

State Instigation in International Law: A General Principle Transposed

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It is widely believed that international law imposes no general prohibition on instigation - no general prohibition on states inducing or inciting or procuring other states to breach their international obligations. The absence of a prohibition on instigation stands in contrast to the now entrenched prohibition on the provision of assistance to another state that facilitates an internationally wrongful act. In this article, I argue that the orthodox position on instigation is incorrect. I argue that a prohibition on instigation is founded on a general principle of law, as envisaged in Article 38(1)(c) of the Statute of the International Court of Justice, and that it would be appropriate to transpose that general principle to the international legal system. To sustain this argument, I first construct a representative set of domestic jurisdictions for comparative analysis. Second, through a brief comparative survey I assess whether in each of these domestic jurisdictions it is wrongful, in one way or another, for an actor to instigate another to commit an act that it would be wrongful for it to do itself. And third, I argue that the transposition of this principle from domestic law to international law is conceptually and normatively appropriate.

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1. Introduction

Imagine two states share a border with each other and with a third state. States A and B enjoy strong diplomatic ties; neither is on good terms with State C. State A is wealthy and has a strong internal legal and political order that ensures its general compliance with international law. State B is less wealthy, and is less constrained, in practice, by international law. Instability in the border territories of State C provokes fears, within both State A and B, of increased refugee flows across their respective territories, first into State B and then into State A. In diplomatic discussions, the Foreign Minister of State A suggests to the Foreign Minister of State B that State B institute a policy whereby all refugees arriving in State B are immediately returned to State C without any process or consideration of their status – a policy that, when executed, would breach customary international law. In return, State A promises that it will later grant to State B increased access to its markets. State B carries out thousands of deportations under the policy.¹

In ordinary language, we might say that State A *encouraged* State B to commit an internationally wrongful act. If we were steeped in criminal law, we might say that State A *abetted* State B's wrong. If these two descriptions seem to underweight State A's role, we might say that it *incited*, or *solicited*, or *instigated*, or *induced* State B's wrong. Perhaps more

¹ Cf Jennings, 'Some International Law Aspects of the Refugee Question', 20 *BYIL* (1939) 98, 111-114.

strongly, we might say that State A *procured* the deportations.² Although each of these might denote a slightly different relationship between the two parties, for present purposes they will be grouped together under the term instigation.³

Instigation is a form of complicity – it refers to conduct that influences the decision of a principal wrongdoer to commit a wrong.⁴ To be more precise, following Hart and Honoré, this article will confine it to situations where the instigator provides to the principal wrongdoer a reason for action – the instigator does ‘something to render some course of action more *eligible* in the eyes of the second actor than it would otherwise have been.’⁵ Instigation can be distinguished from a second common form of complicity – the provision of assistance to the principal that facilitates her commission of the wrong.⁶ In many domestic legal systems, criminal modes of accomplice liability include both instigation and assistance.⁷ In international law, it is crucial to distinguish them.⁸

It is crucial to distinguish them because, as will be seen below, scholarship almost uniformly denies that international law recognizes a general prohibition on instigation by states; it denies, for instance, that international responsibility would arise in the hypothetical set out above. The putative absence of responsibility for instigation may be contrasted with the existence of responsibility for the provision of *assistance*, as embodied in the rule in Article 16 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁹ In other words, the orthodox position is that the complicity rule reflected in Article 16 ARSIWA only covers one of the two classic modes of participation in wrongdoing.¹⁰

This article argues that the orthodox position is wrong as a matter of law. Its central claim is that international law does prohibit states from instigating other states to commit internationally wrongful acts. Such a prohibition is founded on a general principle of law, as recognized as a source of international law by Article 38(1)(c) of the Statute of the International Court of Justice.¹¹ This article shows that in private law, in a representative set of domestic jurisdictions, it is wrongful for an actor to instigate another to commit an act that it would be wrongful for it to do itself. It then argues that it would be appropriate to transpose this general principle of municipal law into the international legal system.

² See *Lumley v Gye* (1853) 2 E & B 216; 118 ER 749 (Coleridge J) § 26: ‘to draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice.’

³ In international law scholarship, the term incitement is sometimes used instead of instigation. This article prefers the term instigation given that in some jurisdictions incitement is viewed as an *inchoate* offence in criminal law.

⁴ Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’, 73 *California Law Review* (1985) 323, at 342.

⁵ HLA Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985), at 54.

⁶ Kadish, *supra* note 4, at 342. See also Hart and Honoré, *supra* note 5, at 379.

⁷ See e.g. StGB § 26 and StGB § 27 (Germany); 18 USC § 2 (1994) (USA); Accessories and Abettors Act 1861, as amended by Sch 12 to the Criminal Law Act 1977, s 8 (England and Wales).

⁸ See though Davies, ‘Accessory Liability for Assisting Torts’, 70 *Cambridge Law Journal* (2011) 353, at 360.

⁹ International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’ annexed to UNGA Res 56/83 (12 December 2001) UN Doc A/Res/56/83.

¹⁰ See Section 3 below.

¹¹ 33 UNTS 993.

To make its argument, this article is structured as follows. Section 2 provides a short history of the prohibition on state complicity in international law. Section 3 sets out the orthodox position in the scholarship – that international law recognizes no general prohibition on instigation. These two sections provide the background to the central claim of the article, which is developed in Sections 4 and 5. Section 4 discusses the function of general principles of law in the international legal system and the methodology for their establishment, constructs a representative set of jurisdictions for analysis, and demonstrates that the principle at issue exists in each of them. Section 5 argues that it would be appropriate to transpose the principle to the international plane, while also considering three potential objections to the acceptance of a general prohibition on instigation in international law. Section 6 sketches the contours of the rule, and Section 7 concludes. As the ILC put it in a related context, ‘a State cannot do by another what it cannot do by itself.’¹²

2. Complicity in the Law of State Responsibility – A Short History

Complicity – the idea of responsibility for participation in another’s wrong – has a somewhat strained history in the international legal system. For instance, in his Hague Lectures of 1939, Ago suggested that the structure of the system denied that any such responsibility could arise. Ago argued that it appeared ‘inconceivable in international law to have any form of complicity, participation, or incitement to a delict.’¹³

