Jurisdiction in Complicity Cases: Rendition and *Refoulement* in Domestic and International Courts

A norm prohibiting the complicity of one state in the internationally wrongful conduct of another state is a recognized part of customary international law. Various formulations of the norm prohibiting state complicity in internationally wrongful acts also appear in international treaties. As a general matter, in order for a complicit state to be found legally responsible for its aid or support of internationally wrongful actions undertaken by another state, it must be sufficiently clear that the supported state has in fact violated international law. Courts may decline to make a determination regarding the complicity of the supporting state when doing so would first require consideration of the conduct of the state receiving the complicit state's support, over which the court may lack jurisdiction. This Note will explore the circumstances in which courts have upheld or declined jurisdiction over complicity claims, relying on recent international and domestic cases that arose in the context of the U.S. extraordinary rendition program. The author hopes to assist in the identification of situations in which an aggrieved person is more likely to have recourse to a judicial or quasi-judicial body to adjudicate his or her claims of human rights violations against a complicit state.

INTRODUCTION 703
I. BACKGROUND.....708
A. Complicity Under the Draft Articles.....708
B. Complicity and Refoulement 711
C. Complicity and Jurisdiction 715
1. Jurisdiction in International Courts.....715
2. Jurisdiction in Domestic Courts.....717
D. Conclusion 723
II. INTERNATIONAL TRIBUNAL CASES.....723
A. The European Court of Human Rights in El-Masri 724
B. The Committee Against Torture and the Human Rights Committee in the Agiza and Alzery Cases.....728
C. Conclusion.....730
III. DOMESTIC COURT CASES.....731
A. United Kingdom High Court of Justice in Belhaj and the Federal Court of Australia in Habib.....731
B. Canadian Supreme Court in Khadr 737
C. German Constitutional Court Case Concerning Two Yemenis 741
D. Conclusion 743
IV. COMPARING STANDARDS.....743
CONCLUSION 747

INTRODUCTION

Complicity is a long-established component of domestic, and even international, criminal law, but it has only recently been incorporated into the law of state responsibility. Prior to World War II, customary international law[1] could not be said to prohibit the complicity of one state in the internationally wrongful acts of another state.[2] But as international law began to transcend its previous orientation toward bilateral state relations and transition toward a more communitarian structure in the post-WWII era, the prohibition on state complicity began to gain acceptance as a customary norm of international law.[3] During the same period, provisions prohibiting state complicity in a variety of substantive areas began to appear in multilateral treaties.[4] By the mid-1970s, the International Law Commis-

1. Customary international law may be defined as international law that "results from a general and consistent practice of States followed by them from a sense of legal obligation." *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987). The Third Restatement notes that "a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law." *Id.* § 102 cmt. c. More recent conceptions of customary international law do not require that states actually practice in conformity with a norm in order for it to be considered part of customary international law, but only that states offer rhetorical support for a legal norm. *See* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1200 (2007). While this issue and other aspects of customary international law remain subject to scholarly debate, it is generally accepted that customary international law is formed on the basis of the "general practice of states . . . [and] the acceptance by states that such practice is necessary by rule of law (*opinio juris sive necessitatis*)." LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS (6th ed. 2014). The International Law Commission (discussed further below) is currently engaged in a project to clarify and elaborate upon the identification of customary international law. *See Formation and Evidence of Customary International Law/Identification of Customary International Law*, INTERNATIONAL LAW COMMISSION (Sept. 23, 2014), http://www.un.org/law/ilc/ (from ILC homepage, scroll to "Current Programme of Work" and select "identification of customary international law").

2. John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 1986 BRIT. Y.B. INT'L L. 77, 82 (quoting Judge Roberto Ago).

3. *See* HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 23 (2013). Aust argues that while "[i]t is very much in the spirit of the move 'from bilateralism to community interest' and the legal developments associated with it to assume that international law will no longer tolerate complicit state behaviour . . . the establishment of a system of collective security . . . [does not] automatically lead to this result." *Id.* at 50. Aust goes on to offer a more complex explanation for complicity's emergence within international law that does not rely on the dichotomy between the traditional bilateral and modern communitarian models of international law. *See id.* at 50–96.

4. For examples, see *infra* Annex, Table 1.

sion (ILC) had concluded that a norm prohibiting complicity at the state level had been accepted as customary international law.[5] In 1978 the ILC added a complicity provision to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), and in 2007, the International Court of Justice (ICJ) endorsed the ILC's articulation of state complicity in Article 16 of ARSIWA as "reflecting a customary rule."[6]

Article 16 defines complicity as follows:

> 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.[7]

This is not the only state complicity provision operative within the international law realm. State complicity provisions appear in a variety of international conventions[8] and in domestic statutes.[9] Nonetheless, the ILC's articulation of the state complicity norm, it-

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5. *See* Quigley, *supra* note 2, at 82. Quigley finds that *opinio juris* has been adequately demonstrated in statements from countries protesting the actions of allegedly complicit states and in the failure of the allegedly complicit state to question whether the alleged conduct would have amounted to complicity. He also finds *opinio juris* reflected in resolutions and decisions from the United Nations Security Council and General Assembly, and in decisions from the International Court of Justice. Additionally he finds evidence of the required *opinio juris* in domestic legislation from the United States prohibiting aid to states that regularly violate human rights. In short, Quigley finds that while state practice alone yields an inference of the required *opinio juris* on complicity, states have also expressly recognized that complicity is prohibited by international law. *Id.* at 97–101.

6. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) [hereinafter Bosnia Genocide], Judgment, 2007 I.C.J. 217, ¶ 420 (Feb. 26). According to one commentator, the ICJ "basically treated the ILC Articles on State Responsibility as holy scripture." Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 693 (2007).

7. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries art. 16, Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ARSIWA].

8. *See infra* Annex, Table 1.

9. *See, e.g.*, The "Leahy Law," Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006); Lora Lumpe, *What the Leahy Law Means for Human Rights*, OPEN SOCIETY FOUNDATIONS (Apr. 24, 2014), http://www.opensocietyfoundations.org/voices/what-leahy-law-means-human-rights.

self based on a comprehensive review of state practice, constitutes a sensible place to begin a discussion of state complicity and affords an illuminating point of comparison for other state complicity provisions.[10]

The ILC's Commentary to ARSIWA explains that the Articles in Chapter IV, which include Article 16 and others concerning the responsibility of states in connection with the acts of other states, contain rules that are "exceptional," "secondary," and a "derivative" form of responsibility.[11] The Commentary also notes that, under Article 16, "[t]he wrongfulness of the aid or assistance given by the former is dependent, inter alia, on the wrongfulness of the conduct of the latter."[12] The Commentary also provides that claimants are "entitled to assert complicity in the wrongful conduct of another state even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other state."[13]

As discussed further below,[14] courts may decline to entertain state complicity cases due to the "triangular situation" that arises when determining the complicity of one state first requires a court to reach some conclusion as to the lawfulness of the conduct of a third state not before the court.[15] In such a "triangular situation," state A seeks a legal judgment against state B for state B's support of state C in committing internationally wrongful acts against state A. If the court in question lacks jurisdiction over state C, the court may also decline to adjudicate state B's complicity in state C's actions, since doing so would require consideration of the conduct of a state over which the court lacks jurisdiction.

In the absence of a competent court, an entitlement to assert one state's complicity in another state's violation of international law provides little real protection or means of redress for individuals whose human rights have been violated. As this Note will show, the problem of finding a court possessed of the jurisdiction and judicial competency to adjudicate a claim of state complicity is not a theoretical one. If opportunities for legal action against the primary state actor are unavailable, the existence of state complicity liability could preserve an alternative means of obtaining justice for serious human rights violations. But in both international and domestic courts, indi-

10. ARSIWA, *supra* note 7, art. 16, commentary ¶ 7.

11. *Id.* commentary ¶¶ 7–8.

12. *Id.* ¶ 11.

13. *Id.*

14. *See infra* Part I.C.1.

15. AUST, *supra* note 3, at 297–98.

viduals whose human rights have been violated with the support of a complicit state have had their claims against the complicit state actor dismissed for want of jurisdiction or as non-justiciable.[16]

This Note will focus on how domestic and international courts have decided complicity cases in recent years, and specifically on the degree to which a tribunal or court must initially determine wrongdoing on the part of the primary state actor before assigning responsibility to the complicit state. The Note will show that some courts and tribunals have been able to establish the complicity of the supporting state without making a determination as to the legal responsibility of the primary state actor. In some cases, it is a court's ability to distinguish a factual assessment of the conduct of a foreign state from a determination regarding the legal responsibility of that state that allows complicity cases to proceed to the merits in both domestic and international courts. Courts and treaty bodies have been particularly agile in this regard in the context of *refoulement* cases, which involve the deportation of an individual to another state where he faces a substantial risk of torture or other ill-treatment. Other courts have found that, in cases concerning alleged violations of *jus cogens* norms,[17] judges need not and should not decline to render a decision on the merits for the sake of comity among nations[18]

16. Jurisdiction and justiciability are distinct concepts, though many courts, including those in the United States and those discussed in this Note, have failed to clearly distinguish between them. *See, e.g.*, Oryszak v. Sullivan, 576 F.3d 522, 527 (D.C. Cir. 2009).

17. A *jus cogens* rule, otherwise referred to as a "peremptory norm of general international law," is defined in Article 53 of the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Though almost all States recognize the existence of *jus cogens* in international law, disagreement persists regarding which rules within the corpus of international law qualify as peremptory norms. *See generally* Rafael Nieto-Navia, *International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law*, *in* MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESSE 595 (Lal Chand Vohrah et al. eds., 2003).

18. Courts may refer to this concept when considering cases that involve foreign states. The classic definition of the concept by the U.S. Supreme Court notes that comity "is neither a matter of absolute obligation" on the one hand, nor one "of mere courtesy and goodwill" on the other. Rather, "it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Anne-Marie Burley [Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1948 (1992) (quoting *Hilton v. Goyt*, 159 U.S. 113, 163–64 (1895)). A British Court has described the rules of comity as "the accepted rules of mutual conduct as between State

and at the expense of the observance and enforcement of widely supported principles of human rights law.[19]

The Note will begin by providing some background on complicity's place within customary international law, as well as discussion of complicity's relationship with the doctrine of *non-refoulement*. General jurisdictional and justiciability issues in complicity cases in domestic and international courts will then be addressed. The Note will then proceed with a discussion of specific cases involving extraordinary rendition and *refoulement*[20] in international judicial and quasi-judicial bodies, including the European Court of Human Rights (ECtHR), the U.N. Committee Against Torture, and the Human Rights Committee (HRC).[21] Discussion will then turn to recent domestic court decisions involving state complicity, including cases from the United Kingdom, Australia, Canada, and Germany. The Note will attempt to distill from the foregoing cases and discussion a set of factors to be used in analyzing whether a court will be able and willing to decide state complicity cases.

It should be emphasized at the outset that most of the cases discussed below deal with complicity claims arising out of the U.S. extraordinary rendition program.[22] These cases were selected be-

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and State which each State adopts in relation to other States and expects other States to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent State . . . ." *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 324 (4th ed. 1990) (quoting Buck v. Attorney General, [1965] 1 Ch. 745, 770, [1965] 1 All E.R. 882 (Diplock L.J.)).

19. For variations on the argument that state immunity doctrines should not prohibit the adjudication of claims raising *jus cogens* violations, see generally Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003). S*ee also* Jodi Horowitz, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*, 23 FORDHAM INT'L L.J. 489, 524 (1999); Sevrine Knuchel, *State Immunity and the Promise of* Jus Cogens, 9 NW. U. J. INT'L HUM. RTS. 149 (2011); Adam C. Belsky, Mark Merva, & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

20. The principle of *non-refoulement* prohibits states from returning refugees or asylum seekers to territories where they face a risk of persecution. *Refoulement* is the practice of such a return that is prohibited under the concept of *non-refoulement*. *See* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement*: Opinion, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 89 (Erika Feller et al. eds., 2003).

21. These entities administer and oversee compliance with the European Convention on Human Rights, the Convention Against Torture, and the International Covenant on Civil and Political Rights, respectively.

22. For background on the extraordinary rendition program, see generally OPEN

cause the conduct of the United States and its allies in carrying out this program generated scenarios in which the current status of the complicity norm within international law can be evaluated. Because of the difficulty in prosecuting successful claims against the United States in U.S. courts, victims of human rights violations have taken legal action against complicit states. In doing so, they have revealed some of the contours of the complicity framework. However, because of the specific factual circumstances and highly charged political atmosphere surrounding the extraordinary rendition program, the insights generated from this Note may not be generalizable to all complicity cases. Developing a comprehensive picture of how the complicity norm functions in international law will require examination of other types of state behavior that may trigger complicity liability.

