

# Shared Non-responsibility in International Law? Defences and the Responsibility of Co-perpetrators and Accessories in the Guiding Principles: Afterword

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## Abstract

*This comment assesses the approach to the reach of defences beyond the international legal person(s) who is (or are) the author(s) of the internationally wrongful act articulated in Guiding Principle 5 of the Guiding Principles on Shared Responsibility in International Law. It will focus on three main points: (1) whether the choice in respect of the reach of defences in Principle 5 is justifiable for the international legal order; (2) the reach of defences in cases of coercion, where the coerced party may benefit from a defence due to the coercion (in the form of a force majeure defence); and (3) the ‘blind spot’ in the Guiding Principles in relation to defences of accessories, in particular where the conditions for accessorial liability are defined broadly as in the case of Principle 6 on aid and assistance.*

## 1. Introduction

It is accepted in most legal systems that wrongs can be committed by more than one legal subject (the ‘principal’ actor or actors) and that others may participate in the wrongdoing of the principal (the ‘accessories’). Responsibility therefore extends beyond the principal, or principals in cases of co-perpetration, also to accessories. This basic idea, articulated through different models and through different frameworks,<sup>1</sup> is present, too, in the international legal order. The rules on accessorial responsibility in international law are codified in Chapter IV of Part One of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>2</sup> and the equivalent chapter of the Articles on the Responsibility of International Organizations (ARIO).<sup>3</sup> The Guiding Principles on Shared Responsibility in International

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<sup>1</sup> For a review and analysis, see M Jackson, *Complicity in International Law* (2015), ch 2.

<sup>2</sup> International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001, reprinted in 2 *International Law Commission Yearbook (ILC Yb)* (2001) 31 (hereinafter ‘ARSIWA’).

<sup>3</sup> ILC, Articles on the Responsibility of International Organizations, UN Doc. A/66/10, reprinted in 2 *ILC Yb* (2011) 46 (hereinafter ‘ARIO’).

Law (hereinafter ‘Guiding Principles’) develop these existing rules and provide further guidance on questions of responsibility in the numerous situations in which wrongs are committed by multiple actors.<sup>4</sup> Guidance in this area is certainly needed given that, as remarked by James Crawford, States (and perhaps international persons in general) tend to ‘hunt in packs’.<sup>5</sup>

If international persons hunt in packs, do defences also shield everyone in the ‘pack’? Do the principal’s defences also cover others involved in their wrongdoing? This is a difficult question, which all domestic legal systems have had to confront – as a matter of both criminal and civil responsibility.<sup>6</sup> There is no obvious or logical answer. Whether the principal can share its defences with other co-perpetrators and accessories – and how this happens – may depend on various factors, which may be weighed and balanced differently in different legal systems. These factors include the legal basis of the co-perpetrators’ and accessories’ liability; the type and character of the defence, namely whether it is a justification or an excuse; questions about the co-perpetrator’s culpability and blameworthiness; and the victims’ rights to reparation.

The Guiding Principles address this question in Principle 5:

Circumstances precluding wrongfulness in situations of shared responsibility

1. Each of the international persons that contributed to the indivisible injury of another person may invoke a circumstance precluding wrongfulness under the rules of international responsibility.
2. A circumstance precluding wrongfulness invoked by an international person that contributed to the indivisible injury of another person does not as such preclude the wrongfulness of the conduct of other international persons that contributed to the indivisible injury.
3. The invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act(s) in question.

In this comment, I review the Guiding Principles’ approach to the sharing of defences in Principle 5. I will focus on three main points: whether the choice on sharing of defences is

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<sup>4</sup> Nollkaemper, d’Aspremont, Ahlborn, Boutin, Nedeski, Plakokefalos, ‘Guiding Principles on Shared Responsibility in International Law’, 31 *European Journal of International Law (EJIL)* (2020) 15 (hereinafter ‘Guiding Principles’).

<sup>5</sup> H Aust, *Complicity and the Law of State Responsibility* (2011), at 2, quoting Crawford, ‘Responsibility of States and Non-State Actors’, Speech at the Biennial Conference of the Japanese Association of International Law, Tokyo, 14 May 2005, manuscript on file with the author, 13.

<sup>6</sup> Hassemer, ‘Justification and Excuse in Criminal Law: Theses and Comments’, *Brigham Young University Law Review (BYU LR)* (1986) 573, at 603.

justifiable for the international legal order (Section 2); a specific difficulty raised by sharing defences in cases of coercion (Section 3); and the blind spot in relation to defences of *accessories* (Section 4). The last section provides some brief concluding remarks.