Whether or not Ago’s claim was true then, it is certainly no longer the case. Recent scholarship, most comprehensively Helmut Aust’s, has shown how the idea of complicity has become embedded in the international law.¹⁴ Initially, in the decades after Ago’s denial of responsibility, we saw an increase in the articulation by states of the responsibility of other states for complicity.¹⁵ In some cases, it is possible to point to the entrenchment of what might be called specific complicity rules – the prohibition of complicity in specific internationally wrongful acts.¹⁶ For instance, international law prohibits states from placing their territory at the disposal of another state for an act of aggression.¹⁷ More recently, the issue of complicity has become more central – questions have arisen, for instance, relating to the sale of weapons, the sharing of intelligence, and the provision of development aid.¹⁸ In this respect, two events are critical to international law’s embrace of complicity.

First, the ILC included Article 16 in the final text of the Articles on State Responsibility. Article 16, which the ILC grounded on some of the specific practice noted above, is a general complicity rule – it prohibits the provision by one state to another of any aid or assistance given with knowledge of the circumstances of the latter’s internationally wrongful act.¹⁹

¹² ARSIWA Commentary on Art 16(6). See also Gardner, ‘Complicity and Causality’, 1 *Criminal Law & Philosophy* (2007) 127.

¹³ Ago, ‘Le Délit International’, 68 *Recueil des Cours* (1939) 419, at 523.

¹⁴ H. Aust, *Complicity and the Law of State Responsibility* (2011).

¹⁵ See *Ibid.*, at 97-191.

¹⁶ M. Jackson, *Complicity in International Law* (2015), at 135-136.

¹⁷ Art 3(f) UNGA Res 3314 (XXIX) (14 December 1974) (Definition of Aggression).

¹⁸ See generally Lowe, ‘Responsibility for the Conduct of Other States’, 101 *Kokusaiho Gaiko Zasshi* (2002) 1; Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, Chatham House Research Paper (November 2016).

¹⁹ Art 16 ARSIWA.

Despite its inclusion in ARSIWA, Article 16 is better seen as a primary rule within the conceptual scheme developed by the ILC.²⁰ However classified, though, it is an important development in the international legal system.²¹

Second, in the *Bosnian Genocide* case, the International Court of Justice declared Article 16 to reflect customary international law.²² Whether or not the customary status of Article 16 was evident at the time of its inclusion in the Articles, the judgment of the ICJ may be taken to be authoritative. The general complicity rule – the prohibition on the provision of aid or assistance – reflected in Article 16 ARSIWA is increasingly affecting the way that states interact with each other.²³

Of course, there remain a number of unaddressed issues with the rule in Article 16. In particular, two issues have drawn comment: the seeming conflict in the fault element between the text of the provision and the commentary, and the implications of, and justification for, the double obligation requirement – the demand that the relevant conduct of the principal state would also be wrongful for the assisting state.²⁴ These may be left aside for now. What matters is international law's embrace of a prohibition on state *aid or assistance* to other states.

3. The Absence of Responsibility for Instigation

At this point, we can return to the original hypothetical. State B, in its summary deportation of thousands of refugees, breached the prohibition on non-refoulement in customary international law.²⁵ State A, itself fearing the subsequent movements of those refugees, instigated the breach. The question is whether State A violated international law in doing so.

At the outset, we can almost certainly exclude a number of potential avenues of responsibility. As a starting point, the execution of the deportations by State B would not be seen as joint conduct by States A and B; the conduct of organs of State B is attributable to State B, and State B alone. Likewise, there is no common organ that might give rise to the attribution of conduct to both states.²⁶ In addition, we are concerned with relationships between the two states that fall short of both direction and control in terms of Article 17 ARSIWA and coercion in terms of Article 18 ARSIWA.²⁷ Both are stringent thresholds. Under Article 17, as the ILC makes clear, the state must exercise 'domination' over the

²⁰ See Graefrath, 'Complicity in the Law of International Responsibility', 29 *Revue Belge de Droit International* (1996) 371, at 372.

²¹ Lowe, *supra* note 18, at 12.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits), 26 February 2007, ICJ Reports (2007) 43, at 217.

²³ See, for instance, the discussion of Article 16 in the context of rendition and detention, Aust, *supra* note 18, at 120-127. For a recent analysis, see Moynihan, *supra* note 18.

²⁴ Aust, *supra* note 14, at 192-268; Jackson, *supra* note 16, at 147-175.

²⁵ For a comprehensive assessment, see Costello and Foster, 'Non-refoulement as Custom and *Jus Cogens*: Putting the Prohibition to the Test', 46 *Netherlands Yearbook of International Law* (2015) 273.

²⁶ See Crawford, 'Second Report on State Responsibility' (1999) UN Doc A/CN.4/498/Add.1 (1999) II(1) YILC 3 for an extended discussion of the different categories.

²⁷ Art 17 ARSIWA; Art 18 ARSIWA. See, in particular, Commentary on Art 17 § 7: '[T]he word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.'

wrongful act and actually direct its commission; incitement is specifically excluded.²⁸ Under Article 18, only ‘conduct which forces the will of the coerced State will suffice.’²⁹

Instead, what we are left with is State A’s act of instigation – State A’s provision to State B of a reason to commit an internationally wrongful act, that reason being the promise of market access later on. During the drafting of ARSIWA, the ILC was clear that instigation, or what it referred to as incitement, did not fall within the scope of Article 16. In his 7th Report as Special Rapporteur, Ago wrote: ‘Mere incitement of one State by another to commit an internationally wrongful act does not fulfil the conditions for characterization as ‘participation’ in the act – at least in the legal meaning of that term, which, as we have seen, is an act having, as such, legal effect and consequences.’³⁰ Likewise, in his 2nd Report as Special Rapporteur, Crawford explained that what was then Article 27 ‘distinguishes between cases of advice, encouragement or incitement, on the one hand, and cases of actual assistance.’³¹ Further, he noted that: ‘Conduct by a State in inciting another to commit an internationally wrongful act was deliberately excluded from chapter IV. Only if it materially assists or actually directs or coerces another State to commit a wrongful act is a State implicated in that act.’³²