I. BACKGROUND

A. Complicity Under the Draft Articles

Since the U.N. General Assembly established the ILC, a group of international jurists and scholars of international law, in 1948, the group has paid particular attention to the topic of state responsibility.[23] In the early 1960s, under the leadership of Roberto Ago, the ILC began the process of defining the general rules of international state responsibility.[24] After decades of drafting and review, a final version of these rules was adopted by the ILC in 2001 and commended to UN member states by the General Assembly in 2002.[25] ARSIWA contains what are referred to as "secondary rules,"

SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 5–9 (2013), *available at* http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition; David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006); *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing Before the Subcomm. on Int'l Org., Human Rights, and Oversight and the Subcomm. on Eur. of the H. Comm. on Foreign Affairs*, 110th Cong. 12 (2007); TORTURING DEMOCRACY (Washington Media Associates 2008), *available at* http://www2.gwu.edu/~nsarchiv/torturingdemocracy/program/ (documentary film).

23. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts: Introductory Note*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2012), *available at* http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf.

24. *Id.*

25. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). While customary international law is binding on states, General Assembly resolutions are non-binding. Marko

which do not purport to furnish or describe the content of the "primary rules" of treaty-based and customary international law that govern state behavior.[26] ARSIWA, rather, provides "an overarching, general framework" that attempts to articulate the consequences of a breach of the primary rules of international law.[27]

Article 16's definition of complicity identifies several requirements that must be met to find complicity on the part of an assisting state. First, the assisting state must be aware of the circumstances making the conduct of the primary state internationally wrongful;[28] second, the assisting state must intend to facilitate the commission of the act by the primary state, and must actually facilitate it; and third, the completed act must be an act that would have been wrongful if committed by the supporting state itself.[29] Beyond these requirements, as James Crawford, Special Rapporteur for the ARSIWA from 1998–2001 has stated, "little more can be said with certainty."[30] Because of the variety of primary rules governing complicity, the concept of aid or assistance articulated in Article 16 is "a normative and case-specific concept, meaning that its content will always have to be determined in the specific situation."[31]

Accordingly, it is appropriate to examine how complicity has been operationalized in specific cases concerning state responsibility.

Divac Öberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 884 (2005).

26. *See* Crawford, *supra* note 23, at 3.

27. *Id.* The distinction between primary and secondary rules is widely accepted, but discrete categorization of a norm can be difficult in some cases. Another part of ARSIWA, containing those articles concerning the rules on attribution of internationally wrongful acts, presents one example of overlap between primary and secondary norms. *See* Anastasios Gourgourinis, *General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System*, 22 EUR. J. INT'L L. 993, 1021 (2011).

28. An internationally wrongful act is one that is attributable to a state under international law and that constitutes a breach of an international obligation of that state. ARSIWA, *supra* note 7, art. 2.

29. ARSIWA, *supra* note 7, art. 16, commentary ¶ 3. While the first two requirements focus on intent and causation, the third protects the assisting state from liability for complicity in the primary state's violation of a treaty to which the assisting state is not a party. It derives from the *pacta tertiis* principle, embodied in the Vienna Convention, *supra* note 17, art. 34 ("A treaty does not create either obligations or rights for a third state without its consent."). *See* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 409 (2013).

30. *Id.* at 405.

31. This is appropriate from the perspective of the ILC, which sought to avoid the inappropriate and probably impossible task of drafting primary rules that would govern State conduct in all areas. *See* AUST, *supra* note 3, at 230.

Though the complicity norm is an accepted component of customary international law, few international tribunals or domestic courts have actually applied the formulation of complicity articulated in Article 16 when rendering decisions on a state's responsibility for aiding or assisting the wrongful act(s) of another state.[32] The absence of reliance on Article 16 has many possible explanations, perhaps the most compelling of which is that rules prohibiting complicity in a wide array of wrongful acts are already present both in the primary rules of domestic statutes and in international treaties and conventions.[33] Courts may prefer to apply these more specific complicity rules when they are available, following the principle of *lex specialis derogat legi generali*: "whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[34] Courts may also be disinclined to decide complicity cases based on customary international law because of a perception that customary international law lacks democratic legitimacy as compared to domestic law and even treaty-based international law.[35]

The numerous formulations of the state complicity norm, as well as the assortment of legal venues in which state complicity cases have been decided, have yielded differing standards and requirements for complicity in varying factual contexts. The case studies below concern instances of extraordinary rendition of terrorism suspects by the United States, or cases of *refoulement*—a state's return of a non-citizen to a country where that individual faces a substantial likelihood of ill-treatment or torture.[36] These are certainly not the only ar-

32. It may be the case that international tribunals have been slow to utilize the formulation of complicity defined in Article 16, or that they simply have heard few cases involving complicity. In its February 2007 review of decisions by international courts invoking ARSIWA, the ILC identified only one case in which ARSIWA's formulation of complicity was referenced by an international court, though ARSIWA was referenced by international bodies at least 131 times as of April 2007. *See* U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Rep. of the Secretary-General*, ¶ 85, U.N. Doc. A/62/62 (Feb. 1, 2007), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/62/62.

33. *See infra* Annex, Table 1.

34. Rep. of the Stud. Grp. of the Int'l Law Comm'n, 58th Sess., May 1–Jun. 9, Jul. 3–Aug. 11, 2006, 8, U.N. Doc. A/CN.4/L.702 (Jul. 18, 2006) [hereinafter ILC Report].

35. *See* McGinnis & Somin, *supra* note 1, at 1202 (arguing that customary international law suffers from a deficit of democracy. In doing so they note that international lawyers tasked with articulating customary international law are disconnected from popular attitudes, and that undemocratic countries participate in the formulation of customary international law, among other points.).

36. The U.S. Court of Appeals for the Second Circuit has described "extraordinary rendition" as "the complicity or cooperation of [government] officials in the delivery of a

eas in which courts have examined complicity at the state level, but discussion of these types of cases has been particularly active in the past decade.[37] Some of the courts examined here do not rely on Article 16 explicitly because of the existence of other, often more specific applicable complicity provisions. But all are concerned with fact patterns and legal claims that involve the complicity of one state in the wrongful conduct of another, and many courts use a framework for complicity liability similar to the formula provided in Article 16 of ARSIWA. Examination of how complicity claims are adjudicated using primary rules of international law can help us to understand not only the primary rules themselves but also how they relate to secondary rules of international law such as the prohibition on complicity.[38]

B. Complicity and Refoulement

The practice of extraordinary rendition by the United States has been extensively documented elsewhere,[39] but the relationship of the *non-refoulement* principle to complicity merits some elucidation. During and immediately after World War II, many thousands of people were deported from their countries of residence despite their protestations that they would be persecuted upon return to their home country.[40] Many of these people were tortured or killed after being deported.[41] In the aftermath of the War, the United States and European nations sought to limit the ability of states to remove persons to their home country when they faced a likelihood of mistreatment or persecution.[42] From the late 1940s through the 1960s, human rights treaties like the Fourth Geneva Convention, the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and others incorporated either explicit or implicit prohibitions on returning an alien to her home coun-

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non-citizen to a foreign country for torture (or with the expectation that torture will take place)." *See* Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009).

37. *See* AUST, *supra* note 3, at 2, 120.

38. Aust notes that the boundary between primary and secondary rules can often be unclear, and that study of the application of primary rules to concrete cases can improve our understanding of secondary rules. *See* AUST, *supra* note 3, at 200.

39. *See supra* note 22.

40. Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in* Non-Refoulement, 80 FORDHAM L. REV. 73, 82 (2011).

41. *Id.*

42. The Lowenstein International Human Rights Clinic, *Aliens and the Duty of* Nonrefoulement*:* Haitian Centers Council v. Mcnary, 6 HARV. HUM. RTS. J. 1, 14 (1993).

try when she faced a significant risk of abuse, persecution, or torture, a practice known as *refoulement*.[43] Perhaps the most explicit and widely cited *non-refoulement* provision (prohibiting the practice of *refoulement*) appears in Article 33 of the Convention and Protocol Relating to the Status of Refugees ("Refugee Convention"), which provides that "[n]o contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[44]

Both the concept of complicity articulated in ARSIWA and the rules prohibiting *refoulement* contained in the treaties mentioned above focus on holding one state accountable for facilitating or assisting the wrongful conduct of another state. But while *non-refoulement* and the prohibition of complicity are closely related, some important distinctions between the doctrines exist. First, *non-refoulement* is a primary rule of international refugee law embodied in multiple treaties as well as in customary international law, whereas the prohibition on complicity is a secondary, or derivative, rule of customary international law that does not appear in its general form in any multilateral treaty.[45] At least one scholar has described *re-*

43. Some states have pushed back against a broad conception of these *non-refoulement* provisions, including the United States, which has previously maintained that only express treaty provisions confer *non-refoulement* rights and that the Convention Against Torture does not apply to transfers originating outside the United States. *See* Padmanabhan, *supra* note 40, at 95–96. This reading of the CAT would mean that Khaled El-Masri's rendition (see *infra* Part II.A) would not be covered by the CAT. The Department of State has recently modified this position. In a January 21, 2013 memo, then-Legal Adviser Harold Koh explained that this "very constrained territorial view" of the CAT is incorrect and that a categorical bar on the CAT's extraterritorial application was not a "legally available" position for policymakers to take. *See* Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES, Mar. 6, 2014, http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?ref=world&_r=1.

44. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

45. Lauterpacht and Bethlehem note that even those States that have not ratified the Refugee Convention or other international instruments prohibiting *refoulement* are still to some degree bound to respect the prohibition because *non-refoulement* has crystallized into a norm of customary international law. *See* Lauterpacht & Bethlehem, *supra* note 20, at 140. It should be noted, however, that the prohibition on *refoulement* is not limited to a formally defined category of refugees. *Id.* at 116 (noting that a restrictive definition of refugee would "undermine the effectiveness and utility of the protective arrangements of the Convention as it would open the door for States to defeat the operation of the Convention simply by refusing to extend to persons meeting the criteria of Article 1A(2) the formal status of refugees."). Finally, it is important to recognize that the distinction between primary and

foulement as a more specific version of complicity—in other words, *refoulement* as a rule of *lex specialis* and Article 16's complicity as a rule *lex generalis*.[46] Article 55 of ARSIWA provides that, following the maxim *lex specialis derogat legi generali*,[47] the rules contained in ARSIWA do not apply to conduct or in situations where special and often more specific rules of international law apply.[48] Applying this principle, in a case of *refoulement*, specific rules contained in treaties like those mentioned above should apply rather than the ARSIWA, which are more general and trans-substantive. Thus, in some situations, the existence of the *non-refoulement* provisions in treaties and conventions makes determining a state's complicity in the violation by another state of international human rights law unnecessary.

Second, ARSIWA sets a higher *scienter* standard for complicity than is required in the *non-refoulement* context. Article 16 requires that aid or assistance be given "with a view to facilitating the commission of . . . [the wrongful act], and must actually do so."[49] *Non-refoulement* provisions vary in their precise content but none require the degree of culpability mandated by ARSIWA. The ECtHR, for example, would hold a deporting state responsible for return of a refugee or asylum seeker if the state "knew or ought to have known" there was a "risk of ill-treatment" for the individual as a result of the return.[50] Also foregoing any strict knowledge requirement, Article 33(1) of the Refugee Convention would hold states accountable for *refoulement* where there is a "real risk that the person may be subjected to torture or cruel, inhuman or degrading treatment or punishment."[51] Whether *refoulement* has occurred is to be determined by inquiring whether there is some "objectively discernible threat of persecution or to life or freedom," rather than on the intent or actual

secondary rules of international law is not always clear, and the prohibition on complicity is a good example of a rule that may not fit neatly in the secondary category. *See* AUST, *supra* note 3, at 6.

46. AUST, supra note 3, at 397.

47. *See* ILC Report, *supra* note 34, at 8–9.

48. ARSIWA, *supra* note 7, art. 55.

49. *Id.* art. 16, commentary ¶ 3.

50. *See* INTERNATIONAL COMMISSION OF JURISTS, WORKSHOP ON MIGRATION AND HUMAN RIGHTS IN EUROPE, NON-REFOULEMENT IN EUROPE AFTER *M.S.S. V. BELGIUM AND GREECE* 2 (2011), *available at* http://www.icj.org/wp-content/uploads/2012/06/Non-refoulement-Europe-summary-of-the-workshop-event-2011-.pdf.

