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RESPONSES TO THE CONCEPT OF COMPLICITY IN GENERAL

No actual definition of "complicity" defined in international law

Georg Nolte and Helmut P. Aust 2009. (Nolte - Professor of Law, Humboldt University Berlin; Member of the International Law Commission. Aust - \*\* MLE, Doctoral Candidate and Research Fellow, University of Munich) Jan 2009 "EQUIVOCAL HELPERS—COMPLICIT STATES, MIXED MESSAGES AND INTERNATIONAL LAW" International and Comparative Law Quarterly (accessed 22 Apr 2023) https://epub.ub.uni-muenchen.de/23180/1/oa\_Nolte\_Aust.pdf (brackets added)

Complicity is not a term of art in international law although it is frequently employed to describe situations in which one State furnishes aid or assistance to another State’s wrongful conduct. It was once used by the ILC [International Law Commission] in its deliberations on supportive States, but was discarded in favour of the more neutral sounding concept of ‘aid or assistance’ which now appears in Article 16 of the ILC Articles on State responsibility.

Overly broad definition of complicity would motivate countries to stop beneficial cooperation (can't take the risk that something will go wrong)

Georg Nolte and Helmut P. Aust 2009. (Nolte - Professor of Law, Humboldt University Berlin; Member of the International Law Commission. Aust - \*\* MLE, Doctoral Candidate and Research Fellow, University of Munich) Jan 2009 "EQUIVOCAL HELPERS—COMPLICIT STATES, MIXED MESSAGES AND INTERNATIONAL LAW" International and Comparative Law Quarterly (accessed 22 Apr 2023) https://epub.ub.uni-muenchen.de/23180/1/oa\_Nolte\_Aust.pdf

Vaughan Lowe has maintained that States should normally be entitled to presume that other States will act lawfully and that to attribute the same risk of unlawfulness to the main actor and to the helper would mean to treat the assisting State as if it were acting jointly with the main actor. While such a strict rule on the responsibility for ‘aid and assistance’ at first sight appears to be beneficial for the international rule of law—as it would claim to force States to be their ‘brother’s keeper’ and to steer far away from the risk of being implied in illegal activity—it would at the same time discourage many typical and usually beneficial forms of international co-operation. We assume that, on balance, most States prefer an interpretation of the rule on the responsibility for ‘aid and assistance’ which leaves room for such typical forms of cooperation as long as the implication in illegal activity is not sufficiently clear.

Complicity has to be limited to aid given with the intent of doing the bad behavior. Otherwise, too much international cooperation will be blocked

Georg Nolte and Helmut P. Aust 2009. (Nolte - Professor of Law, Humboldt University Berlin; Member of the International Law Commission. Aust - \*\* MLE, Doctoral Candidate and Research Fellow, University of Munich) Jan 2009 "EQUIVOCAL HELPERS—COMPLICIT STATES, MIXED MESSAGES AND INTERNATIONAL LAW" International and Comparative Law Quarterly (accessed 22 Apr 2023) https://epub.ub.uni-muenchen.de/23180/1/oa\_Nolte\_Aust.pdf

While much speaks in favour of the existence of a rule of customary international law that prohibits the provision of ‘aid or assistance’ to the commission of an internationally wrongful act by another State, such a rule should be interpreted narrowly in order not to discourage the typically beneficial forms of inter-State cooperation. Any provision on complicity and its interpretation should take into account the stability and the smooth running of the international system as a whole. Thomas Franck has highlighted that determining and defining a legal rule is crucial for its legitimacy and that indeterminate standards are likely to facilitate non-compliance with international law. Hence, it should be established that the assisting State had not only knowledge of the circumstances of the internationally wrongful act but that it also provided its assistance ‘with a view to’ facilitate the commission of this act and that the act to which assistance is given consists of a violation of a sufficiently precise and clearly established rule within international law.

RESPONSES TO COMMERCIAL TRADE "COMPLICITY"

Economic sanctions themselves violate human rights. Hypocritical to violate human rights to protest violations of human rights

Robert W. McGee 2016 (Fayetteville State University - Department of Accounting) 29 Oct 2016 "ETHICS IN INTERNATIONAL TRADE" (accessed 22 Apr 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2861293

Economic sanctions also necessarily violate individual property and contract rights, thus failing the rights test. Some of my prior work mentions this often overlooked aspect of sanctions (McGee, 2002; 2003b) whereas those of other scholars generally ignore this topic, perhaps because they limit their analysis to utilitarian approaches. American hotel chains have a right to set up shop anywhere they want, provided they can find someone willing to sell or lease them the land they need to build. Their rights are being violated whenever they are prevented from entering into such transactions, as are the rights of whoever would be willing to sell or lease them the land they need.