This position was sustained in the final draft of Article 16. First, as to the text, Article 16 refers explicitly to aid and assistance. Second, the examples of practice given in the commentary refer to the provision of material aid – conduct that materially facilitates the principal wrong.³³ Third, the general commentary to Part IV notes that the ‘incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support...’³⁴ Finally, the ICJ’s analysis in the *Bosnian Genocide* case, which drew on the rule reflected in Article 16, focused only on the provision of concrete support.³⁵

Likewise, it would be fair to say that scholarship almost uniformly asserts that instigation is not wrongful in general international law. Thus, for instance, Quigley argues that ‘[c]omplicity does not include moral encouragement or incitement by a State to another State to engage in an internationally wrongful act, although both acts would constitute complicity in domestic law.’³⁶ Graefrath notes that: ‘[I]ncitement to commit an internationally wrongful act ... does not entail international responsibility because the instigated State remains sovereign in its decision to commit or not commit the internationally wrongful act. The State alone therefore is considered liable for the wrongful act.’³⁷ Aust argues that ‘[i]nternational

²⁸ Art 17(1) ARSIWA.

²⁹ Art 18(2) ARSIWA.

³⁰ Ago, ‘Seventh Report on State Responsibility—the Internationally Wrongful Act of the State, Source of International Responsibility’ (1978) UN Doc A/CN.4/307 (1978) I(1) YILC 31, at 55, para. 63.

³¹ Crawford, ‘2nd Report’, *supra* note 26, at 48, para. 170.

³² *Ibid.*, at 56, para. 213.

³³ ARSIWA Commentary on Art 16 §§ 7-9.

³⁴ ARSIWA Commentary on Part 4 § 9.

³⁵ *Bosnian Genocide* §§ 420-421.

³⁶ Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’, 57 *BYIL* (1986) 77, at 80.

³⁷ Graefrath, *supra* note 20, at 371, 373.

law knows no responsibility for incitement.’³⁸ Likewise, Crawford holds that ‘mere incitement will not be considered a violation of ARSIWA Article 16.’³⁹ And finally, Dominicé proposes that ‘[i]t is not contested that such incitement does not constitute a wrongful act in international law.’⁴⁰

This is all simply to say that the orthodox position is that in the absence of a specific treaty rule, state instigation (and its cognate forms) is not wrongful under international law. It is to say that no responsibility arises in the hypothetical set out at the start of this article. It is said to be permissible for states to instigate other states to commit internationally wrongful acts.

4. Instigation in Domestic Law – A General Principle

A. Introduction

The present section argues that there exists in a representative set of domestic jurisdictions a principle that it is wrongful for an actor to instigate another to commit an act that it would be wrongful for it to do itself. To this end, it first considers the function and methodology for the ascertainment of general principles of law in the international legal system. It then constructs a diverse set of jurisdictions to structure the analysis, before turning to a comparative survey of whether the principle exists in those jurisdictions. It is clear that it does.

B. General principles of law: function and method

The idea of general principles of law as a source of international law has a long history. Gaja points out that even prior to the inclusion of ‘general principles of law recognized by civilized nations’ within the Statute of the Permanent Court of International Justice, the arbitrator in the *Antoine Fabiani* case stated that he would apply ‘the general principles of the law of nations on the denial of justice.’⁴¹ Further, with the reproduction of the clause in Article 38(1)(c) of the Statute of the ICJ, general principles as a source of international law have drawn sustained attention from scholars.⁴²

Despite (or because of) this long history, to discuss general principles of law is to enter a much wider set of debates about foundational questions of international law.⁴³ Redgwell points out that ‘[w]hile there is no dispute that general principles are a recognised source of international law, it is only a slight exaggeration to state that there is agreement on little else regarding their ascertainment, content and function.’⁴⁴ Detailed assessment of these issues is beyond the scope of this article. But for present purposes, it is necessary to say something, at least, about function and methodology.

³⁸ Aust, *supra* note 14, at 221.

³⁹ J. Crawford, *State Responsibility: The General Part* (2013), at 403.

⁴⁰ Dominicé, ‘Attribution of Conduct to Multiple States’ in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010) 281, at 285.

⁴¹ Gaja, ‘General Principles of Law’, *MPEIL* (2013) para. 1. See *Antoine Fabiani Case* (31 July 1905) X RIAA 83, 117.

⁴² See e.g. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); Verdross ‘Les Principes Généraux du Droit et le Droit des Gens’, 13 *Revue de droit international* (1934) 484; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); McNair, ‘The General Principles of Law Recognized by Civilized Nations’, 33 *BYIL* (1957) 1; Degan, ‘General Principles of Law: A Source of General International Law’, 3 *Finnish Yearbook of International Law* (1992) 1.

⁴³ Redgwell, ‘General Principles of International Law’ in S. Vogenauer and S. Weatherill, *General Principles of Law: European and Comparative Perspectives* (2017) 5, at 18-19.

⁴⁴ Redgwell, *supra* note 43, at 5.

As to the former, two, non-mutually exclusive, functions are adopted.⁴⁵ First, there is the common view that general principles of law may fulfil a gap-filling function.⁴⁶ Often linked to the need to avoid a *non liquet* in international adjudication,⁴⁷ the idea of a gap-filling function is quite widely supported in scholarship.⁴⁸ General principles operate, here, as an autonomous source of international law.⁴⁹ Second, general principles may operate to aid the interpretation and development of conventional and customary rules of international law.⁵⁰ Here, general principles operate through the interpretation of another rule, which other rule is itself grounded in either Article 38(1)(a) or 38(1)(b) of the Statute of the ICJ.⁵¹

The key point, for present purposes, is that to adopt one of these functions for general principles is not to exclude the other. Raimondo, in a helpful survey, illustrates how judicial decisions, arbitral practice, and scholarship generally accept both of them, together with a confirmative role where judges deploy a particular principle to reinforce their legal reasoning.⁵² As will be argued later, either of these two functions is able to underpin the claim of this article. In other words, a prohibition on instigation can arise as either an autonomous primary rule or through an interpretive extension of the customary rule reflected in Article 16 ARSIWA.