51. Lauterpacht & Bethlehem, *supra* note 20, at 125. Compare with Bosnia Genocide, *supra* note 6, ¶ 421, where the ICJ required a showing of actual—rather than constructive—knowledge, for Serbia to be held complicit in the genocide that occurred at Srebrenica in 1995.

knowledge of the returning state.[52] Thus, finding a state responsible for *refoulement* is dependent neither on its intent nor its actual knowledge that harm would come to the returned person. Under the complicity framework, however, claimants would need to clear the higher bar of establishing that the state in question had given aid with the intent of supporting the commission of an internationally wrongful act.[53]

Finally, and most importantly for the purposes of this Note, under ARSIWA a state is complicit only insofar as it aids or assists another state in committing an internationally wrongful act.[54] In other words, the responsibility of the aiding state is dependent upon the underlying wrongful conduct of the assisted state. As we will see, domestic courts considering complicity cases operate under this framework. Under treaty-based *non-refoulement* provisions administered by international courts and quasi-judicial bodies, finding a state responsible for *refoulement* is not dependent on a finding of wrongdoing on the part of the state to which the individual is returned. A state could be found in violation of its *non-refoulement* obligations if it returned an individual to a country where he had a well-founded fear of persecution; faced a real risk of torture or cruel, inhuman, or degrading treatment or punishment; or confronted a threat to life, physical integrity, or liberty, regardless of whether any of these harms were actually visited upon the individual.[55] This difference exists because the *non-refoulement* provisions under treaties and conventions like the European Convention on Human Rights (ECHR), the Convention Against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR) establish a primary rule of international law that states can be held directly accountable for violating. Article 16, as a derivative or secondary rule, only allows a state to be held responsible for helping another state violate a primary rule.

Therefore, although we might characterize the prohibition of *refoulement* as a more specific subdivision of complicity, proving a claim for *refoulement* will in many cases be easier than holding a state responsible for complicity. A state could be legally responsible

52. Lauterpacht & Bethlehem, *supra* note 20, at 126.

53. *See generally* ARSIWA, *supra* note 7, art. 16, commentary.

54. *Id.* art. 16, commentary ¶ 1 (noting that, under Article 16, "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act").

55. Lauterpacht & Bethlehem, *supra* note 20, at 150; *see also* Alice Farmer, Non-Refoulement *and* Jus Cogens*: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 6 (2008).

for *refoulement* of a refugee without its conduct rising to the level of complicity prohibited under ARSIWA. In the *refoulement* cases discussed below, internationally wrongful acts, including torture, were committed against the individuals seeking redress. This means that a case for complicity liability could have been made, assuming the requisite *scienter* requirement was met. Even if the judicial bodies hearing these cases did not find state complicity, many of the courts dealt with below discuss complicity liability as a possibility. Moreover, interpretation and application of primary rules, like those barring *refoulement*, can enhance our understanding of the "normative environment" in which secondary rules like Article 16 of ARSIWA exist.[56] As a result, *refoulement* cases are included in this discussion of complicity under the ARSIWA, though the distinctions between the doctrines discussed above should be kept in mind.

C. Complicity and Jurisdiction

1. Jurisdiction in International Courts

The ability of courts to make the sometimes-fine distinction between a legal conclusion and a factual assessment has proved to be an important factor in whether courts will accept jurisdiction over complicity cases. Drawing this line has allowed courts considering these cases to avoid the problem identified by the ICJ in *Monetary Gold Removed from Rome in 1943*.[57] In that case, both the United Kingdom and Italy claimed a right to a quantity of gold in Albania's possession that the Germans had removed from Rome during WWII.[58] Whether the United Kingdom, Italy, or anyone else would receive the gold depended on whether Albania had violated international law, but Albania had not consented to the ICJ's jurisdiction.[59] As a result, the court could not decide the dispute because it would require, as a preliminary matter, an adjudication on the international responsibility of Albania without its consent—an action that would violate the ICJ's statute.[60]

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56. AUST, supra note 3, at 200.

57. Monetary Gold Removed from Rome in 1943 (Preliminary Question), (It. v. Fr., U.K. & U.S.), Judgment, 1954 I.C.J. 19 (June 15).

58. *Summary of the Judgment of 15 June 1954*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/docket/index.php?sum=279&code=gold&p1=3&p2=3&case=19&k=79&p3=5 (last visited May 15, 2015).

59. *Id.*

60. The Summary further explains:

The court implied that it might uphold its jurisdiction over disputes involving the legal rights of a third party when the third party's rights were tangential to the dispute at hand, but that in this situation jurisdiction was lacking because "Albania's legal interests would not only be affected by a decision," but would form the "very subject-matter of the decision."[61] Of course, domestic courts and other international tribunals are not bound by the ICJ's *Monetary Gold* jurisdictional doctrine.[62] However, this case illustrates a jurisdictional problem in deciding complicity cases that arises in both domestic and international courts, though perhaps more frequently in the former than in the latter.[63]

The international courts and quasi-judicial bodies discussed in Section III have circumvented this potential problem, in part by characterizing their discussions of the conduct of non-party states as factual assessments rather than legal determinations. In deciding the cases discussed below, courts have analyzed whether the rendered or deported persons had sufficiently well-founded fears of persecution upon returns to their countries of origin to qualify for protection

> To go into the merits of such questions would be to decide a dispute between Italy and Albania—which the Court could not do without the consent of Albania. If the Court did so, it would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

Id.

61. *Id.*

62. Statute of the International Court of Justice art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case"). Nor, moreover, is the ICJ bound by its own past decisions when deciding new cases, though the Court will often refer to past cases in its decisions and states may rely on ICJ interpretations of customary international law. *See* H. Vern Clemons, *The Ethos of the International Court of Justice Is Dependent Upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse*, 20 FORDHAM INT'L L.J. 1479, 1498 (1996). Though Article 94(1) of the U.N. Charter provides that each U.N. member "undertakes to comply with the decision" of the ICJ in a case to which it is a party, the U.S. Supreme Court has found that "undertake" does not mean that "the United States 'shall' or 'must' comply with an ICJ decision." Medellin v. Texas, 552 U.S. 491, 508 (2008). Nor, according to the U.S. Supreme Court, is there any reason to believe that ICJ interpretations of international law are binding on U.S. courts. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006); *see also* discussion of the case and non-binding nature of ICJ decisions in DAMROSCH & MURPHY, *supra* note 1, at 238–41.

63. In domestic courts, complicity cases may require the court to consider the conduct of a friendly or allied State, which might entail negative consequences for the State in its foreign affairs, while international tribunals may have jurisdictional issues because complicity cases require an evaluation of the conduct of foreign State in legal proceedings to which the foreign State has not consented. *See* Matthew Lister, *The Legitimating Role of Consent in International Law*, 11 CHI. J. INT'L L. 663, 664–68 (2011).

against *refoulement*. That is, rather than determine legal responsibility for persecution or other ill-treatment at the hands of a non-party state, tribunals have avoided jurisdictional issues by inquiring only into the facts on the ground in the country to which the individual was returned, and into whether the returning state knew or should have known of the likelihood of persecution. Bodies like the European Court of Human Rights and the Human Rights Council evaluate whether a fear of persecution is well-founded by looking to sources that document a country's human rights record, but avoid making legal conclusions regarding the third-party state.[64] Though these conclusions might have legal or at least reputational implications for the states at issue, international courts have been willing and able to decide cases involving the conduct of non-party states in *non-refoulement* cases. As we will see in Section IV, however, domestic courts are more hesitant to adjudicate complicity claims where the legal and political consequences stemming from the conduct of a third-party state are difficult to minimize or avoid.[65]

2. Jurisdiction in Domestic Courts

Domestic courts that otherwise would have jurisdiction to decide a dispute may decline to accept a case involving a foreign state or its officials due to sovereign immunity, some other immunity doctrine, or the act of state doctrine (which, although not strictly a doctrine of immunity, is a related concept of non-justiciability with similar consequences).[66] These complicated, closely related, centuries-old doctrines are based on mutual respect for the sovereignty of states and reflect a desire to avoid judicial interference in the realm of foreign affairs.[67] The act of state doctrine is a creature of domestic law with origins in English common law. Sovereign immunity, though embodied in a variety of domestic legislation and judge-made law, is a part of customary international law.[68] In the context of domestic

64. *See infra* Part II.

65. *See infra* Part III.

66. *See* YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 221, 226 (2010).

67. In a frequently cited exposition of the principle of foreign State immunity, U.S. Supreme Court Justice John Marshall found the doctrine to be a corollary of the "perfect equality and absolute independence of sovereigns," and that foreign sovereign immunity forms a necessary exception to the general presumption that States enjoy complete and exclusive jurisdiction within their territory. *See* The Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812).

68. *See* NAQVI, *supra* note 66, at 226; *see also* Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, 122 (Feb. 3) (noting the agreement of the parties that "[State]

court cases, plaintiffs focus on foreign officials. This Note focuses primarily on immunity for state officials and not foreign states themselves, though these doctrines are also tangled and share a common history.[69]

In distinguishing sovereign immunity from the act of state doctrine, the High Court of Justice in England in the *Belhaj* case discussed below described sovereign immunity as immunity *ratione personae*, and the act of state doctrine as immunity *ratione materiae*.[70] Immunity *ratione personae* precludes jurisdiction over officials of a foreign state based on their status as representatives of the sovereign, and provides immunity for both private and official conduct while the official is in office.[71] This doctrine is applicable only to a state's highest officials, including heads of state, heads of government (Prime Ministers), and foreign ministers.[72] Immunity *ratione*

immunity is governed by international law and is not a mere matter of comity."); *Report of the International Law Commission on the Work of its Thirty-Second Session*, May 5–July 25, 1980, [1980] 2 Y.B. INT'L L. COMM'N 147, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (noting that "State immunity . . . was formulated in the early nineteenth century . . . was later adopted as a general rule of customary international law solidly rooted in the current practice of States."). Naqvi argues that the act of state doctrine is "probably a derivative of foreign sovereign immunity in its early absolute version," though it seems that the act of state doctrine itself may be quite old itself. NAVQI, *supra* note 66. One scholar finds early recognition of the act of state doctrine in the English Court of Chancery in 1674 in a case involving British subjects seeking to challenge the Danish King's confiscation of their property in Iceland, at that time a territory of the Kingdom of Denmark. The Court refused to "pretend to judge the validity of the king's letters patent in Denmark," believing that to do so would be "monstrous and absurd." *See* JAMES COOPER-HILL, THE LAW OF SOVEREIGN IMMUNITY AND TERRORISM 75 (2006) (quoting Blad v. Bamfield, (1674) 3 Swan. 604, 36 Eng. Rep. 993 (Ch.)).

69. *See* NAQVI, *supra* note 66, at 236 n.101 (quoting Hersch Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 228) (noting that "[state immunity] is rooted, to some extent, in the doctrine of the personal immunity of the heads of States"). The U.S. judiciary has recognized the close relationship between immunities for state officials and the state itself, noting that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." See *id.* at 240 (quoting Chuidian v. Philippine National Bank, 912 F.2d 1095, 1101 (9th Cir.1990)).

70. Belhaj v. Straw, [2013] EWHC (QB) 4111, ¶¶ 35, 37 (Eng.).

71. Knuchel, *supra* note 19, at 151; *see also* NAQVI, *supra* note 66, at 228.

72. At its sixty-fifth session, held in the summer of 2013, the ILC adopted a draft article stating that "[h]eads of State, Heads of Government, and Ministers of Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction." *See* Rep. of the Int'l Law Comm'n, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, 3, U.N. Doc. A/CN.4/L.814 (Jun. 4, 2013); *see also* Sean D. Murphy, *Immunity* Ratione Personae *of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission*, 108 AM. J. INT'L L. 41, 43 (2014).

materiae, of which the act of state doctrine is a domestic law species, is a type of functional immunity that may attach to foreign officials regardless of rank but only covers acts undertaken on behalf of the state.[73] The sovereign immunity and act of state doctrines are variously described as enjoying a "fundamental status" within international law, or existing merely as a "practical courtesy" between sovereign nations, deployed for their "mutual benefit."[74] According to the U.S. Supreme Court, "[b]oth the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government."[75]

It is difficult to discern the precise content and scope of these doctrines, and indeed they have been criticized for their inconsistency both in theoretical foundation and in application, and for preventing states from being held accountable for human rights violations.[76] In the domestic realm, versions of the act of state doctrine similar to that applied in the United States exist in Australia, Canada, and the United Kingdom, and different versions of the doctrine are adhered to in a handful of other nations.[77] In the United States, the act of state doctrine originally required courts to abstain from reviewing the acts of a foreign state out of respect for that state's sovereignty, but by the mid-20th century the doctrine had transformed into a choice of law

73. *See* NAQVI, *supra* note 66, at 223.

74. *See* Caplan, *supra* note 19, at 750 (quoting Justice Marshall in The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812)).

75. MARK WESTON JANIS, INTERNATIONAL LAW 369 (5th ed. 2008) (quoting First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972)).