Countries that have human rights problems will more likely reform if we trade with them than if we refuse

Robert A. Sirico 1998. (Rev. Robert A. Sirico is co‐​founder and president of the Acton Institute for the Study of Religion and Liberty) 17 July 1998 "Free Trade and Human Rights: The Moral Case for Engagement" (accessed 22 Apr 2023) https://www.cato.org/trade-briefing-paper/free-trade-human-rights-moral-case-engagement

Third, Christian conservatives who support sanctions betray a lack of understanding of how trade promotes freedom and development. Economic reforms in China have transformed daily life for hundreds of millions of people who now enjoy greater opportunity, freedom of movement, material abundance, and access to Western ideas. Trade with China benefits Americans through lower prices, wider consumer choice, and greater returns on investment. Imposing sanctions against China will disrupt this mutually beneficial relationship while doing nothing to improve human rights. Like the failed embargo against Cuba, trade sanctions isolate the victims while strengthening their persecutors. Sanctions imposed in the name of human rights also serve the interest of domestic protectionists by limiting competition. The best policy for promoting freedom and human rights remains economic and moral engagement.

Commercial trade is between individuals, not governments

**[This has 2 impacts: 1) Trade doesn't endorse any government, since it's not conducted with the government. 2) Any individual who feels "complicit" by their trade can solve it by not buying something from the individual or company on the other end.]**

Prof. Mark J. Perry 2010 (economics, Univ of Michigan-Flint) Nations Don't Trade with Each Other, People Do (accessed 23 Apr 2023) https://seekingalpha.com/article/181007-nations-dont-trade-with-each-other-people-do

Technically, the United States did NOT import $2.74 billion of steel pipe from China, at least not as a "country." It was dozens, if not hundreds, of American-owned companies that voluntarily placed hundreds, if not thousands, of individual purchase orders in 2008 to purchase Chinese steel from dozens, if not hundreds, of steel-producing companies in China who filled the orders totalling $2.72 billion, and shipped the steel. It might be a subtle point, but it's important to realize that countries don't trade with each other as countries - rather it's individual consumers and individual companies that are doing the buying and selling. The confusion gets reinforced when we constantly hear about the "U.S. trade deficit with Japan" or China, which might again imply that the "unit of analysis" for international trade is the country, when in fact the unit of analysis is the individual U.S. company that engages in trade with other individual companies on the other side of an imaginary line called a national border.

Trade occurs between flesh and blood humans, not "Countries" as a whole

Prof. Donald Boudreaux 2017 (senior fellow with the F.A. Hayek Program for Advanced Study in Philosophy, Politics, and Economics at the Mercatus Center at George Mason University, a Mercatus Center Board Member, and a professor of economics and former economics-department chair at George Mason University) 17 Jan 2017 " No Such Thing as "International" Economics" (accessed 23 Apr 2023) https://fee.org/articles/no-such-thing-as-international-economics/

The very notion of “international trade” causes us to miss the essential reality of trade, which is always flesh-and-blood individuals bargaining and exchanging with each other in ways that each person judges to be in his or her best interest. This intellectual oversight is the result of conceiving of trade as something done between countries. This country-level perspective then prompts us to judge the merits of trade by how likely or unlikely it is to increase the aggregate net well-being (however conceived or measured) of the subset of human beings who are denizens of, or citizens of, each particular country.

RESPONSES TO ARMS SALES/MILITARY AID "COMPLICITY"

No complicity if: 1) weapons exported weren't used in the rights violations or 2) for non-military aid

**[Example: If we exported tanks to a country like Slobonia and then they used handguns to oppress their minority group. There's no "complicity" because they didn't use our tanks to violate human rights. And if we gave Slobonia food aid, there would also be no complicity because food aid doesn't harm human rights.]**

Silke Zwijsen, Dr. Machiko Kanetake & Prof. Cedric Ryngaert 2020. (Zwijsen is graduate student at the Legal Research Master, Utrecht University. Dr. Kanetake is Assistant Professor of Public International Law, Utrecht University. Ryngaert is Professor of Public International Law, Utrecht Univ. ) Feb 2020 State Responsibility for Arms Transfers - The Law of State Responsibility and the Arms Trade Treaty (accessed 22 Apr 2023) <https://dspace.library.uu.nl/bitstream/handle/1874/394557/AA_article_feb_2020.pdf?sequence=1&isAllowed=y> (brackets added)

While the aid or assistance does not need to be indispensable to the commission of the principal wrongful act, a certain nexus – which remains undefined – is required between the aid and the principal act. The scenario of State X selling arms to the army of State Y, which subsequently commits serious violations of international law using these weapons, would normally fall within the scope of article 16 ARSIWA [Articles on the Responsibility of States for Internationally Wrongful Acts]. However, it is not clear whether acts of assistance that have a more distant and tenuous nexus with the principal offence can be considered as ‘facilitating’ the commission of the acts that article 16 ARSIWA mentions. For instance, what if State X sells arms to the army of State Y but the violations are committed by its police force instead of the army? Or what if the wrongful acts are committed ten years after the sale? The ILC only states that the aid or assistance must have the ‘effect of making it materially easier’ for the other State to commit an internationally wrongful act. ILC Special Rapporteur Nikolai Ushakov argued that aid or assistance essentially covers a spectrum, but that only those acts that are ‘active and direct’ are considered to be facilitating the commission of acts under article 16 ARSIWA. Ushakov went on to state: ‘It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.’