## 2. Shared Defences under the Guiding Principles

### A. The Principle of Individuality of Defences

Principle 5 lays down the basic principle that each international person who contributes to an indivisible injury can invoke defences in relation to their contribution. The commentary clarifies that whenever an international person relies on a defence, that defence is *individual* to that person.

The principle of individuality of defences is both reasonable and justifiable. It flows from the basic idea underlying the law of international responsibility: the principle of independent responsibility.<sup>7</sup> This is clear in cases of co-perpetration: co-perpetrators, each responsible for their own internationally wrongful act, do not benefit from the defences of other participants. To illustrate with an example from the commentary to Guiding Principle 2:

[A] boat with seventy-two persons on their way to the Italian island of Lampedusa ran out of fuel and drifted along the Libyan shore before washing up sixteen days later with only eleven survivors. As several states, including Italy and Malta, had boats in the sea area at the time and received distress signals, it could be argued that both states were in the position to take action and can be held responsible for their omission to act. Their concurrent failures to attempt rescue each would have been sufficient to produce the indivisible injury.<sup>8</sup>

If the Italian boat had been physically prevented from reaching the migrant boat, because of strong currents for example, it could benefit from a defence of *force majeure*.<sup>9</sup> The Maltese boat, unaffected by the strong weather, could not benefit from the Italian defence.

### B. Exceptions to the Principle of Individuality

The commentary to Principle 5 also provides for two sets of exceptions to the individuality principle. First, cases where the responsibility of an international person is derivative. These

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<sup>7</sup> ARSIWA, *supra* note 2, Part One, ch. IV, commentary para. 1; referred to in Guiding Principles, *supra* note 4, Principle 2, commentary para. 4.

<sup>8</sup> Guiding Principles, *supra* note 4, Principle 2, commentary para. 8 (footnotes omitted).

<sup>9</sup> ARSIWA, *supra* note 2, Art. 23.

are cases of accessory responsibility covered in Principle 6, on aid and assistance; Principle 7, on concerted action; and Principle 8, on control.<sup>10</sup> Second, cases involving Principle 3, on shared responsibility arising from a single internationally wrongful act.<sup>11</sup> For reasons of space, I will only deal here with the first set of exceptions.

The sharing of defences in cases of accessory responsibility depends on two factors. First, the basis of responsibility of the accessory and, second, the type of defence in question.

## 1. Basis of responsibility

Accessory responsibility involves cases where one international person aids or assists, directs and controls, coerces, or acts in concert with, another international person. The conduct of the accessories is not, on its own, internationally wrongful. That is, the acts of aiding or assisting, directing and controlling, coercing, or acting in concert are not themselves prohibited by international law. Accessories are responsible as a result of the connection between their lawful act and the wrongful act of another international person. Thus, Chapters IV of Part One of both ARSIWA and ARIIO speak of responsibility ‘in connection with the act’ of another international person. In all cases of accessory liability, there is: (i) a wrongful act of the principal; (ii) a lawful act of the accessory; and (iii) a connection between (i) and (ii). It is this connection that makes the accessory responsible. This is the reason why accessory responsibility is said to be derivative: it derives from the wrongful act of another person.

The mechanics of derivation are not the same in all cases of accessory responsibility. There are some nuanced, but important,<sup>12</sup> distinctions between the modes of accessory

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<sup>10</sup> Guiding Principles, *supra* note 4, Principle 5, commentary para. 5.

<sup>11</sup> *Ibid.*, Principle 5, commentary para. 6.

<sup>12</sup> Though seeming purely conceptual, these distinctions could affect the responsibility of each state involved. For example, the amount of compensation may vary for an aiding state, which is responsible for *its* own wrong, and a directing or coercing state, which is responsible for the principal’s wrong. The aiding state may be liable to a portion of the damage caused by the principal’s wrong, whereas the directing and coercing state may be responsible for the whole damage caused by the principal. This would certainly be the case where harm was divisible. It could also be the case where injury is indivisible: under Guiding Principle 11(3), ‘each of the responsible international persons is under an obligation to compensate for the indivisible injury caused, unless its contribution to the injury is negligible’. It is unclear whether ‘contribution’ here concerns the basis of responsibility (causation of the injury) or the content of responsibility (causation of a portion of the injury); if the latter, then the basis of responsibility (for the accessory’s own contribution or for the principal’s wrong) may

responsibility. I will first consider the modes of accessorial responsibility included in ARSIWA<sup>13</sup> and ARIO,<sup>14</sup> and then the case of concerted action in Guiding Principle 7. For simplicity, I will refer here to the rules in ARSIWA but the same analysis is applicable to the rules in ARIO.