76. *See, e.g.*, Burley [Slaughter], *supra* note 18, at 1928; Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 111 (2008); NAQVI, *supra* note 66, at 221. In the *Habib* case discussed in Part III, the Australian court offered its view on the act of state doctrine, writing that "[b]eyond the certainty that the [act of State] doctrine exists there is little clarity as to what constitutes it." Habib v Commonwealth of Australia [2010] FCAFC 12, ¶ 38 (Austl.). The American Law Institute has begun work on the Fourth Restatement of the Foreign Relations Law of the United States, which will focus particularly on issues of jurisdiction and sovereign immunity. When released, this updated Restatement should shed some light on the subjects discussed in this Note. *See Current Projects: Restatement of the Law Fourth, The Foreign Relations Law of the United States*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=28 (last visited May 15, 2015).

77. *See* Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 3 (1990) (citing Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707, 712–13 (1972)); *see also* Paul N. Filzer, *The Continued Viability of the Act of State Doctrine in Foreign Branch Bank Expropriation Cases*, 3 AM. U. J. INT'L L. & POL'Y 99, 108 (1988).

77. *See* Burley [Slaughter], *supra* note 18, at 1928–33.

doctrine directing U.S. courts to apply foreign law in transnational disputes.[78] Since then, several Supreme Court decisions have increased uncertainty regarding the contours of the doctrine, and debate over its precise meaning and scope continues.[79] Having gone through so many phases and varying interpretations, courts themselves often misunderstand and misapply the doctrine.[80]

In spite of the criticisms of these long-standing concepts, the sovereign immunity and act of state doctrines are not without defenders[81] or exceptions.[82] One exception to the immunity and non-justiciability doctrines that enjoys significant support among legal academics would allow adjudication of claims involving foreign sovereigns when the conduct of a foreign state violates a fundamental rule of international law.[83] As the range of peremptory norms and the "universal offenses" that result when these norms are violated has increased since World War II, domestic courts have been called on to exercise jurisdiction over claims alleging such violations by a foreign sovereign.[84] The Third Restatement of The Foreign Relations Law of the United States recognizes a potential exception to the act of state doctrine that would permit such adjudications, noting that a claim alleging a violation of fundamental human rights "would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well estab-

78. *See id.*

79. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court recast the act of state doctrine as a doctrine of judicial restraint or abstention, and the Court has adopted varying positions on the doctrine since. *See* Burley [Slaughter], *supra* note 18, at 1934–39, discussing these cases. The articulation of the act of state doctrine from *Sabbatino* was adopted in the Third Restatement of Foreign Relations Law of the United States, which states "the doctrine was developed . . . as a principle of judicial restraint, essentially to avoid disrespect for foreign States." *See id.* at 1936 n.102 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. a (1987)).

80. Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 330 (1986).

81. For a defense of the act of state doctrine, see Andrew D. Patterson, *The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong*, 15 U.C. DAVIS J. INT'L L. & POL'Y 111 (2008).

82. The doctrine of immunity does not preclude jurisdiction when the foreign state consents and may not preclude jurisdiction over acts *jure gestionis*, or those thought to be less essential to the sovereign function, such as commercial activities. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 321, 330 (3d ed. 1979).

83. *Id.* at 339.

84. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 789 (1988).

lished and contemplates external scrutiny of such acts."[85]

While application of the act of state doctrine may not be sufficient to render claims alleging violations of *jus cogens* norms non-justiciable, many states have found that *jus cogens* violations do not trump the doctrine of sovereign immunity. According to a survey of state practice in a 2012 case concerning the jurisdictional immunities of the state, the ICJ found that courts in the United Kingdom, Canada, Poland, Slovenia, New Zealand, and Greece found that allegations of *jus cogens* violations do not displace the rules of sovereign immunity.[86] Nor are issues of sovereign immunity necessarily overcome when allegations of torture, the prohibition of which enjoys *jus cogens* status, are made in international courts.[87] In its decision in the *East Timor* case, the ICJ reaffirmed the *Monetary Gold Principle* stating that even when faced with claims based on obligations *erga omnes*,[88] the court's jurisdiction could fail when a necessary state

85. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. c (1987).

86. Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 96 (Feb. 3). State practice regarding the relationship of *jus cogens* violations and sovereign immunity is not uniform, however. In *Prefecture of Voiota v. Federal Republic of Germany*, a case concerning atrocities committed by the Nazis in Greece during World War II, the court of first instance in Greece found, *inter alia*, that "[a]cts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity." The Supreme Court of Greece upheld the ruling of the trial court, though it did not specifically endorse the lower court's statement on the foreign immunity exception. *See* Caplan, *supra* note 19, at 769. In a similar case concerning Nazi atrocities, the U.S. Court of Appeals declined to apply an exception, though Judge Patricia Wald entered a dissent in which she argued that "Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide." *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1179 (D.C. Cir. 1994). For further discussion of these issues, see Erika de Wet, *The Prohibition of Torture as an International Norm of* Jus Cogens *and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 105–10 (2004).

87. The status of the torture prohibition as a *jus cogens* norm was recognized by the International Criminal Tribunal for the former Yugoslavia in Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T10, Judgment of the Trial Chamber, ¶ 153 (Dec. 10, 1998). For discussion see de Wet, *supra* note 86, at 97. As discussed above, *jus cogens* rules are those rules of international law that "are recognized by the international community of States as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

88. The relationship between obligations *erga omnes* and peremptory or *jus cogens* norms remains somewhat unclear. Byers finds that *jus cogens* rules are peremptory rules of international "public policy" that void conflicting non-peremptory rules. *Erga omnes* rules are those "which, if violated, give rise to a general right of standing to make claims" of a violation. *See* Michael Byers, *Conceptualising the Relationship between* Jus Cogens *and* Erga Omnes *Rules*, 66 NORDIC J. INT'L L. 211, 211 (1997). Byers notes that some scholars

party does not consent to the court's jurisdiction.[89] It has also recently characterized state immunity as a procedural rule that would not be affected by allegations of a violation of a *jus cogens* norm, a rule of substantive law.[90] While allegations of violations of peremptory norms do not eliminate questions of foreign sovereign immunity in most courts, some may evolve towards relaxing sovereign immunity restrictions when violations of *jus cogens* are at issue.[91]

Domestic courts may also be inclined to make an exception to the general rule for foreign sovereign immunity when there has been a previous determination that a foreign state has breached a fundamental rule of international law and violated a claimant's rights.[92] In the United States, courts may decline to apply the act of state doctrine and accept jurisdiction when the executive branch informs the court that application of the doctrine would not advance national interests.[93] The scope of sovereign immunity (or the act of state doctrine) may also be regulated by domestic legislation, or by treaties between states.[94] In the United States, for example, state immunity is

find important differences between the two, while others assert that they are coterminous. *Id.* Aust notes that peremptory norms and obligations *erga omnes* are frequently grouped together, but finds that those who seek to preserve the distinction argue that *jus cogens* norms "prevent states from entering into agreements in contravention thereof, [while] obligations *erga omnes* provide for the standing of states not directly injured to bring a claim or initiate court proceedings." AUST, *supra* note 3, at 36. Posner argues that all *jus cogens* norms must also be *erga omnes* norms, and finds that there may not be a meaningful difference between the two. *See* Eric A. Posner, Erga Omnes *Norms, Institutionalization, and Constitutionalism in International Law* 13–14 (John M. Olin Law & Economics Working Paper No. 419, 2008).

89. AUST, *supra* note 3, at 303 (quoting the ICJ in Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29).

90. *See* Stefan Talmon, Jus Cogens *after* Germany v. Italy*: Substantive and Procedural Rules Distinguished* 2 (Bonn Research Papers on Public International Law, Paper No. 4/2012, June 16, 2012) (quoting Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J.).

91. *See* Knuchel, *supra* note 19, at 153.

92. *See* Enzo Cannizzaro & Beatrice I. Bonafe, *Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 825, 839–40 (Ulrich Fastenrath et al. eds., 2011).

93. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972).

94. Examples include the American Foreign Sovereign Immunities Act (limiting immunity in commercial disputes involving foreign sovereigns) and the Treaty of Friendship, Commerce, and Navigation Between the United States and Japan (similarly, limiting sovereign immunity in commercial disputes between the two nations). *See* Janis, *supra* note 75, at 360–61.

applied unevenly, with states that are designated as sponsors of terrorism being ineligible for immunity under the Foreign Sovereign Immunities Act.[95] This feature of immunity law in the United States reflects the practical and somewhat political nature of immunity doctrines. Indeed, domestic courts may be more likely to decline jurisdiction when a dispute involving another state can be settled at the international level, if the claimant can obtain a legal remedy from the foreign state, or if adjudicating the claim would be particularly problematic for a country's foreign policy.[96] As we will see in the discussion below, domestic courts have varied in their approach to sovereign immunity, the act of state doctrine, and to notions of comity more generally.[97]

D. Conclusion

As globalization continues and states interact in ever increasing ways, complicity is likely to become an increasingly important topic in international law. Although it might be preferable to challenge directly the actions of the primary state responsible for an internationally wrongful act, the state complicity doctrine or the *refoulement* prohibition may provide the next best alternative because of justiciability issues or state immunities.[98] The various ways in which domestic and international courts understand their jurisdiction and interpret and apply state immunity doctrines can make or break claims of state complicity in human rights violations. It is therefore important to examine the diverse ways in which complicity cases have played out in a variety of judicial forums.

II. INTERNATIONAL TRIBUNAL CASES

The following cases involve individuals' claims against European states that effectuated or otherwise facilitated the transfer of

95. *See* NAQVI, *supra* note 66, at 238; *see also Amendment to Foreign Sovereign Immunities Act Makes it Easier for Victims to Recover Damages from State Sponsors of Terrorism*, GIBSON DUNN: PUBLICATIONS (Jan. 28, 2008), http://www.gibsondunn.com/publications/Pages/Amendment-ForeignSovereignImmunitiesAct.aspx.

96. *See* Cannizaro & Bonafe, *supra* note 92, at 840–41.

97. *See infra* Part III.

98. Khalid El-Masri, for example, attempted to seek legal redress for his extraordinary rendition and torture by the CIA from the United States in U.S. federal court. His claim was dismissed based on the State Secrets privilege. *See* El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007). He enjoyed more success before an international tribunal. *See infra* Part II.A.

those individuals to the custody of another state where they were subject to torture or persecution. Rather than hold the persecuting state responsible, these individuals utilized complicity provisions embedded within international treaties that allow for the supporting or transferring state to be held accountable. The cases illustrate how complicity prohibitions in the primary rules of international treaties vary from the complicity provision in ARSIWA. They show that, through treaty provisions prohibiting complicity and by framing the inquiry into the conduct of the non-party state as factual rather than legal in nature, tribunals can avoid the problem presented by the "triangular situation" at issue in cases like *Monetary Gold*.

A. The European Court of Human Rights in El-Masri

Khaled El-Masri, a German citizen, boarded a bus in Ulm, Germany on December 31, 2003, intending to visit Skopje, Macedonia, for a vacation.[99] Upon arriving at the Serbia-Macedonia border, Macedonian authorities questioned El-Masri about his recently issued passport and his ties to Islamic organizations.[100] Macedonian police took El-Masri to a hotel, where he was kept under constant armed guard and subjected to repeated interrogation.[101] The police offered him a deal whereby he would be sent back to Germany in return for a confession that he was a member of al-Qaeda, which he refused.[102] On January 23, El-Masri was told he would be returning to Germany, and was taken from his hotel room and transferred to the Skopje airport.[103] At the airport he was subjected to a variety of abuses before being transferred via CIA aircraft to Afghanistan.[104] El-Masri was detained under harsh conditions in Afghanistan until May 28, 2004, when he was subject to a "reverse rendition" operation, in which he was blindfolded and flown to Albania, where he was released.[105] El-Masri eventually made it back to Germany, where he sought accountability for his rendition, confinement, and torture through a variety of means.[106] After exhausting all other potential avenues of le-

99. El-Masri v. Former Yugoslav Republic of Macedonia, 57 Eur. H.R. Rep. 25, ¶ 17 (2013).

100. *Id.*

101. *Id.* ¶ 18.

102. *Id.*

103. *Id.* ¶ 20.

104. El-Masri was stripped and sodomized, shackled and hooded, chained to the floor, and forcibly tranquilized, among other mistreatment. *Id.* ¶¶ 21, 205.

105. *Id.* ¶ 32.

gal redress, El-Masri brought a case against Macedonia to the ECtHR.