The second issue is methodological – how do we establish if a general principle of law exists? Here, there is a range of approaches. On one end of a spectrum, there is the idea that international courts and lawyers need not delve in detail into methodological complexities of comparative law.⁵³ It is enough to gather domestic law ‘into a few families or systems of law’ and check if the principle is present.⁵⁴ On the other end, there is the doubt, which draws on theoretical disagreement in comparative law scholarship, that it is possible to distil the essence (or core) of a rule or principle without reference to wider legal and social context.⁵⁵ On this approach, as Ellis puts it, the ‘quest for a universally shared body of legal rules or concepts is probably futile.’⁵⁶

⁴⁵ For a wider discussion, see F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008).

⁴⁶ Pellet, ‘Article 38’ in A. Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed., 2012) 731, at 850.

⁴⁷ Pellet, *supra* note 46, at 832; Redgwell, *supra* note 43, at 7.

⁴⁸ See d’Aspremont, ‘What Was Not Meant to Be: General Principles of Law As a Source of International Law’ in R. Pisillo Mazzeschi and P. De Sena (eds), *Global Justice, Human Rights, and the Modernization of International Law* (2018) 163.

⁴⁹ Redgwell, *supra* note 43, at 11.

⁵⁰ Cheng, *supra* note 42, at 390.

⁵¹ For a recent discussion, see d’Aspremont, *supra* note 48.

⁵² Raimondo, *supra* note 45, at 44.

⁵³ Pellet, *supra* note 46, at 837.

⁵⁴ *Ibid.*

⁵⁵ Ellis, ‘General Principles and Comparative Law’, 22 (2011) *EJIL* 949, at 958-963.

⁵⁶ Ellis, *supra* note 55, at 971. See further Tunkin, ‘Coexistence and International Law’, 95 *Recueil des Cours* (1958) 1, at 26.

It is beyond the scope of this article to engage with theoretical disagreement in comparative law scholarship. From a starting premise that general principles of law are widely accepted as a source of international law,⁵⁷ it adopts the following methodology. First, it constructs a representative set of legal *systems* for analysis, where that selection is informed by the literature on the classification of legal families and traditions.⁵⁸ In doing so, it does not address forms of normative authority outside of the state itself or provide an account of historical influences and relationships among legal systems. The choice to proceed jurisdiction-by-jurisdiction is informed by the principle of the sovereign equality of states.⁵⁹ Second, it surveys domestic law in each with a view to determining how each deals with forms of participation in a civil wrong committed by another actor. The initial site of inquiry is private law; here, the transposition of a general principle of law into international law is more broadly accepted.⁶⁰ At times, supplementary reference is made to domestic criminal law, where instigation and its related forms are widely accepted modes of criminal responsibility.⁶¹ And third, it asks whether it would be appropriate to transpose the principle from domestic law into the international legal system.

Although more wide-ranging, this methodology thus resembles that adopted in certain separate opinions in cases before the ICJ. In *Certain Norwegian Loans*, Judge Lauterpacht briefly considered the law of France and the United States to establish that ‘an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking.’⁶² In *North Sea Continental Shelf*, Judge Ammoun assessed the principle of equity as it manifests ‘in the great legal systems of the modern world.’⁶³ And in *Oil Platforms*, Judge Simma undertook a comparative survey of how ‘various common law jurisdictions as well as French, Swiss and German tort law’ dealt with the issue of multiple tortfeasors.⁶⁴

Two further methodological points are worth noting – one wider and one specific to the present analysis. First, as to the wider point, it may be that particular legal systems recognise a specific category of either ‘principles of law’ or ‘general principles of law’ as a matter of

⁵⁷ For a comprehensive discussion, see Raimondo, *supra* note 45, at 7-72.

⁵⁸ See Raimondo, *supra* note 45, at 55. For an introduction, see M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (2008); M. Bussani and U. Mattei, *The Cambridge Companion of Comparative Law* (2012).

⁵⁹ See also Article 9 Statute of the International Court of Justice:

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

⁶⁰ See Ago, ‘7th Report’, *supra* note 30, at para 72; Lauterpacht, ‘Some Observations on the Prohibition of “Non Liquef” and the Completeness of the Law’ in F.M. van Asbeck (ed.), *Symbolae Verzijl* (1958) 196, at 205.

⁶¹ See M. Bohlander and A. Reed (eds), *Participation in Crime – Domestic and Comparative Perspectives* (2013).

⁶² *Case of Certain Norwegian Loans (France v Norway)*, Judgment, 6 July 1957, ICJ Reports |(1957) 9, Separate Opinion of Judge Lauterpacht, at p. 49-50.

⁶³ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, Separate Opinion of Judge Ammoun, at p. 140-141. Judge Ammoun’s analysis is partially pitched at a more general level, focusing on legal traditions.

⁶⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, Separate Opinion of Judge Simma, at p. 354, para 66.

domestic classification. Likewise, it may be that the principle under consideration in this article manifests in different ways across legal systems.⁶⁵ Neither is *per se* a problem for the analysis herein. Instead, the comparative survey asks only whether the principle is instantiated in the set of domestic legal systems *in one way or another*, however classified domestically.⁶⁶ As Gutteridge wrote in 1949:

If any real meaning is to be given to the words ‘general’ or ‘universal’ and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognized *in substance* by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.⁶⁷

As will be seen, instigation is captured in different legal systems in different ways. In some, there is an explicit provision in the civil code. In others, case law has developed a form of civil accomplice liability, which includes within its ambit instigation. In others still, acceptance of a multiplicity of causes allows instigators to be brought within a general clause on civil responsibility. What matters is that the principle exists in substance across jurisdictions.