There's no "Complicity" if the arms exporter did not intend for the recipient to use the weapons wrongfully

**[Example: We exported tanks to Slobonia and told them to use them to defend against threats from Elbonia. But instead Slobonia used them to oppress a minority group. There's no "Complicity" because it's not what we intended the tanks to be used for.]**

Silke Zwijsen, Dr. Machiko Kanetake & Prof. Cedric Ryngaert 2020. (Zwijsen is graduate student at the Legal Research Master, Utrecht University. Dr. Kanetake is Assistant Professor of Public International Law, Utrecht University. Ryngaert is Professor of Public International Law, Utrecht Univ. ) Feb 2020 State Responsibility for Arms Transfers - The Law of State Responsibility and the Arms Trade Treaty (accessed 22 Apr 2023) <https://dspace.library.uu.nl/bitstream/handle/1874/394557/AA_article_feb_2020.pdf?sequence=1&isAllowed=y> (first 2 brackets added; third brackets in original)

Nevertheless, the ILC [International Law Commission] Commentary to article 16(a) ARSIWA [Articles on the Responsibility of States for Internationally Wrongful Acts] notes that a State is not responsible ‘unless [it] intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’. Also, the original drafter of the article, Roberto Ago, seemed to consider intent to be inherent to complicity: ‘The very idea of “complicity” in the internationally wrongful act of another necessarily presupposes intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity.’

The U.S. can be labeled an oppressive government too for some of its practices. But selling weapons to the US government doesn't contribute to anyone's oppression

James Christensen 2018 (Department of Government, University of Essex, Colchester, UK) 5 Feb 2018 "Arming the Outlaws: On the Moral Limits of the Arms Trade" (accessed 23 Apr 2023) https://journals.sagepub.com/doi/full/10.1177/0032321718754516

But there is also a second consideration that one might adduce in support of my suggestion, namely, that arms sales to oppressive regimes sometimes do not contribute to oppression *at all*. This thought can be illustrated with an example. The US subjects certain prisoners to sustained periods of solitary confinement, a practice which critics argue is a form of torture, and we might think that this fact justifies regarding the US as an oppressive regime ([Gawande, 2009](https://journals.sagepub.com/doi/full/10.1177/0032321718754516#bibr11-0032321718754516)). But it is natural to doubt whether arms sales contribute to the maintenance of this practice; the suspension of arms transfers, it seems reasonable to suppose, would not precipitate the abolition of solitary confinement.

Complicity only happens when we aid a state to commit an internationally wrongful act

Prof. Bernhard Graefrath 1996 (Professor at Humboldt University, Berlin Germany) Complicity in the law of International Responsibility (accessed 22 Apr 2023) https://rbdi.bruylant.be/modele/rbdi/content/pdf/rbdi\_2016/RBDI%201996.2%20-%20pp.%20370%20a%20380%20-%20Bernhard%20Graefrath.pdf



Even "bad" countries can have legitimate needs and uses for arms imports

James Christensen 2018 (Department of Government, University of Essex, Colchester, UK) 5 Feb 2018 "Arming the Outlaws: On the Moral Limits of the Arms Trade" (accessed 23 Apr 2023) https://journals.sagepub.com/doi/full/10.1177/0032321718754516

But can the presumption against arming oppressive and aggressive regimes sometimes be overturned? And, if so, under what conditions could the justificatory burden be met? According to the argument that I want to consider here, outlaw states can have legitimate security interests, and transferring weapons to these states can be an appropriate way of promoting those interests. Weapons enable governments to engage in wrongful oppression and aggression, but they also enable them to fend off predators in a manner that can be beneficial to their citizens. It clearly does not follow from the fact that a state is oppressive or aggressive that it will never be a victim of wrongful aggression itself, and while an outlaw state’s primary aim in repelling such aggression will often be the preservation of its own power, its defensive manoeuvres will sometimes also serve its citizens’ interests. In short, supplying weapons to outlaw states may sometimes contribute to the protection of innocents.