Under Article 16 ARSIWA, the accomplice is responsible for its own conduct, and the wrongfulness of that conduct is derived from the wrongfulness of the principal's conduct.<sup>15</sup> Consider the following scenario of *military support*: state *A* provides military support to state *B* for the latter's military invasion of state *C*. The provision of military support is not prohibited as such in international law. Nevertheless, state *A* would be responsible towards state *C*. State *A* would not be responsible towards state *C* for the invasion carried out by state *B*; rather, it would be responsible for its provision of support to state *B*'s wrongful act. The provision of military support, despite being itself lawful, becomes unlawful due to its connection with state *B*'s invasion. The act of state *A* (the accomplice) derives its wrongfulness from the act of state *B* (the principal).

Under Article 17 ARSIWA, the directing state is not responsible for its own conduct, but for the act of the directed state.<sup>16</sup> In this case, the directing state derives responsibility from the directed state's wrong. The direction and control, of themselves lawful, do not become wrongful because of the wrongfulness of the directed state's act. ARSIWA give the following example:

During the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of [Germany]. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.<sup>17</sup>

German control of the Italian police was not itself wrongful in international law. And yet, Germany was responsible towards the Holy See, because it was responsible *for* Italy's wrong.

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make a difference. Furthermore, as noted below, the different basis of responsibility may have an impact on the availability of defences *of* the accessory.

<sup>13</sup> ARSIWA, *supra* note 2, Arts 16 (aid or assistance), 15 (direction and control), and 16 (coercion).

<sup>14</sup> ARIO, *supra* note 3, Arts 14 (aid or assistance), 15 (direction and control), and 16 (coercion). *Ibid.*, Art. 17 (circumvention of international obligations) raises different issues, and is not considered here.

<sup>15</sup> ARSIWA, *supra* note 2, Art. 16, commentary para. 10.

<sup>16</sup> *Ibid.*, Art. 17, commentary para. 1.

<sup>17</sup> *Ibid.*, Art. 17, commentary para. 5.

The connection is here between Italy's wrong and German responsibility: the accessory (Germany) derives responsibility from the wrongful act of the principal (Italy). Article 17 ARSIWA, in attributing the responsibility for the directed State's wrong to the directing state, is better seen as a form of imputational responsibility.<sup>18</sup>

Article 18 ARSIWA, on coercion, is also a form of imputational responsibility.<sup>19</sup> The coercing state is responsible for the wrongful act of the coerced state. The act of coercion is itself lawful,<sup>20</sup> and does not become wrongful from its connection with the wrongful act of the coerced state. The coercing State's responsibility is derived from the wrongful act of the coerced state. Take the following scenario of *cultural property*: state *X* coerces state *Y* to destroy cultural property of state *Z*. State *X*'s coercion is not wrongful on its own. But state *X* would be responsible towards state *Z* for the destruction committed by state *Y*.<sup>21</sup>

Principle 7 adds an additional form of accessorial responsibility to the three just considered: concerted action. It addresses situations where 'international persons act in concert in the commission of one or several internationally wrongful acts and contribute to an indivisible injury'.<sup>22</sup> This situation arises where international persons, acting to achieve a common goal, commit one or several wrongful acts that contribute to the indivisible injury of another person.<sup>23</sup> The goal in itself need not be internationally wrongful, it is enough that 'a wrongful act is committed in the course of that concerted action'.<sup>24</sup> Furthermore, not all acts of all parties must be unlawful: it suffices that the acts of one party carrying out the common goal is unlawful. The commentary to Principle 7 provides the example of the 2003 bombing of Iraq, which was 'carried out by coalition partners where, although only certain states carried out the actual bombings, multiple other states participated in the decision-making and

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<sup>18</sup> See Jackson, *supra* note 1, ch. 2.

<sup>19</sup> ARSIWA, *supra* note 2, Art. 18, commentary para. 1.

<sup>20</sup> Unless, of course, it reaches the level of a threat of use of force. Coercion involving the threat of force is prohibited by the Charter of the United Nations, 24 October 1945, 1 UNTS 16, Art. 2(4) (hereinafter 'UN Charter').

<sup>21</sup> Though note that some aspects of the ARSIWA commentary suggest this is a case of principalship. The coercing state is perceived as indirectly perpetrating the wrongful act through the coerced state: the coerced state would be merely the instrument of the coercing state: ARSIWA, *supra* note 2, Part One, ch. VI, commentary para. 6.

<sup>22</sup> Guiding Principles, *supra* note 4, Principle 7, commentary para. 1.

<sup>23</sup> *Ibid.*, Principle 7, commentary para. 6.