Second, as to the specific comparative survey undertaken below, within private law the focus is on principles relating to participation in tortious or delictual wrongdoing. It was noted above that one element of the existing rule reflected in Article 16 ARSIWA is what is called the double obligation requirement – the requirement, said to flow from the *pacta tertiis* principle, that the act of the principal state must be wrongful if committed by the assisting state.⁶⁸ On this basis, no responsibility arises under the rule in Article 16 where State A assists State B’s breach of a bilateral treaty between States B and C.⁶⁹ This article does not seek to challenge the double obligation requirement, but rather works within it by focusing on domestic rules concerning participation in tortious wrongs.⁷⁰ At times, however, it does discuss domestic rules concerning inducing breach of contract, particularly where the rules on participation in tortious wrongdoing are not clear.

C. Constructing a representative set of jurisdictions

The key, then, is to construct a representative set of jurisdictions to structure the comparative analysis. Constructing the set is marked by the tensions raised above – the tension between a

⁶⁵ Friedmann, ‘The Uses of “General Principles” in the Development of International Law’, 57 *AJIL* (1963), at 284. See also Akehurst, ‘Equity and General Principles of Law’, 25 *ICLQ* (1976) 801, at 814: ‘One can also say that there is a general principle of law when different systems of municipal law achieve the same result by different means...’

⁶⁶ On classification, the Arbitrator in *Antoine Fabiani*, at 117, defined ‘the general *principles* of the law of nations on the denial of justice’ as ‘the *rules* common to most legislations or taught by doctrines...’ See also Gaja, *supra* note 41, paras. 1-3.

⁶⁷ H. Gutteridge, *Comparative Law* (2nd edn., 1949) at 65.

⁶⁸ Art 16(b) ARSIWA. For doubts, see Lanovoy, ‘Complicity in an Internationally Wrongful Act’ in A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 134 at 165-168.

⁶⁹ See Lowe, *supra* note 18, at 7-8.

⁷⁰ Special Rapporteur Crawford’s 2nd Report includes a brief comparative survey of principles relating to inducing breach of contract in domestic law with a view to assessing whether the double obligation requirement is justifiable. See Crawford, ‘2nd Report’, *supra* note 26, Annex.

jurisdiction-by-jurisdiction assessment and developments in (and doubts about) taxonomic approaches in comparative law; the tension between the need for geographical diversity and an awareness of the historical – often colonial – relationships between states; and the tension between putting certain systems forward as representative and recognizing distinctive features of every jurisdiction.

With that in mind, the following set of jurisdictions is put forward. As representative of the common law, England and Wales, India, and the United States are considered. Japan and China are considered as East Asian jurisdictions – in the specific area under consideration, in the former the civil code dates from 1898; in the latter, the Tort Liability Act dates from 2009. Germany, naturally, is taken as representative of the Germanic limb of the civil law tradition; France is taken as representative of the Romanist limb. Poland is considered from Central Europe – being, as it is, a mix of civil law, national, and socialist influences. South Africa is an example of what is sometimes called a mixed jurisdiction. In Latin America, Brazil is considered. Iran is assessed in the Islamic tradition. The idea is that these legal systems together compose a sufficiently representative set of jurisdictions to found a claim to generality under Article 38(1)(c) of the Statute of the ICJ.

D. Comparative survey

To start in England and Wales, accessory liability in civil law has received increased attention in recent years.⁷¹ Much of the controversy concerns the existence (or otherwise) of civil responsibility for knowing *assistance* of a tort.⁷² In contrast to the difficulties surrounding *assistance*, it is well-established that tortious responsibility arises where one actor procures another actor to commit a tort.⁷³ In the leading case of *CBS Songs v Amstrad*, Lord Templeman held that a ‘defendant may procure an infringement by inducement, incitement or persuasion.’⁷⁴ The incitor must intend and share ‘a common design that infringement shall take place.’⁷⁵ The principle articulated by Lord Templeman was cited with approval by the Supreme Court in *Sea Shepherd UK* in 2015.⁷⁶

In India, although no recent case addresses a general rule directly, the civil responsibility of instigators is evident in a number of specific areas of law. First, it was recognized in the pre-independence case of *Issardas Kishinchand* in the context of the tort of malicious prosecution.⁷⁷ The Court refused to allow an escape from liability for those who, with malicious intent, ‘worked more dangerously and effectively through others.’⁷⁸ Second, it is possible that the civil liability of an instigator would be captured by the tort of conspiracy.⁷⁹

⁷¹ See generally Carty, ‘Joint Tortfeasance and Assistance Liability’, 19 *Legal Studies* (1999) 489; Dietrich, ‘Accessorial Liability in the Law of Torts’, 31 *Legal Studies* (2011) 231; P. Davies, *Accessory Liability* (2015); Lee, ‘Accessory Liability in Tort and Equity’, 27 *Singapore Academy of Law Journal* (2015) 851.

⁷² *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, [2015] AC 1229 § 21.

⁷³ Carty, *supra* note 71, at 489.

⁷⁴ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] 1 AC 1013, 1058.

⁷⁵ *Ibid.* See also the discussion in *Sea Shepherd UK* (Lord Sumption), *supra* note 72, § 41.

⁷⁶ *Sea Shepherd UK*, *supra* note 72, § 19. For tortious interference with contract, see the rule in *Lumley v Gye*, *supra* note 2.

⁷⁷ *Issardas Kishinchand v Assudomal Ramandas and Ors.*, MANU/SN/0059/1939 (High Court of Sind).

⁷⁸ *Ibid.*, § 3.

⁷⁹ See *Daulat Ram Sud v Kamaleshwar Dutt* (1971) ILR 2 Cal 308 (High Court of Calcutta) § 90.

And third, the tort of inducing breach of contract is well-established.⁸⁰ It is unlikely that a legal system that prohibits the procurement by a third party of a breach of contract would not hold responsible a third party who procures the commission of a tort.