Complicity Turn: We might be complicit if we failed to send weapons to a "bad" government if they came under threat from another "even worse" challenger trying to replace them

James Christensen 2018 (Department of Government, University of Essex, Colchester, UK) 5 Feb 2018 "Arming the Outlaws: On the Moral Limits of the Arms Trade" (accessed 23 Apr 2023) https://journals.sagepub.com/doi/full/10.1177/0032321718754516

Let us start by considering a case in which an oppressive regime is a victim of wrongful aggression:
*Oppressors*: An oppressive regime (the Incumbent) is vulnerable to being overthrown by vicious insurgents or the invading army of a rival state (the Challenger) whose rule promises to be even more despotic than the status quo.If we withhold weapons from the Incumbent, we will undermine its ability to wage a just defensive war that would serve the security interests of its citizens. Those interests cannot be served (as effectively, or without imposing far greater costs on us, the intervener) by other means.
In such a scenario, it seems, intuitively, that the general presumption against arming oppressive regimes is suspended. When the conditions I have described are satisfied, it will likely be said that we are permitted to transfer arms (the *permission to arm claim*) or even that we have a duty to transfer arms (the *duty to arm claim*).

Wrong question to ask "Is the recipient oppressive" - We should ask "What effect will the sale have on the degree of oppression?"

James Christensen 2018 (Department of Government, University of Essex, Colchester, UK) 5 Feb 2018 "Arming the Outlaws: On the Moral Limits of the Arms Trade" (accessed 23 Apr 2023) https://journals.sagepub.com/doi/full/10.1177/0032321718754516

Let me conclude this section by suggesting that when attempting to determine whether a particular arms transfer is permissible, the first question we should ask is not ‘Is the recipient oppressive?’, but rather ‘What effect will the sale have on the incidence and degree of oppression?’ The consideration that motivates this suggestion is the one that we have examined, namely, that arms transfers to an oppressive regime may sometimes *reduce* the overall incidence or degree of oppression by enabling the regime in question to repel an even more oppressive rival. This can be true even if the sale contributes to oppression in one sense by sustaining an oppressive status quo.

There are so many possibilities of how resources and equipment may be used that complicity is impossible to determine

Prof. Bernhard Graefrath 1996 (Professor at Humboldt University, Berlin Germany) Complicity in the law of International Responsibility (accessed 22 Apr 2023) https://rbdi.bruylant.be/modele/rbdi/content/pdf/rbdi\_2016/RBDI%201996.2%20-%20pp.%20370%20a%20380%20-%20Bernhard%20Graefrath.pdf



Exporting arms to a bad government still produces a greater good. Examples: Soviet Union in World War 2 and South Korea during the Korean War

Dr. Ted Bromund 2021. (PhD in history from Yale; holds two master’s degrees in history from Yale and a bachelor of arts degree from Iowa’s Grinnell College ) The Biden Administration’s Conventional Arms Transfer Policy Should Not Be Handcuffed by the Arms Trade Treaty 1 Nov 2021 (accessed 4 Oct 2022) https://www.heritage.org/global-politics/report/the-biden-administrations-conventional-arms-transfer-policy-should-not-be (brackets added)

If the ATT [Arms Trade Treaty] had existed in 1942, the U.S. could not have extended Lend-Lease aid to Stalin, who used the trucks the U.S. provided to deport almost 100,000 people from the nation of Georgia to Siberia. But aiding Stalin against Hitler was nonetheless the correct policy. If the ATT had existed in 1950, the U.S. could not have aided South Korea, which was a brutal military dictatorship, when it was attacked by the North. But aiding South Korea against North Korea was the correct, and, in fact, the humane, policy to follow.

We couldn't use arms exports to fight against tyranny if we strictly apply human rights standards

Dr. Ted Bromund 2021. (PhD in history from Yale; holds two master’s degrees in history from Yale and a bachelor of arts degree from Iowa’s Grinnell College) The Biden Administration’s Conventional Arms Transfer Policy Should Not Be Handcuffed by the Arms Trade Treaty 1 Nov 2021 (accessed 4 Oct 2022) https://www.heritage.org/global-politics/report/the-biden-administrations-conventional-arms-transfer-policy-should-not-be (brackets added)

If the U.S. bound itself to respect foreign import controls by treaty, it would be legally dubious for the U.S. to arm anyone resisting a tyranny. For example, the treaty would make it legally very difficult for the U.S. to arm, as Obama did, the opponents of the Assad regime in Syria.  In fact, opponents of Obama’s policy argued that he was likely violating the ATT [Arms Trade Treaty].  Every U.S. President since Harry Truman has armed resistance fighters. The ATT would thus raise serious barriers to U.S. foreign policy as it has been carried out, on a bipartisan basis, since the start of the Cold War. It would also, in practice, put the U.S. on the side of dictators and their human rights violations.