<sup>24</sup> *Ibid.*, Principle 7, commentary para. 8.

execution processes'. According to Principle 7, all coalition partners who participated in the decision-making would be responsible for the bombing carried out by a few states.

This mode of accessorial liability is somewhat uncertain and has been subject to criticism.<sup>25</sup> For present purposes, it should be noted that it is not clear whether it involves a case of derived wrongfulness or derived responsibility. That is, it is not clear whether the participation of all coalition partners in the decision-making becomes wrongful because of its connection to the unlawful bombing carried out by some of them, or if coalition partners are responsible for the unlawful bombing carried out by some of them. This issue does not affect the sharing of defences for, as will be seen, defence-sharing still relies on the commission of a wrong by the principal. But it may affect other matters, in particular the invocation of defences *by accessories themselves*, discussed in Section 4.

## 2. Type of defence

All cases of accessorial responsibility share the fact that they depend on the commission of a wrongful act by the principal. Thus, defences available to the principal may affect the responsibility of the accessory. But this depends on the character of the defence as a justification or an excuse.<sup>26</sup>

Justifications arise from properties or characteristics of acts, and render those acts lawful. If the act of the principal is lawful, the accessory will have assisted, for example, a lawful act. By implication, the effect of the justification is shared with the accessory. To exemplify, in the *military support* scenario, if state *B* was acting in self-defence, state *A* would have assisted a lawful act and its assistance would remain lawful.

Excuses, instead, arise from properties or characteristics of actors, and they preclude the responsibility of that actor for its wrongful act. If an excuse precludes the responsibility of the principal, this would have no effect on the responsibility of accessories. Since the principal's act remains wrongful, wrongfulness or responsibility for the accessory may still be derived from it. In the *cultural property* scenario, state *Y* could plead the excuse of *force majeure* due to the coercion of state *X*. This would exclude state *Y*'s responsibility towards

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<sup>25</sup> See Murray, 'Liability *In Solidum* in the Law of International Responsibility: A Comment on Guiding Principle 7', 31 *EJIL* (2020) XXX.

<sup>26</sup> Guiding Principles, *supra* note 4, Principle 5, commentary paras 4–5. On this distinction, see F Paddeu, *Justification and Excuse in International Law* (2018), chs 1–3; Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses?', 10 *EJIL* (1999) 405.



state Z, but it would leave unaffected the wrongfulness of state Y's act: the destruction remains a wrongful act. Consequently, state X's responsibility could still be derived from state Y's wrong. Indeed, excuses, as they arise from properties or characteristic of the actor, are particular to that actor and cannot be shared.

The Guiding Principles commentary's approach to the responsibility of accessories in cases in which the principal invokes defences is therefore justifiable. Indeed, the wrongfulness of the accessory's conduct or the accessory's responsibility, as the case may be, are dependent on the accessory's connection to the wrongful act of the principal's conduct.<sup>27</sup> By implication, defences of the principal can affect the responsibility of the accessory – either to exclude it, where the principal's conduct is justified, or to retain it, where the principal is excused.

### 3. Sharing Defences and the Problem of Coercion

Situations of coercion present a particular problem for sharing defences between principal and accessories. The problem arises from a combination of factors: (i) the specific conditions and operation of coercion as a form of accessorial responsibility; and (ii) the assumption that *force majeure* operates as a justification, rather than as an excuse. I will explain each of these in turn and then, building on the analysis in Section 3.1, show how the problem arises.

As to the specific conditions of coercion, there are four features of this mode of liability that compose the problem:<sup>28</sup>

First, coercion need not itself be an internationally wrongful act of the coercing party,<sup>29</sup> it can be a lawful act, like economic pressure.<sup>30</sup> The responsibility of the coercing party is derivative from the wrongful act of the coerced party.<sup>31</sup> In the *cultural property*

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<sup>27</sup> Guiding Principles, *supra* note 4, Principle 5, commentary para. 5.

<sup>28</sup> For simplicity, I refer to ARSIWA only. Pursuant to ARSIWA, *supra* note 2, Art. 18:

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) the coercing State does so with knowledge of the circumstances of the act.

<sup>29</sup> *Ibid.*, Art. 18, commentary para. 3.

<sup>30</sup> Economic coercion is not prohibited by international law: Carter, 'Economic Coercion', in *The Max Planck Encyclopedia of International Law* (last updated September 2009), para. 11, available at <https://bit.ly/2VSy3xA> (by subscription).

<sup>31</sup> *Ibid.*, para. 1.



scenario, state *X* was responsible for the destruction of state *Z*'s property, because the destruction was a wrongful act of state *Y*. By implication, if the coerced party does not commit a wrongful act, the coercing party cannot be responsible. If state *X* had coerced state *Y* into paying its debt to state *Z*, there would be no wrongful act to hold state *X* responsible for.