In the United States, Section 876 of the Restatement of Torts sets out the following rule: ‘For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or *encouragement* to the other so to conduct himself...’⁸¹ The case of *Halberstam v Welch* in the United States Court of Appeals for the District of Columbia Circuit contains an extensive discussion of the rule – how it is distinguished from civil conspiracy, the requirements of knowledge and substantiality, and its application in other state jurisdictions in the United States.⁸² As one commentator put it, in the years since *Halberstam v Welch*, ‘courts across the country have been flooded with cases seeking to impose civil liability on persons alleged to have aided and abetted the wrongdoing of others, and in almost every one of those cases, they have recognized the viability of this theory of liability.’⁸³ Moreover, it is clear that encouragement alone, in the absence of material assistance, may ground liability.⁸⁴

Much like the US Restatement, in Germany the Civil Code makes explicit provision for instigation. Section 830(1) of the Code sets down the basic rule on joint responsibility as follows: ‘If more than one person has caused damage by a jointly committed tort, then each of them is responsible for the damage...’⁸⁵ Section 830(2) then provides: ‘Instigators and accessories are equivalent to joint tortfeasors.’ The basic principle has been developed in the jurisprudence of the Federal Court of Justice. In its judgment of 24 June 2003 (‘Buchpreisbindung’), the Court considered the responsibility of the federal state of Berlin in relation to the purchase of textbooks in breach of antitrust rules.⁸⁶ Addressing the basic principle in the Code, the Court specified that ‘[h]e, who incites another to commit conduct prohibited in civil law, does not harm the legal order less gravely than the perpetrator...’⁸⁷ More recently, the Court has reiterated that the standards developed in complicity in criminal law, which include responsibility for instigation, are to be considered in interpreting complicity in civil responsibility.⁸⁸

⁸⁰ See *Khimji Vasanji v Narsi Dhanji* (1914) 17 Bombay Law Reporter 225; *Ambience Space Sellers Ltd v Asia Industrial Technology Pvt. Ltd* (1998) 18 PTC 232. See also the wider discussion of economic torts in *Lindsay International Pvt Ltd and Others v Laxmi Niwas Mittal and Others* (2017) SCC Online Cal 14920.

⁸¹ The American Law Institute, *Restatement (Second) of the Law of Torts*, (1979). See also Section 766 regarding intentional interference with contractual relations.

⁸² *Halberstam v Welch*, 705 F.2d 472 (D.C. Cir. 1983). See also *Rael v. Cadena*, 604 P.2d 822 (N.M. Ct. App. 1979) and the discussion in *Eastern Trading Company v Refco Inc.*, 229 F.3d 617 (7th Cir. 2000).

⁸³ Schiltz, ‘Civil Liability for Aiding and Abetting: Should Lawyers Be “Privileged” to Assist Their Clients’ Wrongdoing?’, 29 *Pace Law Review* (2008) 75. See though *DeVries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828.

⁸⁴ Restatement, *supra* note 81, § 876 comment d; *Halberstam*, *supra* note 82, at [24].

⁸⁵ See also section 840 BGB on the consequences of responsibility.

⁸⁶ BGH, 24. 6. 2003 – KZR 32/02, BGHZ 155, 189.

⁸⁷ *Ibid.* § 27.

⁸⁸ BGH, 5. 2. 2015 – I ZR 240/12, NJW 2015, 2122.

As is often noted, the Japanese Civil Code, adopted in 1896 and in force since 1898, was strongly influenced by 19th century German legal theory.⁸⁹ Indeed, the adoption of the Code is sometimes described as one of a relatively rare set of voluntary receptions of another tradition.⁹⁰ The German relationship continued in the early years of the 20th century, though French and then US influence increased.⁹¹ Article 709 of the Civil Code sets out the basic rule on liability in tort: ‘A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.’ Article 719(1) provides for the joint and several liability for joint tortfeasors; Article 719(2) deems as a joint tortfeasor ‘any person who incited or was an accessory to the perpetrator.’⁹²

Moving to China, it is hard to do justice to the complexity of the evolution of civil law.⁹³ In respect of tort law in particular, recent reform commenced with a new draft law published in December 2002.⁹⁴ After consultation and redrafting, the Tort Liability Law of the People’s Republic of China was adopted in 2009 by the National People’s Congress Standing Committee and entered into force in July 2010.⁹⁵ Article 6 of the Tort Liability Law sets out the general rule: liability attaches to one who is at fault and who infringes the civil right or interest of another person.⁹⁶ For present purposes, Article 9 is critical: ‘One who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.’⁹⁷ Article 9 may be seen as the legislative reiteration of the Supreme People’s Court’s previous interpretation of the General Principles of Civil Law of the People’s Republic of China.⁹⁸

⁸⁹ Act No 89 of April 27, 1896. See Kitagawa, ‘Development of Comparative Law in East Asia’ in Reimann and Zimmermann, *supra* note 58, at 238. For a contemporaneous assessment, see Hatoyama, ‘The Civil Code of Japan Compared with the French Civil Code’, 11 *Yale Law Journal* (1902) 296.

⁹⁰ W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2008) at 273-274.

⁹¹ Kitagawa, *supra* note 89, at 242-243. Of course, a focus on foreign influence can miss the distinctive elements of the Japanese system itself – see 245.

⁹² Art 719(2). Oda translates the provision as referring to instigators and accomplices – H. Oda, *Japanese Law* (2009), at 196.

⁹³ For an overview, see Rou (Ocko tr), ‘The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role’, 52 *Law and Contemporary Problems* (1989) 151; L. Chen and C.H. van Rhee (eds), *Towards a Chinese Civil Law: Comparative and Historical Perspectives* (2012).

⁹⁴ H. Koziol and Y. Zhu, ‘Background and Key Contents of the New Chinese Tort Liability Law’, 1 *Journal of European Tort Law* (2010) 328, 332.

⁹⁵ Tort Liability Law of the People’s Republic of China (adopted 26 December 2009, entered into force 1 July 2010).

⁹⁶ Art 6 of the Chinese Tort Liability Law.

