts, for example, by the exclusionary rule applicable in judicial proceedings where the use of information obtained through torture would

467. Information obtained by torture generally will not be; however, the information may nonetheless be obtained unlawfully in a way that does not entail its unreliability, e.g., in violation of State sovereignty or the human right to privacy.

468. See CUSTOMARY IHL STUDY, *supra* note 202, rr. 15–16; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 57(1), 57(2)(a), June 8, 1977, 1125 U.N.T.S. 3.

469. See *A v. Home Secretary (No 2)* [2005] UKHL 71 [47] (“If under such torture a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it. There would be a flagrant breach of article 3 [ECHR] for which the United Kingdom would be answerable, but no breach of article 5(4) or 6.” [Lord Bingham], [68]–[69]). (“[I]f use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way[;] . . . [in] these instances the executive arm of the State is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.” [Lord Nicholls], [161].) (“Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive *entitled* to make use of this information; to my mind it is *bound* to do so. It has a prime responsibility to safeguard the security of the State and would be failing in its duty if it ignores whatever it may learn or fails to follow it up. Of course it must do nothing to promote torture. It must not enlist torturers to its aid (rendition being perhaps the most extreme example of this). But nor need it sever relations even with those States whose interrogation practices are of most concern. So far as the courts are concerned, however, the position is different. [Lord Brown].)

violate a defendant's right to a fair trial⁴⁷⁰ or when the use of information obtained in violation of diplomatic law could further infringe the rights of the injured State.⁴⁷¹

In sum, in the scenario in which intelligence is unlawfully obtained and shared, the most difficult issues are those regarding the responsibility of the State receiving the intelligence. As a general matter, the mere receipt of unlawfully obtained information does not, as such, fall within the scope of either the general complicity rule in Article 16 ASR or the IHL- and IHRL-specific complicity rules.⁴⁷² This will generally be the case in situations in which the intelligence sharing is sporadic or isolated. However, in situations of longer-term partnerships, especially those in which a pattern can be discerned in the behavior of the State or non-State actor sharing the intelligence, such as the use of torture, and when there is a standing relationship of mutual assistance, the recipient State may no longer be regarded as merely a passive recipient of tainted information but may be seen as encouraging or actively

470. See, e.g., *id.* (House of Lords unanimously concluding that evidence tainted by torture was inadmissible in proceedings before a special immigration tribunal). See further Tobias Thienel, *The Admissibility of Evidence Obtained by Torture under International Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 349 (2006).

471. See, e.g., *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (No 3) [2018] UKSC 3 (UK Supreme Court holding that the admission into judicial proceedings of documents obtained unlawfully from the archives of a diplomatic mission or from its correspondence would in principle violate Articles 24 and 27 of the Vienna Convention on Diplomatic Relations, unless such documents were already in the public domain). See further Robert McCorquodale, *Wikileaks Documents Are Admissible in a Domestic Court*, EJIL:TALK! (Feb. 21, 2018), <https://www.ejiltalk.org/wikileaks-documents-are-admissible-in-a-domestic-court/>.

472. *But see* Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Report*, ¶¶ 54–55 U.N. Doc. A/HRC/10/3 (Feb. 4, 2009) (arguing that mere passive receipt of information where the receiving State knew or ought to have known that the information was obtained through torture, ill-treatment or arbitrary detention would make the receiving State complicit in the wrong). As explained, my position is narrower—in some cases, and likely only on a subjective culpability standard, the receiving State may be regarded as assisting the wrongdoing State. Notably, the Court of Appeal of England and Wales rejected Scheinin's analysis as “significantly aspirational rather than declaratory of existing law” and “not based upon either treaty or customary law.” See *Ahmed*, *supra* note 456, [44], [48].

assisting the production and sharing of such information, including by creating a market for such violations.⁴⁷³ Consider, for example, the United Kingdom's receipt of intelligence procured by third States through the mistreatment of detainees in the "war on terror." Parliament's Intelligence and Security Committee investigation found "198 cases recorded where UK personnel received intelligence from liaison services obtained from detainees whom they knew had been mistreated, or with no indication as to how the detainee had been treated but where, in our view, they should have suspected mistreatment."⁴⁷⁴ Depending on the facts, such situations can fall within the scope of Articles 16 and 41 ASR or of the regime-specific complicity rules. Again, however, as a general matter, the use of tainted information by the receiving State, such as for targeting purposes in the course of a military operation, will not be internationally wrongful except in specific contexts, for example, in judicial proceedings. But if the information pertains to the private lives of specific individuals, the processing and use of that information may, in the absence of sufficient privacy safeguards, run afoul of IHRL even if the State was merely its passive recipient.⁴⁷⁵

VI. CONCLUSION

The complicity rules of international law may be underdetermined. But as this article has shown we nonetheless possess an ample toolbox with which to address complicity scenarios, including those triggered by the sharing of intelligence in the course of multi-partner military operations. Article 16 ASR is the most powerful tool in that toolbox because of its general applicability and its usefulness as a normative baseline for other, regime-specific complicity rules. Most of this article was devoted to unpacking the fault elements of

473. Cf. *UK Principles*, *supra* note 387, annex A, ¶ 12 (referring to a situation in which the UK government's "continued receipt of intelligence is an encouragement of the methods used to obtain it or adversely effects [sic] the conditions under which the detainee is held" by a third party). See also Méndez, *supra* note 273, ¶ 55.

474. INTELLIGENCE AND SECURITY COMMITTEE, *supra* note 387, at 3.

475. See also U.N. Human Rights Council, Res. 42/15, The Right to Privacy in the Digital Age, U.N. Doc. A/HRC/RES/42/15, pmb. (Oct. 7, 2019) (The Council emphasizing "that States must respect international human rights obligations regarding the right to privacy when they intercept digital communications of individuals and/or collect personal data, when they share or otherwise provide access to data collected through, *inter alia*, intelligence-sharing agreements, and when they require disclosure of personal data from third parties, including business enterprises.").

such rules, elements that pose many complex and difficult questions and largely determine the reach of these rules.