Second, coercion 'has the same essential character as *force majeure* under [A]rticle 23' of ARSIWA.<sup>32</sup> To amount to coercion, an act of pressure must be such that it leaves the coerced party with no effective choice but to comply with the wishes of the coercing party.<sup>33</sup> Like a *force majeure*, the coercion must nullify the will of the coerced party.<sup>34</sup>

Third, since coercion must nullify its will, in most cases the coerced party will be able to rely on the defence of *force majeure* in relation to its wrongful conduct.<sup>35</sup> Consequently, in most cases of coercion, the coerced party's responsibility vis-à-vis the injured party will be precluded.<sup>36</sup> In the *cultural property* scenario, state *Y* could plead *force majeure* due to coercion from state *X*. It would thus not be responsible towards state *Z*. This appears a desirable outcome for, after all, state *Y* could do nothing to resist state *X*'s pressure. In these circumstances, it would seem unfair to hold state *Y* responsible towards state *Z*.

Fourth, the coercing party need not be bound by the obligation breached by the coerced party: the obligation need not be opposable to it.<sup>37</sup> In the *cultural property* scenario, the obligation to protect cultural property may be established in a treaty between states *Y* and *Z*, to which state *X* is not a party. Yet, though state *X* was not bound by the treaty, it could be responsible towards state *Z* for *Y*'s wrongful conduct. Indeed, state *X* derives responsibility from state *Y*'s wrongful conduct, but it does not derive the wrongfulness of *Y*'s conduct: state *X*'s conduct could not be wrongful, originally or derivatively, as *X* is not bound by the obligation breached.

As to the character of *force majeure*, ARSIWA, ARIO, and the Guiding Principles refer to this defence as a 'circumstance precluding wrongfulness'. Taken literally, this expression means that the conduct committed in the relevant circumstances is not wrongful,

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<sup>32</sup> ARSIWA, *supra* note 2, Article 18, commentary para. 2.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, para. 1.

<sup>35</sup> Guiding Principles, *supra* note 4, Principle 8, commentary para. 6.

<sup>36</sup> *Ibid.*, para. 4.

<sup>37</sup> ARSIWA, *supra* note 2, Article 18, commentary para. 6. See V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016), at 144.

that the defence acts like a justification. The Guiding Principles, for example, say that the coerced person could invoke *force majeure* as a ‘circumstance precluding wrongfulness’.<sup>38</sup> It is not clear whether the Guiding Principles deliberately opted to use this expression as a synonym of justification, or used this expression to refer to defences generally.

The problem considered here arises if *force majeure* is treated as a justification. If the coerced party benefits from the justification of *force majeure*, such that its conduct is lawful, this will affect the responsibility of the coercing party. Recall that this is a derivative form of responsibility: the coercee’s responsibility is grafted onto the coerced’s wrongful act. In the *cultural property* scenario, state *X* is only responsible towards state *Z* if state *Y*’s destruction of *Z*’s cultural property is wrongful. If state *Y*’s conduct is lawful, there is no wrongful act that state *X* can be responsible for. Allowing a justification to state *Y* due to the coercion thus has the collateral effect of undercutting the basis of state *X*’s responsibility. The defence of the principal is here shared with the accessory. And this sharing leads to the problem: achieving the desirable aim of excluding state *Y*’s responsibility for violating state *Z*’s rights, unwittingly leads to excluding the responsibility of state *X* as well. State *Z* is left with no redress.

The ILC and the authors of the Guiding Principles see and dislike this outcome, and try to prevent it. Indeed, they note that there is no reason why state *X* should benefit from state *Y*’s defence.<sup>39</sup> And, moreover, it would be unfair if state *Z* was left without redress.<sup>40</sup> To prevent this undesirable outcome, ARSIWA simply block the effect of the coerced state’s defence from reaching the coercing state.<sup>41</sup> The Guiding Principles follow the ILC’s approach on this point.<sup>42</sup> The defence, here, will not be shared.

But the reasoning for this blocking is unconvincing. If *force majeure* is treated as a justification, then the defence *must* be shared – at least on analytical grounds. *Force majeure* would render the conduct of the coerced party lawful, but the coercing party could only be responsible if the coerced party’s conduct was unlawful. If there is *force majeure*, then no

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<sup>38</sup> Guiding Principles, *supra* note 4, Principle 8, commentary para. 6, states that the coerced State can invoke ‘coercion as a circumstance precluding wrongfulness’. This is technically incorrect: coercion is not a defence under international law. The coerced state can invoke *force majeure* when the coercion is such as to suppress all ‘element of free choice’ of the coerced State: ARSIWA, *supra* note 2, Art. 23, commentary para. 1.