The ECtHR found that Macedonia "must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities," which in this case included the torture and ill-treatment El-Masri suffered at the hands of the CIA at the airport in Skopje.[107] The court also found that Macedonia had run afoul of its obligations under Article 3 of the ECHR by transferring El-Masri to CIA custody, because they "knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention."[108] Additionally, the court held that Macedonia had violated its obligations under Article 5 of the Convention, prohibiting wrongful deprivation of liberty, in facilitating the transfer of El-Masri to the custody of the CIA.[109]

The court noted that Article 16 of ARSIWA was "relevant international law," and took note of the submission by intervener Interights, which argued that Macedonia could be found liable as an accomplice to violations committed by the United States, because "under general international law a state could be held responsible where it rendered aid or assistance to another state in the commission of an internationally wrongful act ('accessory responsibility')."[110] Though the court did not apply Article 16 in making its decision, it did note in its ruling on the violation of Article 3 of the ECHR that it would be necessary to make a determination regarding the conditions the removed person would likely face in the hands of the receiving

106. After investigating El-Masri's allegations, the Munich public prosecutor issued arrest warrants for thirteen CIA agents in connection with El-Masri's rendition. A parliamentary inquiry was also launched in Germany, which called into question the Macedonian government's version of events. In the United States, the ACLU filed a claim in federal district court on behalf of El-Masri against the CIA under the Alien Tort Statute. This claim was eventually dismissed. *See id.* ¶¶ 58–63. El-Masri also sought legal redress in Macedonia, and his criminal complaint was dismissed. *See id.* ¶ 70. At the time of the ECtHR's decision, a civil case in Macedonia was still pending.

107. *Id.* ¶ 206.

108. *Id.* ¶ 220. Article 3 of the ECHR provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." In 1989, the ECtHR interpreted Article 3 to prohibit the sending (or, more specifically, the extradition) by a state party to the ECHR of a person to a state not party to the ECHR where he or she faced a "real risk of treatment going beyond the threshold set by Article 3." *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 111 (1989). *Soering* concerned the extradition of a German national by the United Kingdom to face capital murder charges in the United States.

109. *El-Masri*, 57 Eur. H.R. Rep. ¶¶ 240–41.

110. *Id.* ¶ 176.

country.[111]

The ECtHR decided that this would not be a problem, because in determining the responsibility of the "sending" state (Macedonia), there is "no question of adjudicating on or establishing the responsibility of the receiving country [the United States]," a state clearly not a party to the ECHR.[112] The court proceeded to rely on a variety of sources for a determination that the conduct of the primary actor in this scenario, the United States, and more specifically the CIA, had been violating widely recognized human rights in its program of extraordinary rendition. A report by the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism was cited for authority that the United States was using torture against detainees in the War on Terror.[113] The court pointed to a decision by a U.K. civil appellate court that had found that the detention of a British national at Guantanamo violated "fundamental principles recognised by both [English and American] jurisdictions and by international law."[114] The court also took note of a memorandum from Amnesty International and an Opinion from a U.N. Working Group on Arbitrary Detention to show that the United States had committed human rights violations in maintaining a system of secret detention in which detainees were subject to torture and other forms of ill-treatment.[115]

Though not all of these sources were available to Macedonian officials prior to or during the time of El-Masri's detention, the court used these authorities to show both that the United States was engaged in violations of fundamental human rights norms and that the Macedonian authorities knew or should have known about the violations. The court thus decided that the Macedonian authorities "actively facilitated [El-Masri's] subsequent detention in Afghanistan by handing him over to the CIA," and that "it should have been clear to the Macedonian authorities that, having been handed over into the

111. *Id.* ¶ 212.

112. *Id.* In this case, it is clear a decision that El-Masri faced a substantial risk of treatment contrary to Article 3 of the ECHR in the hands of the United States would have no direct legal implications for the United States, since it is not a party to the ECHR. However, given that the prohibition against torture in the ECHR is almost identical to torture prohibitions in other treaties like the ICCPR and the CAT, to which the United States is a party, the factual finding that El-Masri suffered torture or inhuman or degrading treatment while in U.S. custody is not devoid of legal implications for the United States.

113. *Id.* ¶ 103.

114. *Id.* ¶ 106 (quoting Abbasi v. Secretary of State for Foreign and Commonwealth Affairs, [2002] EWCA (Civ) 1598 (Eng.)).

115. *El-Masri*, 57 Eur. H.R. Rep., ¶¶ 113, 119, 123.

custody of U.S. authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5."[116] As a result, the court held Macedonia responsible for violating El-Masri's rights during the entire period of his captivity, not only for the time during which he was detained extra-judicially in Skopje.[117]

The principle of *non-refoulement* implicitly embodied within Articles 3 and 5 of the ECHR is similar to the prohibition against complicity articulated in Article 16, but is more specific. The ECHR provisions, as *lex specialis* in this case, made it unnecessary to rely explicitly on the customary international law principle against complicity contained within ARSIWA to effectively find Macedonia complicit in the U.S. violations of El-Masri's rights. It is notable that under the ECHR, it was sufficient to show that Macedonian authorities *should have known* that El-Masri faced a real risk of torture or ill-treatment in the hands of the CIA. As discussed above, establishing complicity under ARSIWA would require the aggrieved to meet a higher *scienter* standard, because "[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 and the internationally wrongful conduct is actually committed by the aided or assisted state."[118] Furthermore, to establish complicity under Article 16, it must be shown that the feared harm actually occurred, while under the ECHR, it is only necessary that "substantial grounds" be "shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."[119]

One might assume that a higher knowledge and harm standard for complicity under ARSIWA would entail more responsibility, and perhaps more wide-ranging remedies, but in fact, under Article 16 "the assisting state will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act."[120] The ECtHR seems to go further in holding that Macedonia was "to be held responsible for violating the applicant's rights under Article 5 of the Convention during the entire period of his captivity."[121] Seemingly, then, the ECtHR will hold member states re-

116. *Id.* ¶ 239.

117. *Id.* ¶¶ 240–41.

118. ARSIWA, *supra* note 7, art. 16, commentary ¶ 5.

119. *El-Masri*, 57 Eur. H.R. Rep., ¶ 212. The ECtHR has held that Article 3 of the Convention prohibits *refoulement* since at least the late 1980s. *See* Padmanabhan, *supra* note 40, at 85.

120. ARSIWA, *supra* note 7, art. 16, commentary ¶ 1.

121. *El-Masri*, 57 Eur. H.R. Rep., ¶ 241.

sponsible for violations of the prohibitions on torture, ill-treatment, and arbitrary detention of protected persons without requiring a showing of intent or even actual knowledge on the part of the sending state, and will hold the sending state responsible for all actions that would constitute violations of the Convention undertaken by the receiving state. Here we see the *lex specialis* rule on complicity setting a much lower threshold for establishing responsibility than the *lex generalis* of Article 16 would allow.[122]

B. The Committee Against Torture and the Human Rights Committee in the Agiza *and* Alzery *Cases*

The *Agiza* and *Alzery* cases reveal additional instances in which the complicity norm of customary international law finds more specific expression within a treaty. They also offer further support for the proposition that determination of the wrongful conduct of the primary state actor need not be an obstacle to determining the wrongfulness of the secondary state's conduct. *Agiza v. Sweden* involved Sweden's denial of asylum to an Egyptian national, Ahmed Agiza, who Sweden deported to Egypt after it received diplomatic assurances from Egypt that Agiza would not be subjected to torture.[123] Agiza alleged that Sweden violated his rights under Article 3 of the CAT, which obligates state parties not to "expel or to return a person to another state where there are substantial grounds for believing that he

122. Another case recently decided by the European Court involving the extraordinary rendition program further demonstrated that a prohibition on complicity is inscribed within Articles 3 and 5 of the Convention and offered another compelling illustration of the utility of complicity in holding states accountable for human rights violations. In a landmark case decided on July 24, 2014 involving Poland's complicity with the United States in the extraordinary rendition program, the Court held that "removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination." Husayn (Abu Zubaydah) v. Poland, [2014] Eur. Ct. H.R. 834, ¶ 450. The Court also avoided any issues of comity by noting that, "[w]hile the establishment of the sending State's responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise." *Id.* ¶ 454. The Court found violations of both Articles 3 and 5. *See id.* ¶¶ 514, 526. For a brief summary of the ruling, see Press Release, Amnesty International, Landmark Rulings Expose Poland's Role in CIA Secret Detention and Torture (July 28, 2014), *available at* http://www.amnestyusa.org/news/press-releases/landmark-rulings-expose-poland-s-role-in-cia-secret-detention-and-torture-0.

123. Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005).

or she would be in danger of being subjected by the [other state's] authorities to torture."[124] The CAT treaty body, the Committee Against Torture, decided Agiza's case on May 20, 2005.

In deciding the case, the Committee Against Torture noted that Sweden knew or should have known that Agiza faced a substantial risk of torture in Egypt, citing the Committee's own reports on Egypt, as well as the knowledge of the Swedish security services that the Egyptian government considered Agiza to be a terrorist.[125] Sweden, therefore, had substantial grounds for believing Agiza would be in danger of being subjected to torture in Egypt, and thus violated Article 3 of the CAT by transferring Agiza.[126] In its report on potential U.K. complicity in torture, the British Parliament noted the low bar for finding complicity liability under the CAT, finding that "tacit consent" or "acquiescence," including both constructive as well as actual knowledge that torture was taking place, is enough to find state responsibility under the CAT.[127]

One year later, the HRC, the treaty body that monitors compliance with the ICCPR, came to similar conclusions in a case with a similar factual background. In *Mohammed Alzery v. Sweden*, the HRC found that diplomatic assurances provided by Egypt to Sweden that Alzery would not be subjected to torture were not enough to reduce the risk of ill-treatment to a level that would satisfy Article 7 of the ICCPR.[128] Therefore, in deporting Alzery to Egypt, Sweden was responsible for a violation of that provision.[129] In determining if Sweden exposed Alzery to a "real risk" of torture or other ill-treatment by expelling him to Egypt, the HRC held that it "must consider all relevant elements, including the general situation of human rights in a state."[130] The extent of the HRC's consideration of the situation in Egypt was quite limited in this case, as Sweden had conceded that there was a risk of ill-treatment, but argued that Egypt's diplomatic assurances significantly reduced that risk. Notably, in

124. *Id.* ¶¶ 3.2, 13.2.

125. *Id.* ¶ 13.4.

126. *Id.*

127. JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF U.K. COMPLICITY IN TORTURE, 2008–2009, H.L.152, H.C. 230, ¶ 32.

128. Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005, (U.N. Human Rights Committee (HRC), Nov. 10, 2006), *available at* http://www. refworld.org/docid/47975afa21.html. Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

129. *Id.* ¶ 11.5.

130. *Id.* ¶ 11.3.

neither instance was it necessary for the treaty body to find that torture had actually taken place—it was enough to establish a real risk of torture in the receiving country. The HRC went on to hold that the assurances provided by Egypt were insufficient to reduce the risk below the level identified by Article 7 of the ICCPR.[131]

It would initially appear that there would be no jurisdictional issue in the *Alzery* case, since Egypt is a party to both the CAT and the ICCPR. However, as noted by the HRC, "Egypt had not accepted the individual complaint jurisdiction of any treaty body, or the invitation of any international monitoring bodies."[132] Though Egypt had not consented to the individual complaint jurisdiction of either treaty body discussed in this section, neither body was hesitant to rule on the violation of the complicit state, Sweden. As in the *El-Masri* case, in *Alzery* adjudication was possible both because the analysis of the situation on the ground in the non-consenting state was characterized as a factual, rather than a legal, determination, and because the primary rules prohibiting complicity in the CAT and ICCPR made the conduct of the returning state wrongful irrespective of the legal responsibility of the primary state.

C. Conclusion

In the above cases, holding accountable the state that had transferred the individual in question was made possible through the consent of state parties to conventions which contained primary rules prohibiting the return of asylum seekers to home countries where they faced a substantial risk of torture or ill-treatment. In these cases, resorting to secondary rules of international law like those contained in ARSIWA was unnecessary, and the resulting concerns raised by state immunity and non-justiciability doctrines were not an issue. This demonstrates that, although complicity may be a part of customary international law, the concept possesses more legal power when

131. *Id.* ¶ 11.5.

132. *Id.* ¶ 4.4. Here it is important to note that, for treaty bodies to have jurisdiction over individual claims, two criteria must be met. First, the state against whom the complaint is made must be a party to the treaty that it is alleged was violated by the state. Second, "the State party must have recognized the competence of the Committee monitoring the relevant treaty to receive and consider complaints from individuals." Both criteria were satisfied in the complaints against Sweden, but the latter would have been lacking had Agiza or Alzery attempted to bring a claim against Egypt directly. *See Human Rights Treaty Bodies—Individual Communications*, U.N. OFFICE OF THE HIGH COMM'R HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx (click on hyperlink "Against whom can a complaint under a treaty be brought?") (last visited May 15, 2015).

embodied within the primary rules of international treaties. These primary rules remove the predicate question presented by complicity cases—whether the primary state actor or its agents undertook unlawful actions. In each of the cases discussed above, although an examination of the factual context that obtained in the receiving state was necessary, no legal rulings were made *vis-à-vis* the primary state. As we will see below, domestic courts have been considerably more reticent to adjudicate similar cases where the plaintiff attempts to hold a state responsible for its complicity in a wrongful act.