⁹⁷ *Ibid.*, art 9 (Koziol and Zhu tr). There has been further development of the principle in the particular area of copyright infringement – see Provisions of the Supreme People’s Court on Certain Issues Related to the Application of Law in the Trial of Civil Cases Involving Disputes over Infringement of the Right of Dissemination through Information Networks, Fa Shi [2012] No. 20, 17/12/2012, arts 7-10.

⁹⁸ Opinion of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China (For Trial Implementation) (2 April 1988) § 148: ‘A person who instigates or helps another person to commit a tort is a joint tortfeasor and must bear joint civil liability.’ For a translation, see Gray and Zheng, ‘Opinion of the Supreme People’s Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People’s Republic of China’ 52 *Law & Contemporary Problems* (1989) 59, at 81.

The South African legal system has long held the interest of comparatists and is often classified as a mixed jurisdiction.⁹⁹ The law of delict, in particular, reflects this mixed tradition, with the Roman-Dutch actions initially being influenced and developed by common law ideas and judicial decision-making.¹⁰⁰ More recently, recognition of African customary law, as well as the influence on private law of the values of the 1996 Constitution, only reinforces this complexity.¹⁰¹ On the narrow question at hand, recent authority confirms the general principle in the law of delict. *Cipla MedPro*, a case about pharmaceutical patents, concerned conduct that is ordinarily captured in other jurisdictions under a provision on contributory infringement. The relevant legislation in South Africa contained no such provision. However, the Supreme Court of Appeal approvingly cited the following passage from the 1917 decision of the Appellate Division in *McKenzie v Van Der Merwe*:

Under the *Lex Aquilia* not only the persons who actually took part in the commission of a delict were held liable for the damage caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed. To a similar effect is the passage which was quoted from *Grotius* (3, 32, 12, 13) that everyone is liable for a delict ‘even though he has not done the deed himself, who has by act or omission in some way or other caused the deed or its consequence: by act, that is by command, consent, harbouring, abetting, advising or instigating.’¹⁰²

In conclusion, the Supreme Court of Appeal held that it is ‘unlawful to incite or aid and abet the commission of a civil wrong.’¹⁰³

As to Poland, the 19th and early 20th centuries were marked by regional diversity, with Austrian, Hungarian, German, and French law elements and influences.¹⁰⁴ The Code of Obligations of 1933 and then the Civil Code, adopted in 1964, drew strongly on the Napoleonic Code.¹⁰⁵ The period since the fall of communism has seen a range of new influences and reform, notably that driven by European integration. As to tort specifically, Article 415 of the Civil Code sets out the general rule: ‘Anyone who by a fault on his part causes damage to another person is obliged to remedy it.’¹⁰⁶ For present purposes, Article 422 sets out a rule of particular interest: ‘Liability for damage is borne not only by the direct

⁹⁹ See generally V. Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, 2012).

¹⁰⁰ Loubser, ‘Law of Delict’ in C.G. van der Merwe and Jacques du Plessis (eds), *Introduction to the Law of South Africa* (2004) 275.

¹⁰¹ See e.g. *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22, which altered the pre-constitutional approach to determining the wrongfulness of omissions in delictual liability.

¹⁰² *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* (139/2012, 138/2012) [2012] ZASCA 108 § 34 citing *McKenzie v Van der Merwe* [1917] AD 41.

¹⁰³ *Ibid.*, § 39. In addition, in South Africa delictual liability for tortious interference with contractual relations is well-developed – see most recently the discussion in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28.

¹⁰⁴ Kühn, ‘Development of Comparative Law in Central and Eastern Europe’ in Reimann and Zimmermann, *supra* note 58, at 218.

¹⁰⁵ Brzozowski, ‘Civil Law’ in S. Frankowski and A. Bodnar (eds), *Introduction to Polish Law* (2005). For a contemporaneous appraisal of the law of torts specifically, see Szpunar, ‘The Law of Tort in the Polish Civil Code’, 16 *ICLQ* (1967) 86.

¹⁰⁶ Art 415 of The Polish Civil Code (enacted 1964, entered into force 1965).

perpetrator but also by any person who incites or aids another to cause damage and a person who knowingly takes advantage of damage caused to another person.’¹⁰⁷

Unlike the German Civil Code, the French Civil Code includes no specific provision on instigation. The general clause on responsibility, now Article 1240, simply provides that ‘(a)ny human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it’.¹⁰⁸ Nonetheless, the general principle manifests in French civil law in three ways. First, there is the possibility that the instigator will be treated as a joint wrongdoer under Article 1240 – the key here will be a demonstration of causation.¹⁰⁹ Second, in French law the institution of the *partie civile* allows one who has suffered harm to initiate or join criminal proceedings and seek damages in that process.¹¹⁰ Given that instigation is captured by the French penal code, a civil action may accompany a criminal prosecution.¹¹¹ And third, French law recognizes third party responsibility for inducing breach of contract.¹¹² As noted previously, it would be strange if a legal system imposed responsibility for inducing breach of contract but did not do so for the instigation of delictual wrongs.

This analysis of the French position is generally applicable to Brazil. Brazilian private law is broadly in the civilian tradition, with historical influences from Portuguese colonial power and French and German civilian principles.¹¹³ The Civil Code, promulgated in 2002 and influenced by the social Constitution of 1988, sets out the basic principle that ‘(t)hose who, by voluntary action or omission, negligence or recklessness, violate a right or cause damage to another, even if exclusively of moral character, commit a wrongful act’.¹¹⁴ Except for service contracts, there is no explicit provision for instigation.¹¹⁵ However, much as in France, the general principle manifests in three ways. First, there is the possibility that an instigator of a civil wrong is found to be a co-author of the wrong pursuant to Article 942 of the Civil Code.¹¹⁶ Second, a crime that causes harm automatically entails a form of civil responsibility in Brazilian law.¹¹⁷ Given that instigation is a mode of criminal responsibility,

¹⁰⁷ Art 422 of The Polish Civil Code.

¹⁰⁸ Art 1240 Code civil (Cartwright, Fauvarque-Cosson & Whittaker tr). See also art 1241 of the Code civil.