<sup>39</sup> ARSIWA, *supra* note 2, Article 18, commentary para. 4.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, para. 6.

<sup>42</sup> Guiding Principles, *supra* note 4, Principle 8, commentary para. 6.

one can be responsible. And yet, pursuant to the reasoning of ARSIWA and the Guiding Principles, the coercing state would be responsible despite the fact that: (i) it has not itself breached any obligations binding upon it; and (ii) the coerced state has not breached its obligation either. More succinctly, the coercing state would be responsible for an internationally wrongful act despite the fact that: (i) its own conduct was lawful *and* (ii) the coerced state's conduct was lawful. Now, two rights cannot make a wrong any more than two wrongs can make a right. If coercion is a form of derivative responsibility, then there needs to be some wrong that it attaches to. There is nothing in the ILC's or the Guiding Principles' solution that allows such derivation: following their reasoning, state *X* would be responsible for an internationally wrongful act in circumstances in which there has been no internationally wrongful act. State *X*'s responsibility here requires a leap of faith.

It is desirable both to prevent state *Y* from being responsible towards state *Z*, and to hold state *X* responsible towards state *Z*, for *Z* would otherwise have no redress for the injury suffered. One solution to this problem would be to prohibit coercion in international law. In this case, the coercing state *X* could be responsible towards state *Z* as a principal, rather than as an accessory. This is not, however, settled law. Only certain forms of coercion, or coercive mechanisms, are currently prohibited by international law.<sup>43</sup> A more readily available, and perhaps more elegant, solution would be to classify *force majeure* as an excuse. If this defence were an excuse, then state *Y* would be exonerated from the obligations of cessation and reparation vis-à-vis state *Z*, but its conduct would remain wrongful. As such, it would still be possible to graft the responsibility of state *X* onto the wrongfulness of the state *Y*'s act.<sup>44</sup> A coerced party's excuse of *force majeure* would not be shared: it could not block the connection between the coerced party's wrong and the responsibility of the coercing party.<sup>45</sup>

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<sup>43</sup> For example, coercion amounting to the threat of force: see UN Charter, *supra* note 20, Art. 2(4).

<sup>44</sup> See Paddeu, *supra* note 26, at 69–70.

<sup>45</sup> Similar problems arise in domestic law, where defendants can plead that the accessory coerced them to commit the crime (invoking, for example, duress by threats). See, e.g., the English case of *Bourne* [1952] 36 Cr App R 125: *D* had been coerced by her husband *S* to have sexual intercourse with a dog. *S* was convicted though it was clear *D* would have been acquitted on the basis of coercion had she been charged. The decision has been rationalized on the basis that coercion was an excusatory defence: D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed., 2018), at 222–223. A similar result would be achieved under German criminal law also on the basis of the theory of excuse: see Schreiber, 'Problems of Justification and Excuse in the Setting of Accessorial Conduct', *BYU LR* (1986) 611, at 634–635.

## 4. Defences of Accessories? The Problem of Equivocal Helpers and Virtuous Accomplices

Guiding Principle 6 requires that the international person providing aid or assistance (the ‘accomplice’) possesses actual *or* constructive knowledge of the circumstances of the principal’s wrong.<sup>46</sup> This is a lower threshold than that provided for in Article 16 ARSIWA<sup>47</sup> and Article 14 ARIO,<sup>48</sup> which require actual knowledge. So, in the *military support* scenario, under Principle 6, state *A* would be responsible for its military assistance to state *B* even if it did not know of the circumstances of state *B*’s invasion of state *C*. Principle 6 and its commentary also exclude the requirement of intent referred to in the commentaries to ARSIWA Article 16 and ARIO Article 14, according to which assistance is wrongful if it is provided ‘with a view to facilitating’ the principal’s wrong.<sup>49</sup> The Guiding Principles commentary explains this deviation on a practical rationale: given the significant difficulties in proving the intent of corporate entities, the notion of aid or assistance could be ‘unworkable’.<sup>50</sup>

The potential drawback of this approach is that it casts the net too wide and may capture instances of typical and beneficial cooperation. Rules on complicity must carefully balance competing interests: on one hand, to censure assistance in the commission of wrongs and, on the other, to allow beneficial international cooperation.<sup>51</sup> The wider the definition of complicity, the narrower the scope of beneficial international cooperation, and vice versa. A broad rule on complicity, based on actual *or* constructive knowledge, could cover ambiguous situations in which it may not be desirable to hold the accomplice party responsible.<sup>52</sup> Take

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<sup>46</sup> Guiding Principles, *supra* note 4, Principle 6(2) states that the international person ‘knew or should have known the circumstances of the internationally wrongful act’.