III. DOMESTIC COURT CASES

The following section will address efforts on behalf of individual claimants to seek legal redress for deprivation of their rights by foreign states in domestic courts. In each case, the foreign state is the primary wrongdoer, but the claimant seeks redress from the state that has aided or facilitated the foreign state's wrongdoing. The British, Australian, Canadian, and German courts discussed below all express more hesitation in adjudicating these claims than did the international tribunals discussed above, though the results varied in each case. This review of cases will explore how questions of sovereign immunity, the act of state doctrine, and notions of comity more generally, play out in complicity cases in domestic courts.

A. United Kingdom High Court of Justice in Belhaj *and the Federal Court of Australia in* Habib

The possibility that state actors might be found complicit in the wrongful acts of another state was recently addressed in a case brought against high-ranking officials of the British Government by Libyan politician and military leader Abdul Hakim Belhaj.[133] Belhaj alleged that British government agents, acting under color of state authority, provided intelligence to the United States that facilitated the extraordinary rendition of him and his wife from China, through Malaysia and Thailand, and finally, via a CIA jet, to Tripoli, Libya, in March of 2004. At the time, Libya was under the control of Colonel Muammar Qaddafi, who had been working to improve relations with the United States and the United Kingdom, with some success.[134] Belhaj filed suit in the British High Court of Justice, seeking a decla-

133. Belhaj v. Straw, [2013] EWHC (QB) 4111.

134. CHRISTOPHER BLANCHARD & JIM ZANOTTI, CONG. RESEARCH SERV., RL33142, LIBYA: BACKGROUND AND U.S. RELATIONS 7 (2011).

ration of illegality and damages. In his complaint, Belhaj alleged that he was subject to ill-treatment during the rendition, and that he was subjected to torture throughout his detention in Libya, which continued until 2010.[135] Belhaj alleged that British agents acted tortiously in supporting agents of the other countries involved (principally Libya and the United States) in effecting Belhaj's detention and maltreatment. Belhaj did not indicate with clarity whether British or foreign law should be applied, a shortcoming which served to undermine his claim.[136]

The ruling by Justice Simon made no mention of ARSIWA, and Belhaj did not rely on international law in his complaint. The court did, however, employ the same logic used to define complicity within ARSIWA. Justice Simon notes at the outset of his analysis that Belhaj's allegation "is based upon a finding that the U.S. and Libyan authorities committed torts under the relevant applicable law.[137] In other words, the success or failure of his claims against the British government would turn on whether the United States and Libya did in fact violate the law and Belhaj's rights.

The court began by noting that under U.K. law, state immunity is an "absolute jurisdictional bar" that would permit no exceptions "even against crimes against humanity and the most extreme breaches of human rights."[138] However, the court decided that the individual defendants' state immunity defense[139] would not preclude jurisdiction over claims against British officials because the other states involved had not been "impleaded by the claim," and were "not put in a position of having to waive their right to immunity or have a judgment in default, because there could be no judgment in default which could affect them, other than tangentially."[140] Something

135. *See Belhaj*, [2013] EWHC (QB), ¶¶ 5–17. The "ill-treatment" Belhaj alleged to have been committed against him during the rendition operation include the use of shackles and hoods, hanging from hooks attached to the ceiling, repeatedly being slammed into walls, beatings, and the use of stress positions. *Id.*

136. *Id.* ¶ 143 ("The Claimants failure to plead the applicable law of torts, taken with [Belhaj's attorney's] concession that the detention in China and Malaysia may have been lawful, presents the Claimants with a difficulty in answering the question: on what basis can it be said that the detention, which forms one of the bases of the claim, is unlawful?").

137. *Id.* ¶ 25.

138. *Id.* ¶ 62.

139. In another nod to the connection between immunity for the State and its officials, the court noted that this defense was available to the named individual defendants because "[s]tates act through their agents and officials, and that state immunity extends to those agents and officials." *Id.* ¶ 63.

140. *Id.* ¶ 64.

more tangible than a foreign state's reputation must be at issue for foreign sovereign immunity to bar the proceedings.[141]

Interestingly, the *Belhaj* court noted the ICJ's decision in the *East Timor* case, in which it reaffirmed the *Monetary Gold* principle that it "could not rule on the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case."[142] The court noted, however, that this rule was specific to the ICJ, and echoed the rationale given by the international tribunals discussed above in explaining that immunity need not apply simply because the court must consider the actions of a foreign state, but only when its decision would obviously affect the rights and interests of the non-party state.[143]

Though foreign sovereign immunity would not bring the case outside the court's jurisdiction, the court found that the closely related act of state doctrine would prevent the court from making a decision on the merits.[144] The court explained that the act of state doctrine provides immunity to foreign sovereigns based not on the status of the party (*ratione personae*), but based on the subject matter of the case (*ratione materiae*).[145] In this case, the court found that one formulation of the act of state doctrine, which focuses on cases concerning the legislative or executive acts of other states, would compel the court to hold the dispute non-justiciable. Specifically, it declined to consider the merits of Belhaj's claims because "[t]he claims (a) call into question the activity of a foreign state on its own territory; (b) without reference to any 'judicial or manageable,' or 'clear and identifiable' standards by which such acts may be judged; and (c) relate to the legal validity of those acts within the states' own territory."[146] The court also noted the "clear evidence" that deciding the case at hand could "jeopardize the country's international relations and national security interests."[147]

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141. *Id.* ¶ 67.

142. *Id.* ¶ 72 (quoting Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30)).

143. *Id.* ¶¶ 66–67.

144. *Id.* ¶ 36 (The act of state doctrine "is used to mean (1) an act of the Crown performed in the course of its relations with other States, (2) executive acts which are authorized or ratified by the Crown in the exercise of foreign power and (3) legislative or executive acts of foreign States.").

145. *Id.* ¶¶ 35, 37.

146. *Id.* ¶ 146.

147. In a cursory fashion, the Court noted that, as a *jus cogens* or peremptory norm, the prohibition against torture is the subject of universal jurisdiction and no derogation is permitted. *See id.* ¶ 148. The Court believed it could dismiss this potential problem because

The court declined to render a decision on the merits notwithstanding the fact that British courts had previously recognized that the act of state doctrine "will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights."[148] The court also considered but declined to apply an exception (referred to by the court as the "*Kirkpatrick* exception") to the act of state doctrine grounded in the distinction between a legal determination on the responsibility of a foreign state and a factual assessment of that foreign state's conduct.[149] As noted by Belhaj in his submissions to the court, in 2010 this distinction allowed an Australian court to adjudicate the claims of an Australian citizen who alleged complicity on the part of the Australian government in his torture by foreign officials in Pakistan, Egypt, Afghanistan, and at Guantanamo Bay.[150] In *Mamdouh Habib v. Commonwealth of Australia*, the preliminary question before the court dealt precisely with the act of state doctrine:

> [W]hether, as the Commonwealth asserts, the court should dismiss the claims of misfeasance in a public office and intentional but indirect infliction of harm for the reason that, since their resolution would require a determination of the unlawfulness of acts of agents of foreign states within the territories of foreign

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the defendants in the case were not directly implicated in the torture and because the Claimants made no claim under Article 3 of the ECHR, as the Claimant had in *El-Masri*. *Id.* ¶¶ 148–49.

148. *Id.* ¶ 81 (citing Yukos Capital v. OJSC Rosneft Oil Co., [2012] EWCA (Civ) 855, ¶ 69). The Court failed to expressly state why this precedent should not preclude application of the act of state doctrine in this case, resting its ruling instead on the harm that a "forensic investigation" of the conduct of a foreign state on its own soil would have for the United Kingdom's foreign relations, and on the absence of clear, manageable judicial standards to resolve the case. *Id.* ¶¶ 146, 148.

149. The name for this exception originates from the name of a case heard by the U.S. Supreme Court. *See* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International, 493 U.S. 400 (1990). In that case, Justice Scalia announced the exception to the act of state doctrine: "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of sovereigns taken within their own jurisdiction shall be deemed to be valid." *Id.* at 409; *see also* Belhaj v. Straw, [2013] EWHC (QB) 4111, ¶ 84. The *Kirkpatrick* exception was later interpreted by a British appeals court as stating that "what Kirkpatrick is ultimately about . . . is the distinction between referring to act of state . . . as an existential matter, and on the other hand asking the court to enquire into them for the purposes of adjudicating upon their legal effectiveness . . ." *Id.* This formulation of the exception was taken by the *Belhaj* court as binding precedent.

150. Habib v Commonwealth of Australia [2010] FCAFC 12 (Austl.).

> states, those claims are not justiciable and give rise to no "matter" within the jurisdiction of the court . . . .[151]

As in other complicity cases discussed thus far, in order to prevail at trial in his claim that Australian officials were guilty of "aiding and abetting" the crimes of the United States and other countries, the court noted that Habib would have to "prove that foreign officials committed those crimes."[152] In deciding such an issue, the court acknowledged that "[f]indings will be necessary as facts along the way," but reasoned that "no declaration with respect to the conduct of foreign officials is required" and that "no foreign officials would be subject to the jurisdiction of an Australian court."[153] The court noted that comity considerations and the "risk of a generalized embarrassment to Australia's foreign relations" would not bar adjudication of Habib's claims, despite the state's suggestion that deciding the case might undermine international comity.[154] In justifying its acceptance of jurisdiction, the court also emphasized the *jus cogens* status of the torture prohibition,[155] and appealed to that fundamental phrase defining the responsibility of the judiciary—"to say what the law is."[156] The court would not allow the act of state doctrine to "cripple" the Australian Constitution and prevent the court from doing its duty.[157]

The *Habib* court was making a fine distinction between a factual determination regarding the conduct of a foreign sovereign and a determination as to the legal responsibility of that foreign state. In fact, it may have crossed that line in admitting that *Habib* would have to demonstrate that foreign officials broke the law if he were to succeed, though the court also stated it would be making findings of fact, and not making a "declaration" regarding the foreign state. The British court in *Belhaj* noted the Australian court's distinction between factual and legal assessments, and that a similar distinction had been made by the U.S. Supreme Court in finding an exception to the act of state doctrine in the *Kirkpatrick* case.[158] As summarized by the *Bel-*

151. *Id.* ¶ 4.

152. *Id.* ¶ 22.

153. *Id.* ¶ 115.

154. *Id.* ¶ 118. The court also quipped, "[n]o doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament." *See id.* ¶ 37.

155. *Id.* ¶ 117.

156. *Id.* ¶ 25 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

157. *Id.* ¶ 29.

158. *Kirkpatrick*, 493 U.S. at 405.

haj court, *Kirkpatrick* stands for the principle that "there is a distinction between inviting the Court to adjudicate on the legal effect of an act of state (its validity) and proving an act of a sovereign state within its own jurisdiction as a factual matter (its existence). The act of state doctrine applies to the former and not the latter."[159] The *Belhaj* court also openly disagreed with the government's attorneys, who argued that the act of state doctrine as explicated in *Habib* was inconsistent with the doctrine as it exists in the United Kingdom, and determined that the development of the doctrine in Australia bore "considerable weight."[160]

In Belhaj's case, however, the court was unwilling to make the distinction between factual and legal conclusions to save the case from non-justiciability. Because the ultimate decision could not be made without first deciding a preliminary question involving a foreign sovereign, the court lacked jurisdiction to decide the complicity of British officials in torts committed by another state.[161] The court failed to expressly distinguish the precedents from the United States and Australia in *Kirkpatrick* and *Habib*, applying the act of state doctrine due to a lack of clear standards for adjudicating the dispute and out of deference to the foreign policy and national security prerogatives of the executive branch.[162] The court was also particularly troubled by the question of which law (foreign or U.K.) should apply to the alleged conduct at which points in time, and were frustrated by the claimants' initial failure to specifically identify which law applied, which the court found "evasive."[163]

It is unsurprising that domestic courts would be more likely to be affected by considerations of comity and respect for the foreign policy interests of their coordinate branches of government. International courts like the ECtHR are certainly interested in maintaining

159. Belhaj v. Straw, [2013] EWHC (QB) 4111, ¶ 116. In the words of the Kirkpatrick Court, "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Kirkpatrick*, 493 U.S. at 409–10.

160. *Belhaj*, [2013] EWHC (QB), ¶ 114.

161. It is interesting to note that, though the Court did not consider complicity under customary international law as a potential cause of action, the Court did not hesitate to discuss international law as well as decisions in American and Australian Courts. The Court referenced the U.S. Supreme Court's decision in *Banco Nacional v. Sabbatino* as well as the Australian High Court's decision in *Habib v. Commonwealth of Australia* (a case involving extraordinary rendition) in searching for a definition of the act of state doctrine, which continues to evolve within the common law.

162. *Belhaj*, [2013] EWHC (QB), ¶ 150.