With regard to Article 16, I have argued that State assistance to another State that significantly or substantially contributed to the wrongful act of the latter State will be caught by Article 16 if the assisted State acted with (1) purpose/direct intent to facilitate the wrongful act, regardless of any deficits in knowledge; (2) with oblique/indirect intent to facilitate the wrongful act, that is if it was practically certain that the assisted State would commit the act, practically certain that the aid provided would facilitate the act and consciously decided to provide the assistance nonetheless; or (3) with willful blindness, that is with a purpose to avoid acquiring information but for which it would have been acting with oblique intent. This variegated mental element is normatively justifiable and practicable, allows us to make sense of the internally conflicted ILC work product, and enables us to move beyond the false dilemma between intent and knowledge that has burdened much of the literature so far. As for Article 41(2) ASR as drafted by the ILC, it possesses no culpability requirement, but its apparent imposition of strict liability for aiding and assisting does not seem appropriate even for serious breaches of *jus cogens*. Arguably Article 41(2) can use not only the culpability requirements in Article 16 ASR but also risk-based modes of fault, subjective or even objective, for a State negligently failing to know (to some degree of probability) that its aid would help maintain a situation created by a serious *jus cogens* breach.

Regime-specific complicity rules coexist with the generally applicable ones and can be of great practical import. Both IHL and IHRL contain such rules, which can apply to State assistance in multinational military operations. The existence of the IHL rule is not in doubt. Again, we are speaking here of the negative duty of restraint *not* to encourage or facilitate violations of IHL, a duty with which any State can and should comply, and not about the much broader positive obligation to exert influence on third parties to put an end to their violations, which remains controversial. Even if some of its elements remain indeterminate, the IHL-specific complicity rule applies in all circumstances, regardless of whether the assisting State is involved in the armed conflict in which violations of IHL might occur, and regardless of the legal classification of that conflict. As for the IHRL rule, it is in the process of consolidation, in the course of which it will vary from treaty to treaty. Its practical utility also depends on the resolution of the extraterritoriality conundrum. Even so, we can reasonably expect that in the long run human rights bodies will embrace an expansive approach such as the one articulated

by the German Constitutional Court, holding that all State actions need to comply with guarantees of fundamental rights regardless of the location of the affected individual, and that “[u]nder no circumstances may the State be complicit in violations of human dignity” by sharing intelligence with third parties committing such violations.”⁴⁷⁶

An added value of IHL- and IHRL-specific complicity rules over Article 16 ASR lies in their application to assistance provided to non-State actors and, potentially, in their more relaxed fault requirements. In particular, as we have seen, States are arguably not acting in line with their negative duties to respect IHL and IHRL if they supply assistance to partners while consciously disregarding a risk that their partners will commit serious violations of those regimes. That probability threshold may be set at likelihood or one of the lower levels—substantial, clear, or real risk. In any event, States may implement mitigation measures that can decrease the appreciable risk below the prescribed threshold. It is unlikely, however, that States can lawfully balance that risk of harm against some other reason for providing assistance, at least if serious violations of IHL and IHRL are concerned.

The determination of the assisting State’s fault will depend greatly on the perspective from which the assessment is being made. The officials of the assisting State, including legal advisers, will initially make *ex ante* decisions on whether the State would be acting with the requisite degree of fault if it provided the assistance. In particular, their assessment of the future conduct of the assisted party will inherently be contingent and probabilistic. Also, while it is a standard feature of international law as a decentralized system that factual and legal issues are initially going to be self-judged, it is perfectly normal for other entities, including domestic and international courts, to make determinations of the assisting State’s culpability *ex post*, i.e., after it provided the assistance that facilitated the wrongful act. From both perspectives, the key consideration will always be the existence, *vel non*, of any pattern of behavior by the wrongdoing partner.

Finally, we have seen that there are two basic scenarios of intelligence sharing in multinational military operations that may raise questions of complicity. The first is the sharing of intelligence that facilitates the wrongful act of a third party, either sporadically or as part of systematic assistance to a war effort more generally. The causal contribution and fault elements of Article 16 ASR and the IHL- and IHRL-specific complicity rules may all be met in such situations. In the second, intelligence is unlawfully collected and

476. 1 BvR 2835/17, *supra* note 319, ¶ 237.

shared with the receiving State, which then uses it for its own purposes. In principle, the mere use of tainted intelligence will not make the receiving State's conduct, such as an attack against a military object, unlawful. However, if the State is not merely a passive recipient of such information but expressly or implicitly encourages or assists the party that wrongfully obtains and shares it, the various complicity rules will be engaged. The storage, processing, and use of unlawfully obtained personal information may also violate discrete rules of IHRL, such as the right to privacy or (in a specific context) the right to a fair trial.

In sum, while the web of legal rules that apply in complicity scenarios, such as those of intelligence sharing in military operations, is a complex one, the conceptual and practical difficulties in interpreting, applying, and developing these rules are not insurmountable. As with all legal rules, their practical implementation will depend primarily on a gradual process of norm internalization and the building up of a culture of compliance for which capacity-building efforts within governments are indispensable, partly as result of external and internal pressure, advocacy, and litigation. That said, the reality of coalition operations is that the relevant partners may be subjected to different treaties and mechanisms of outside scrutiny. But it is inevitable that the greater constraints to which some of the States involved may be subject will have spillover effects on their partners, who will in practice have to take them into account. As far as legal risks for partners are concerned, domestic and international litigation under IHRL will produce the most acute such risks, a tendency that will only grow in the future.