<sup>47</sup> ARSIWA, *supra* note 2, Art. 16(a).

<sup>48</sup> ARIO, *supra* note 3, Art. 14(a).

<sup>49</sup> ARSIWA, *supra* note 2, Art. 16, commentary para. 1; ARIO, *supra* note 3, Art. 14, commentary para. 3. For the debates on the mental element of Article 16 ARSIWA, see Moynihan, ‘Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission’s Articles on State Responsibility’, 67 *International and Comparative Law Quarterly (ICLQ)* (2018) 455, at 460–462.

<sup>50</sup> Guiding Principles, *supra* note 4, Principle 6, commentary para. 6.

<sup>51</sup> Aust, *supra* note 5, at 428.

<sup>52</sup> Of course, other elements of the definition of complicity may help reduce its scope. The requirement of opposability, for example, restrict the scope of responsibility for aid and assistance. See Lanovoy, *supra* note 37, at 241–258.

the situation of an equivocal helper, where legal and/or factual uncertainties may prevent the accessory from having a clear picture of the circumstances of the principal's conduct.<sup>53</sup> Or the situation of the virtuous accomplice,<sup>54</sup> such as where a party provided financial assistance to a state to alleviate a humanitarian crisis in the knowledge that some of the assistance will be appropriated by government officials to circumvent sanctions. Or a situation in which an international person shares intelligence with a state battling terrorist groups, knowing some of it may be used to repress political dissenters. Given the density and character of interstate relations, and the great diversity of situations that can arise in practice, such ambiguous situations may not be infrequent.<sup>55</sup>

Holding equivocal and virtuous accomplices responsible in all circumstances may have a chilling effect on international cooperation.<sup>56</sup> This is all the more so due to two factors. First, due to its derivative character, accessorial responsibility is to some extent a question of moral luck: whether the accessory is responsible is not dependent, solely, on its own action, but is out of its control. Its responsibility depends on whether the principal goes on to commit the wrongful act (and possesses no justifications in so doing).<sup>57</sup> Second is the well-known problem of hindsight bias: the benefit of hindsight may show connections between facts and events, or show events in a different light, which were not clear to the accessory at the time of acting.<sup>58</sup> Against this landscape, international cooperation may look too risky for some international actors.

There are two possible ways of addressing this tension. One is to define the general (and default) rule of accomplice liability narrowly, as done by Article 16 ARSIWA.<sup>59</sup> The other is to maintain a broad definition of accomplice liability, but to recognize defences *for* the accessory, namely defences that the accessory can itself raise, rather than defences which the accessory might benefit from as a result of their application to the principal. Insofar as

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<sup>53</sup> Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) 1, 12.

<sup>54</sup> The expression is from Jackson, 'Virtuous Accomplices in International Criminal Law', 68 *ICLQ* (2019) 817.

<sup>55</sup> J Crawford, *State Responsibility: The General Part* (2013), at 408.

<sup>56</sup> See, Aust, *supra* note 5, at 239ff.

<sup>57</sup> See J Herring, *Great Debates in Criminal Law* (3rd ed., 2015), at 195.

<sup>58</sup> Roese and Vohs, 'Hindsight Bias', 7 *Perspectives on Psychological Science* (2012) 411, 412.

<sup>59</sup> Nolte and Aust, *supra* note 53, at 16–18; Aust, *supra* note 5, at 230–249; Crawford, *supra* note 559, at 405–408.

accomplices are responsible for their own conduct,<sup>60</sup> they may benefit from the range of recognized general defences in their legal order.<sup>61</sup> But there could also be defences specific to the accomplice, namely covering only the specific circumstances in which accomplice liability arises.

The Guiding Principles' choice to lower the standard of knowledge required for complicity, widening the scope of this form of responsibility, should therefore be accompanied by the identification of defences available to the accomplice. Principle 5(1) may be interpreted as allowing accessories to have their own defences: it states that *each* international person which contributed to the indivisible injury can invoke a defence under the rules on international responsibility. But none of the defences currently available in international law would cover these types of situations. Cases of complicity are mostly cases of voluntary action, excluding *force majeure* which covers involuntary action. They are also likely not to be triggered by a prior wrongful act, in turn excluding self-defence and countermeasures. Finally, they are not likely to have the consent of the victim, thus excluding the defence of consent. Only state of necessity could cover voluntary action unrelated to a prior wrongful act, but it may not always be applicable. Thus, cooperation may not involve protecting essential interests from grave and imminent perils and the type of cooperation may not be the 'only way' to address those perils. A specific defence for the accessory may therefore be necessary.