163. *Id.* ¶¶ 124, 140.

their legitimacy and encouraging cooperation from national governments, but they lack the kind of strategic foreign policy interests that make states wary of decisions by their courts that may damage relations with other states. It is open to question, however, why the Australian court found the act of state doctrine to be no barrier to jurisdiction and the British court found otherwise, given that both courts cited the other's jurisprudence, and both come from the same legal tradition. The answer may lie partially in Belhaj's failure to make a convincing case that British law should govern his claim, while Habib succeeded in convincing his court that Australian law should apply extraterritorially.[164] Perhaps the *Belhaj* court's finding that jurisdiction was lacking reflects a stronger degree of judicial deference to the foreign policy prerogatives of the executive in Britain. Maybe the "special relationship" between the United States and the United Kingdom played an important background role in this case, given that the court seemingly extended the act of state doctrine further than was required by law.[165] As we will see below, a somewhat special circumstance allowed the Canadian Supreme Court to decide a case that otherwise might have been deemed non-justiciable due to concerns of comity and respect for the executive's foreign policy prerogatives.

B. Canadian Supreme Court in Khadr

Omar Khadr, a Canadian citizen, was fifteen years old when he was arrested after a firefight in Afghanistan in July of 2002 and transferred to Guantanamo Bay. The U.S. government alleged that Khadr had conspired with members of al-Qaeda to commit murder and acts of terrorism against U.S. and coalition forces, and specifical-

164. Habib's claim relied on the Crimes Torture Act ("[a]n Act to give effect to certain provisions of the Torture Convention and for related purposes"), an Australian statute that "reflects the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy." The Act "is directed to the conduct of public officials and persons acting in an official capacity irrespective of their citizenship and irrespective of the identity of their government." *See* Habib v Commonwealth of Australia [2010] FCAFC 12, ¶¶ 8–9 (Austl.).

165. *See, e.g.*, Ian Silvera, *Scotland Independence Results: Obama Reaffirms Special Relationship After "Passionate" Referendum*, INTERNATIONAL BUSINESS TIMES (Sept. 19, 2014, 3:31 PM), http://www.ibtimes.co.uk/scotland-independence-results-obama-reaffirms-special-relationship-after-passionate-referendum-1466315 (quoting President Obama as saying, "[w]e have no closer ally than the UK, and we look forward to continuing our strong and special relationship with all the people of Great Britain and Northern Ireland as we address the challenges facing the world today").

ly, that he threw a grenade that killed an American soldier.[166] In February and September of 2003, agents of the Canadian Security Intelligence Service (CSIS) questioned Khadr at Guantanamo Bay and shared the substance of these interviews with U.S. authorities. At Guantanamo, Khadr was incarcerated with adults, subjected to abusive interrogations, and deprived of educational opportunities. He was also detained for more than two years before he was granted access to an attorney, and detained for more than three years before he was charged with a crime.[167] In October 2010, Khadr accepted a plea deal with the United States in which he admitted to murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.[168] Khadr was then transferred to Canadian custody.

In 2005, while in U.S. custody at Guantanamo, Khadr sought all records in the possession of Canadian authorities relevant to the charges he faced in the United States, including interviews Canadian officials conducted with him at Guantanamo in 2003.[169] The decision about whether the court would compel the Canadian authorities to produce the documents turned on whether the Canadian Charter of Rights and Freedoms extended to Khadr during his detention at Guantanamo.[170] A federal court of appeals ruled in Khadr's favor and ordered the disclosure, and the Canadian Minister of Justice appealed to the Canadian Supreme Court, which ruled on Khadr's record request in 2008.

Responding to the Canadian government's arguments that the Charter could not apply to the conduct of Canadian agents at Guantanamo, the court acknowledged the argument of the Government that in general, comity requires that countries refrain from the extraterritorial enforcement of their domestic laws. However, the court noted that "the deference required by the principle of comity ends where clear violations of international law and fundamental human rights begin."[171] Because violations of international law were being perpetrated at Guantanamo, and because Canadian officials were participating in a process contrary to Canada's international human

166. Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, ¶ 5 (Can.).

167. *Omar Ahmed Khadr*, HUMAN RIGHTS WATCH (Oct. 25, 2012), http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr.

168. Press Release, U.S. Dep't of Defense, Details of Omar Khadr Plea Agreement Released (Oct. 31, 2010), *available at* http://www.defense.gov/releases/release.aspx?releaseid=14024.

169. *Khadr*, [2008] 2 S.C.R., ¶ 8.

170. *Id.* ¶¶ 15–16.

171. *Id.* ¶ 18 (internal quotations omitted).

rights obligations by conducting their interrogation of Khadr under these conditions and sharing the fruits of the interrogation with U.S. authorities, the Canadian Charter of Rights and Freedoms was held to apply.[172] The high court ordered the disclosure of the requested documents.[173]

In contrast to the approach taken by the British court in *Belhaj*, the Canadian Supreme court found that "comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations."[174] In a sense, in this particular case comity actually counseled in favor of sustaining jurisdiction—the court was merely recognizing the validity of determinations made by the U.S. Supreme Court that the rights of Khadr and other detainees at Guantanamo under the U.S. Constitution and under Common Article 3 of the Geneva Conventions were denied by U.S. authorities.[175] As stated by the Canadian Supreme Court in its 2008 decision, "[t]he violations of human rights identified by the U.S. Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law."[176]

In 2010, the Canadian high court again heard an appeal from Mr. Khadr, who was seeking his repatriation to Canada from Guantanamo Bay.[177] The Canadian Prime Minister had declined Khadr's request to seek his repatriation, and Khadr sought judicial review of the denial, asserting that Canada had a duty to protect him under section 7 of the Charter. The court utilized the logic of complicity in stating the following:

> Canada actively participated in a process contrary to its international human rights obligations and contributed to [Khadr's] ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice . . . . While

172. *Id.* ¶ 27.

173. *Id.* ¶¶ 27, 31.

174. *Id.* ¶ 18.

175. The Court repeatedly refers to Canada's participation in violations of international law and in conduct that violates the principles of fundamental justice and describes the conduct that violated these rules, relying on the violations found by the U.S. Supreme Court in Rasul v. Bush, 542 U.S. 466 (2004) and Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

176. *See Khadr*, [2008] 2 S.C.R., ¶ 24.

177. Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44 (Can.).

> the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the court that the Statements taken by Canadian officials are contributing to [Khadr's] continued detention.[178]

The court went on to agree with the lower courts that Khadr's rights had been violated, but declined to uphold the lower court's order requiring the executive to seek Khadr's repatriation, limiting itself to a declaration that Khadr's rights under the Canadian Charter and international human rights law had been violated.[179]

In the *Khadr* decision, the Canadian Supreme Court effectively found that Canada was complicit in an act of the United States that violated international law. The court found that at the time Khadr was interrogated, Canadian authorities knew that detainees at Guantanamo had been denied the ability to challenge the legality of their detention via a writ of *habeas corpus*, that Khadr was sixteen years of age, and that he had not been allowed access to an attorney.[180] The court also found that Canadian officials knew at the time of the March 2004 interrogation that Khadr had been subjected to three weeks of sleep deprivation, and that U.S. authorities would have full access to the fruits of the interrogation.[181] Thus, the court found that Canadian authorities had actual knowledge of the human rights violations occurring at Guantanamo, though the court did not discuss whether constructive knowledge would have sufficed. Canadian authorities had knowledge of the circumstances that violated international law, and the action would have been illegal had Canada been the primary actor in keeping Khadr, a minor, detained in harsh conditions without access to an attorney for more than two years. The Canadian high court was thus able to overcome comity considerations and allow the Canadian Charter to apply to Canadian officials acting abroad, because, as shown by decisions of the U.S. Supreme Court itself, a clear violation of international law had been perpetrated. The

178. *Id.* ¶ 46.

179. *Id.* ¶¶ 46–48. Because of "evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive," the Court limited itself to providing declaratory relief, finding that "through the conduct of Canadian officials in the course of interrogations in 2003–2004 . . . Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by [section 7] of the *Charter*, contrary to the principles of fundamental justice." *Id.*

180. *Id.* ¶ 24.

181. *Id.*

court did demonstrate some institutional modesty and deference to the executive in declining to provide Khadr with injunctive relief, but was not so deferential as to refrain from declaring that Canada had participated in depriving Khadr of his fundamental rights.

C. German Constitutional Court Case Concerning Two Yemenis

In November of 2003, the German Constitutional Court heard a case involving Germany's potential complicity in a counterterrorism operation conducted by the United States.[182] In a less-forceful variation of extraordinary rendition, the case concerned a Yemeni Imam and his secretary who were lured out of Yemen to Germany by undercover U.S. agents. Specifically, U.S. agents had used a confidential informant to convince the two Yemenis to come to Germany to meet another person who was interested in making a "major financial contribution."[183] The two were arrested on terrorism charges pursuant to a warrant issued by a U.S. district court. The government of Yemen intervened, arguing that the Yemenis had been abducted in violation of international law and demanded their return to Yemen.[184] The United States sought their extradition based on an extradition treaty between Germany and the United States.[185] The two unnamed Yemenis opposed the extradition, and in 2003, Germany's Federal Constitutional Court heard the case, focusing on the question of whether a general rule existed in international law prohibiting the extradition of persons abducted from their home country."[186]

Germany's Basic Law is notable not only because it recognizes that "international law shall be an integral part of federal law," but also in establishing that the general rules of international law "shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."[187] Consistent with this principle, the court found that, should the Complainants' extradition be found to violate international law, the two would have to be freed. Affirming that German Basic Law includes a norm against

182. BVerfG (Federal Constitutional Court), Nov. 5, 2003, 109 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [2 BvR1506/03] 113 (Ger.), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20031105_2bvr150603en.html [hereinafter Yemeni Citizens].

183. The purpose for which the funds were to be used was disputed. *See id.* ¶ 4.

184. *Id.* ¶ 8.

185. *Id.* ¶ 5.

186. *Id.* ¶ 23.

187. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI, art. 25 (Ger.).

complicity in violations of international law, the court noted that German administrative authorities and courts "are prevented from participating, in a decisive manner, in acts of non-German organs of state authority that are performed in violation of general rules of international law" by virtue of Article 25 of the Basic Law.[188]

The court proceeded to examine the possibility of German complicity in internationally wrongful conduct by the United States. If the United States had in fact contravened international law in its interaction with the complainants, "there would be the risk that by extraditing the complainant, Germany would support a U.S. action that is possibly contrary to international law, which would make Germany itself responsible under international law *vis-à-vis* Yemen."[189] The court cited directly to Article 16 of ARSIWA in making this observation.[190]

Ultimately, the court decided that there was no norm of customary international law prohibiting the conduct that led to the Complainants' arrests in Germany. The court found that the majority of courts that had considered the matter did not regard the circumstances that led to the complainant's arrest to bar criminal prosecution, citing cases from the United Kingdom, the United States, Canada, and the International Criminal Tribunal for the Former Yugoslavia.[191] The court took note of the fact that no force was used against the complainants and that they came to Germany of their own accord, although a confidential informant acting at the behest of U.S. authorities deceived them.[192]

This case shows that the logic of complicity as articulated in ARSIWA may be utilized in domestic courts operating within constitutional structures that give international law a preeminent position in a state's legal system. Indeed, Germany's Federal Constitutional Court has invoked ARSIWA in a variety of cases since 2001.[193] However, in the case of a complainant alleging German complicity in torture, even assuming that the court would have recognized the pro-

188. Yemeni Citizens, *supra* note 181, ¶ 45.

189. *Id.* ¶ 47.

190. *Id.*

191. *Id.* ¶¶ 57–58. The Court also cited a Swiss case, relied on by the complainant, prohibiting extradition in similar circumstances. *Id.* ¶ 59.

192. *Id.* ¶¶ 53, 55.

193. *See* Theodor Schweisfurth, *The International Law Commission's Articles on State Responsibility and the German Federal Constitutional Court*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 1298 (Ulrich Fastenrath et al. eds., 2011).

hibition of torture as having *jus cogens* status, it is unclear whether the prohibition would have trumped any customary rule on the act of state doctrine or sovereign immunity.[194]

D. Conclusion

The above discussion demonstrates that, while domestic courts are generally more hesitant to adjudicate complicity cases involving foreign states, considerable variation exists among states' approaches to these types of claims. A British court declined to review a case involving extraordinary rendition, citing the act of state doctrine, while an Australian court found it could adjudicate a case involving almost identical factual scenarios, the act of state doctrine notwithstanding. The Canadian Supreme Court was willing to adjudicate a case involving the conduct of a close ally, the United States, largely because the United States Supreme Court had already decided that fundamental rights of detainees at Guantanamo had been violated. For its part, because of Germany's constitutional structure, Germany's Federal Constitutional Court would have had little difficulty entertaining a case involving the customary international law norm against complicity had it found that the United States had in fact committed an internationally wrongful act in enticing two Yemenis from their home country using subterfuge. These cases illustrate the considerable variation in how domestic courts approach complicity claims, though issues of sovereign immunity and deference to foreign policy prerogatives and comity among nations can serve as significant obstacles to adjudication of such claims. The next section will compare the approaches of the domestic and international courts discussed above in an effort to extract general conclusions about courts' willingness and ability to decide state complicity claims.

IV. COMPARING STANDARDS

The definition of complicity in Article 16 requires that the

194. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) ("These rules [*jus cogens* or peremptory norms] prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character."). Notwithstanding this general rule, whether the German court could have entertained the case would hinge at least partly on whether they followed the ICJ's decision that sovereign immunity is a procedural rule, and that its application is not affected when violations of *jus cogens* are at issue. *See* Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 96 (Feb. 3).

primary state actor must in fact have committed an internationally wrongful act in order for derivative liability to be properly assigned to a secondary state that has provided aid or assistance to the primary actor. Courts deciding cases involving one state's complicity with another, however, are often decided using a complicity framework other than the complicity norm of customary international law embodied in Article 16 of ARSIWA. What, then, have international and domestic courts held to be a sufficient showing of wrongful conduct on the part of the primary state in order to properly rule on the complicity of the secondary state? This question is intimately tied to the question of jurisdiction and justiciability in complicity cases, since, as discussed above, courts are hesitant to make legal conclusions regarding the actions of states over which they lack jurisdiction.

In the *Khadr* case, the Canadian Supreme Court determined that the findings of fact in U.S. Supreme Court cases like *Hamdan v. Rumsfeld* and *Rasul v. Bush* relieved them of the responsibility of determining that human rights violations were committed at Guantanamo. These findings and conclusions allowed the court to hold that Canada had assisted in the commission of the violations. Concerns of comity and relations with the United States were diluted, since the Supreme Court of the United States had already found that violations of international law had been committed the United States.

In the *Belhaj* case, this element was missing, as no U.S. court had pronounced on the illegality of the extraordinary rendition program. For the *Belhaj* court, it would be necessary to offer a pronouncement on the illegality of actions taken by U.S. officials, and the court was not prepared to take this predicate step in determining British complicity with the rendition program. The British High Court of Justice found the act of state doctrine to apply and declined to exercise its jurisdiction, citing a lack of manageable standards stemming from the choice of law problem, comity concerns, and the foreign policy and national security prerogatives of the British government.

The Australian High Court in *Habib* found an exception to the act of state doctrine, as Habib had alleged violations of fundamental human rights and the Australian legislature had made clear its intention to make domestic laws barring torture apply extraterritorially. Drawing a distinction between factual and legal determinations regarding the conduct of a foreign sovereign, and highlighting the *jus cogens* status of the torture prohibition, the Australian High Court refused to allow the act of state doctrine to preclude a decision on the merits.

In the German Constitutional Court case, the court likely would have applied the customary international law of complicity,

had they found that the United States violated some international law in luring the two Yemeni complainants to Germany. Given the primacy of international law in the German legal system, and due to the *jus cogens* status of the torture prohibition, it seems unlikely that the court would have determined that foreign sovereign immunity prevented adjudication.

The international tribunals and treaty bodies discussed in this Note were comparatively more likely than domestic courts to allow claimants alleging state complicity in the commission of internationally wrongful conduct to obtain a decision on the merits. In *El-Masri*, the court was careful to note that, while it had to inquire into the circumstances of El-Masri's detention in the United States, liability for any violation of international law could only be found for the respondent state, a party to the ECHR.[195] The court sought to "examine the foreseeable consequences of sending the applicant to the receiving country," making reference to all material placed before it and material obtained *proprio motu*.[196] These materials came from a variety of sources as noted above, many of which would not have been available to Macedonian authorities at the time of El-Masri's detention.[197] The ECtHR availed itself of virtually all relevant information to determine whether Macedonia did know or should have known that El-Masri would be subjected to a "real risk of ill-treatment" prohibited by Article 3 of the ECHR.

The Committee Against Torture and the Human Rights Committee were likewise inclined to consider all relevant materials in determining whether Sweden should have known better than to accept Egypt's diplomatic assurances that Agiza and Alzery would not be subject to torture or ill-treatment. That Egypt had not accepted either treaty body's jurisdiction over individual claims against it was no obstacle, because the primary rules prohibiting *refoulement* in the CAT and ICCPR do not require any conclusive demonstration of a violation on the part of the country to which the person in question has been transferred.

In general, international tribunals and treaty bodies also applied a relatively lax knowledge requirement with regard to cases involving rendition. The ECtHR, the HRC, and the Committee Against

195. El-Masri v. Former Yugoslav Republic of Macedonia, 57 Eur. H.R. Rep. 25, ¶ 212 (2012).

196. *Id.* ¶ 213.

197. These materials include an April 26, 2005 resolution of the Council of Europe on Guantanamo and rendition, a December 2003 U.S. federal court of appeals case regarding a Guantanamo detainee (*Id.* ¶ 107); the CAT Committee decision on Agiza and Alzery from 2006, and a USA Today article on Agiza from 2008. *Id.* ¶¶ 99, 107, 108, 110.

Torture all found responsibility on the part of the sending state using a standard of constructive knowledge. Because the prohibition of torture is regarded as a peremptory norm, tribunals like the ECtHR and treaty bodies like the Committee Against Torture and the HRC may have good reason to loosen the *scienter* requirement when considering cases involving extraordinary rendition and torture. Indeed, the ILC noted in its commentary to ARSIWA that "obligations imposed on states by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts."[198] More in line with Article 16's *scienter* requirement, in the *Bosnia Genocide* case the ICJ set the threshold higher, requiring the aiding or assisting state's knowledge of the primary state's specific intent to find complicity liability on the part of the assisting state.[199]

Domestically, the Canadian Supreme Court in *Khadr* found that Canadian authorities had actual knowledge of the human rights violations occurring at Guantanamo and that this was sufficient to find Canada responsible for violating Khadr's rights under the Canadian Charter of Rights and Freedoms. Because the British court in *Belhaj* failed to reach the merits of the case, the German court found no internationally wrongful act, and the Australian government ultimately settled with Habib before his case went to trial, it is difficult to know what standard of intent or knowledge these domestic courts would have applied.[200]

The above discussion of complicity cases involving torture demonstrates that state parties to conventions such as the CAT, the ICCPR, and the ECHR have made it more difficult for state parties to avoid accountability for complicity in torture or for exposing individuals to a real risk of torture or persecution. This has been accomplished by ratification of treaties like the CAT, ECHR, and ICCPR that create primary rules prohibiting states from subjecting individuals even to a risk of torture or ill-treatment. These treaties have obviated the need for aggrieved individuals to resort to state complicity claims based in customary international law, which sets a higher standard for the defendant's knowledge and requires an internationally wrongful act by the primary state actor, inquiry into which may raise state immunity or justiciability problems.

198. ARSIWA, *supra* note 7, art. 12, commentary ¶ 7.

199. *See* Bosnia Genocide, *supra* note 6, ¶ 421.

200. *See* Ben Batros, *Case Watch: Australia's Complicity in Torture—An Update*, OPEN SOCIETY FOUNDATIONS (Oct. 14, 2011), http://www.opensocietyfoundations.org/voices/case-watch-australias-complicity-torture-update.

CONCLUSION

A variety of factors may help to analyze whether a particular court is more or less likely to adjudicate state complicity cases. First, as we have seen, international courts are more likely to accept jurisdiction over cases involving the conduct of a foreign state that has not consented to the court's jurisdiction. This is because international courts can generally apply primary rules of international law, embodied within a treaty, that allow for responsibility to be assigned to the assisting state without any determination as to the legal responsibility of a non-party state. It is also due to the fact that international judicial bodies, unlike domestic courts, need not be concerned with encroaching on the foreign policy prerogatives of an executive branch.

Second, a court is relatively more likely to proceed with adjudicating a state complicity case when a court of the primary wrongdoing state has already determined that the state acted in an internationally wrongful manner. These situations may be rare, but as demonstrated in the *Khadr* case, such a finding by a court in the primary wrongdoing state can make a crucial difference in a court's willingness to adjudicate a claim involving the conduct of a foreign state.

Third, it is not yet clear that courts are more likely to decline to apply sovereign immunity or the act of state doctrine when violation of a *jus cogens* norm is at issue. Though the Australian High Court indicated that the *jus cogens* status of the torture prohibition counseled in favor of declining to apply immunity in *Habib*, there were other considerations supporting the justiciability of the case.[201] While some academics argue that the universal nature of such norms should trump jurisdictional doctrines that would preclude a finding of responsibility for violation of fundamental laws such as the prohibition against torture, many courts have been hesitant to adopt such an approach.[202] In general, as the ICJ has noted, courts have decided that a state's entitlement to immunity is not "dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated."[203]

Fourth, a domestic court is more likely to accept jurisdiction when its laws in a certain area have been held to apply extraterritorially, as was found to be the case in the *Khadr* and *Habib* cases. In

201. *See supra* Part III.A.

202. *See supra* note 19 and accompanying text.

203. Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 84 (Feb. 3).

such cases, courts are more readily able to avoid the choice of law problem that may arise when claimants allege a variety of wrongs committed by multiple states in a several jurisdictions, as was the case in *Belhaj*.

Finally, domestic courts are more likely to accept jurisdiction when they believe a decision will not adversely affect their nation's foreign policy or national security.[204] Though probably a rare occurrence, courts will be more likely to reject application of the act of state doctrine when the executive branch clearly expresses its view that application would not serve the state's interests in a particular case.

The lawyering on behalf of the complainant is also an essential part of the equation. Emphasizing the distinction between a factual and legal assessment of the conduct of a foreign state and clearly articulating the law that should apply will help courts to adjudicate complicity cases. Such an approach may assist courts in guiding jurisprudence on the act of state doctrine and on sovereign immunity in a direction that allows for adjudication of claims involving fundamental human rights abuses committed by foreign states. Indeed, complicity cases may be a particularly auspicious context in which this progression can occur, because courts can characterize their decisions as not directly bearing on the legal responsibility of the primary state actor, limiting the impact that their decisions may have on comity and foreign relations.

The increasing recognition of state complicity as a part of customary international law and its embodiment in numerous multilateral treaties is a positive development in the field of international law—a step toward international law's "material completeness."[205]

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204. It should be noted that these factors bear some resemblance to the factors identified by the U.S. Supreme Court fifty years ago in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (noting that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . ."). Some federal appellate courts have added a fourth factor that counsels in favor of application of the act of state doctrine if the foreign State was acting in the public interest. *See* Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989).

205. Lauterpacht wrote that "material completeness" is the "necessary aim of any legal system" and that achieving this goal requires us to "consider not only the letter of the law,

As international law develops, those persons and institutions that move it forward will tend to do so incrementally, seeking to maintain the legitimacy of the international legal system and to ensure the broad participation of states in that system. In this Note we have seen examples of the relatively recent norm prohibiting state complicity in the commission of internationally wrongful acts conflict with long-standing doctrines designed to protect the sovereignty of the state and to promote comity among nations. Courts have generally been hesitant to adjudicate state complicity claims because of these justiciability and jurisdictional issues, save in those circumstances where the state respondent is party to a treaty that effectively prohibits one state from assisting another violate international law. Eventually, our international legal framework and domestic legal systems may evolve to a point where they can more readily facilitate the adjudication of state complicity claims. Until that time, claimants seeking to bring complicity cases will continue to face obstacles from the sovereign immunity and act of state doctrines, though these hurdles can, in some cases, be cleared.

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but also its spirit and purpose." HERSCH LAUTERPACHT, THE FUNCTION OF THE LAW IN THE INTERNATIONAL COMMUNITY 85, 86 (1933).

ANNEX

Table 1: Treaties and Conventions Containing Complicity or Express or Implied *Non-Refoulement* Provisions

Convention/Law	Complicity Provision
U.N. Charter	Article 2(5): All Members shall . . . refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
Convention Against Torture	Article 3: No state Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction	Article 1(c): Each state Party undertakes never under any circumstances . . . to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a state Party under this Convention.
Cluster Munitions Convention	Article 1(c): Each state Party undertakes never under any circumstances . . . to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a state Party under this Convention.

Treaty on the Non-Proliferation of Nuclear Weapons	Article 1: Each nuclear-weapon state Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.
Convention on the Prevention and Punishment of the Crime of Genocide	Article III: The following acts shall be punishable: . . . (e) Complicity in genocide.
Convention and Protocol Relating to the Status of Refugees	Article 33: No Contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
International Covenant on Civil and Political Rights	Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
European Convention on Human Rights	Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
Fourth Geneva Convention	Article 45: In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.