The approach in some domestic legal systems may be useful to show how an international law defence might be formulated for this type of situations. English criminal law, for example, recognizes a defence of 'acting reasonably' for the inchoate offence of assisting or encouraging crime.<sup>62</sup> The defence is highly contextual, and allows taking into consideration several factors, like the seriousness of the principal wrong and the purpose of the accessory's act.<sup>63</sup> As Paul Davies has noted, what amounts to 'reasonable [action] depends upon the circumstances of any given case'.<sup>64</sup>

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<sup>60</sup> This would certainly be the case for accomplices. Matters may be different for parties which direct, control, or coerce a wrongful act by the principal, as in these cases the accessories are responsible for the principal's act and not for their own act.

<sup>61</sup> See, e.g., Schreiber, *supra* note 45, at 628, in respect of German criminal law on this point.

<sup>62</sup> Serious Crimes Act, c. 27, 2007, s. 50.

<sup>63</sup> P. Davies, *Accessory Liability* (2015), at 83.

<sup>64</sup> *Ibid.*

A similar defence could be developed in international law, taking into account the following factors: First, a defence of reasonableness is not a mere denial of the mental element of complicity – it is not a ‘failure-of-proof’ defence. Rather, it would apply precisely in cases where the mental element was met, to exclude the conduct of the accomplice from the scope of the rule on complicity.

Second, the defence could be defined flexibly to allow drawing distinctions between different fact-patterns. The defence could take into account the gravity of the principal’s wrong, the purpose for which the assistance was given, and the efforts undertaken by the assisting person in assessing the relevant factual circumstances of the principal’s conduct. The defence may provide, for example, a shield to the person which assists another despite knowing that some of its assistance would be used to circumvent mandatory sanctions because, for example, relieving the distress of the local population outweighs compliance with the mandatory sanctions; but it may not shield a person that shares intelligence with a state known for violent repression of dissent including torture. Likewise, in a dynamic situation where there are competing accounts in respect of what is happening on the ground,<sup>65</sup> an accessory might be held to have acted reasonably by reference to the knowledge it had at the time.

Finally, a defence of reasonableness could also side-step the debate on whether the rule on complicity imposes a duty to inquire on the part of the assisting party.<sup>66</sup> Instead of imposing a due diligence duty to inquire before any type of international cooperation, a reasonableness defence would allow accessories to raise their diligence in the assessment of the situation to deflect claims of wrongdoing in connection with the wrongful acts of those whom they assist. International persons could avoid performing such inquiries for garden-variety cooperation, which would be burdensome and may stymie cooperation, but focus instead on situations where there may be some risk associated with the assisted party’s conduct. A defence of reasonableness is the necessary counterbalance to a wide rule on complicity and could promote the bureaucratization of risk assessment, thereby making ‘a significant contribution to the entrenchment of the rule of law in the international community’.<sup>67</sup>

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<sup>65</sup> Moynihan, *supra* note 49, at 465.

<sup>66</sup> *Ibid.*, at 462-463.

<sup>67</sup> Lowe, ‘Responsibility for the Conduct of Other States’ (2002) 101 *Kokusaihō gaikō zasshi* 1, 14.



## 5. Conclusion

The approach of the Guiding Principles to the sharing of defences between a principal and its co-perpetrators or accessories, is reasonable and justifiable. Starting from the principle of independent responsibility, Principle 5 articulates a principle of individuality of defences. By application of this principle, an international person who contributes to the indivisible injury of another can only rely on defences if it, individually, meets the requirements of the relevant defence. The effects of the defence will be individual to that person only. As a general rule, then, while responsibility may be shared, non-responsibility is not.

The Guiding Principles also recognize some exceptions, where non-responsibility is also shared: those in which responsibility is derivative. These are cases of aid and assistance, direction and control, coercion, and concerted action. In these cases, however, the sharing of the defence turns on whether the defence is a justification or an excuse. This is a reasonable position, provided that defences are properly classed as justifications or as excuses, as demonstrated by the case of coercion.

Finally, the Guiding Principles contain one blind spot: Can accomplices invoke defences themselves in relation to their own conduct? This possibility may be necessary where the rules on responsibility for aid and assistance cast the net too wide. Given the broad scope of Guiding Principles rule on aid or assistance in Principle 6, a defence of reasonableness may be necessary to ensure that the balance between international cooperation and censuring assistance to wrongful acts is properly struck.