¹⁰⁹ Malabat and Wester-Ouisse, ‘The quest for balance between tort and crime in French law’ in M. Dyson (ed.), *Comparing Tort and Crime: Learning from across and within Legal Systems* (2015) 73, at 114. See also S. Steel, *Proof of Causation in Tort Law* (2015) at 156.

¹¹⁰ See arts 2 and 3 of the Code de procédure pénale (entered into force 2 March 1959). For discussion, see Whittaker, ‘The Law of Obligations’ in J. Bell *et al* (eds), *Principles of French Law* (2008) 294, at 368-373; Malabat and Wester-Ouisse, *supra* note 109.

¹¹¹ Art 121-7 of the Code pénal (adopted 22 July 1992, entered into force 1 March 1994). See Bell, ‘Criminal Law’ in Bell *et al*, *supra* note 110, at 233.

¹¹² For an early case, see for example *Doeuillet v. Raudnitz*, Cass. Civ., 27 May 1908, D.1908.I.459, S. 1910.I.118. See generally Palmer, ‘A Comparative Study (From a Common Law Perspective) of the French Action for Wrongful Interference with Contract’, 40 *Am. J. Comp. L.* (1992) 297.

¹¹³ See generally Moreira Alves, ‘Panorama do Direito Civil Brasileiro: das origens aos dias atuais’, 88 *Revista da Faculdade de Direito da Universidade de São Paulo* (1993) 185, 193; Lucas Abreu Barroso, *Contemporary Legal Theory in Brazilian Civil Law* (2014) 12.

¹¹⁴ Art 186 of the Brazilian Civil Code (adopted 10 January 2002 entered into force 11 January 2003).

¹¹⁵ See art 608 of the Brazilian Civil Code.

¹¹⁶ Art 942 of the Brazilian Civil Code.

¹¹⁷ See art 91, I Brazilian Criminal Code (adopted 7 December 1940 entered into force 1 January 1942).

a judgment against an instigator gives rise to an obligation to pay compensation.¹¹⁸ And third, case law and scholarship recognize broad extra-contractual responsibility for inducing breach of contract, responsibility based on external opposability of contracts in line with their social function.¹¹⁹

Finally, with respect to Iran, certain procedures and principles in jurisdictions influenced by Islamic law indicate a blurring of the categories of tort and crime as they would be perceived in, say, a common law jurisdiction.¹²⁰ This includes, in some instances, the waiving of retributive justice in favour of compensation.¹²¹ In Iran, specifically, the Penal Code incorporates compensatory elements, while a separate regime of civil responsibility for intentional torts is less well developed. For this reason, it may be appropriate to look directly to penal law. In general terms, Islamic law condemns those who instigate others to do wrong. Hedayati-Kakhki points to the Quranic injunction that ‘whoever recommends and helps a good cause becomes a partner therein; and whoever recommends and helps an evil cause, shares in its burden...’.¹²² In Iran, the basic principle informs Article 126 of the Islamic Penal Code of 2013, which includes as an accessory to an offence ‘[a]nyone, who encourages or threatens or suborns or incites someone else to commit an offense, or through a plot, deception, or abuse of power causes an offense to be committed.’¹²³ It may also be seen in the criminal codes of Pakistan and Egypt, both of which are informed by Sharia.¹²⁴

E. Conclusion

The preceding analysis shows widespread acceptance of responsibility for instigation in civil law across domestic jurisdictions. A cursory examination of the relevant provisions in Israel,¹²⁵ Switzerland,¹²⁶ and South Korea¹²⁷ demonstrates a similar approach. Moreover, two recent European tort law harmonization projects include the principle in their model codes.¹²⁸ Article 9:101(1)(a) of the Principles of European Tort Law proposed by the European Group on Tort Law provides that liability is solidary where ‘a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim...’¹²⁹

¹¹⁸ See art 29 of the Brazilian Criminal Code and art 62 III (as amended by Federal Law number 7.209 of 1984).

¹¹⁹ See e.g. *Tribunal de Justiça de São Paulo, Apelação nº 9112793-79.2007.8.26.0000*, Primo Schincariol Indústria de Cervejas e Refrigerantes S/A v. Companhia de Bebida das Américas – Ambev e Outros, Reporting Judge JL Mônaco da Silva, São Paulo, 12 June 2013, 5 - 6.

¹²⁰ C. Mallat, *Introduction to Middle Eastern Law* (OUP 2009) 288-289.

¹²¹ Ziadeh, ‘Criminal Law’ in J. Esposito (ed.), *The Oxford Encyclopaedia of the Islamic World* online edition (OUP 2009) available at <www.oxfordislamicstudies.com> last visited 1 November 2017.

¹²² Hedayati-Kakhki, ‘Islamic Law’, in Bohlander and Reed, *supra* note 61, at 342 citing the *Qur’an* [4:85].

¹²³ Art 126(1). See also art 127.

¹²⁴ See art 40 of the Law No 58 of 1937 Promulgating The Penal Code (EG) (as amended up to Law No 95 of 2003); art 107 of the Majmu’ah-yi ta’zirat-i Pakistan (entered into force 1947).

¹²⁵ Art 12 of the Israeli Civil Wrongs Ordinance (entered into force 1 October 1968).

¹²⁶ Art 50(1) of the Federal Act on the Amendment of the Swiss Civil Code (Swiss Code of Obligations) (entered into force 1 January 1912).

¹²⁷ Art 760(3) of the South Korean Civil Code (entered into force 22 February 1958).

¹²⁸ For a powerful critique of the underlying idea, see Schultz, ‘Disharmonization: A Swedish Critique of Principles of European Tort Law’, 18 *European Business Law Review* (2007) 1305.

¹²⁹ The European Group of Tort Law, ‘Principles of European Tort Law’ (2005).

Article 4:102 of the Principles of Non-Contractual Liability Arising out of Damage Caused to Another proposed by the Study Group on a European Civil Code provides: ‘A person who participates with, instigates or materially assists another in causing legally relevant damage is to be regarded as causing that damage.’¹³⁰

In other words, there is attention across jurisdictions to capturing those who instigate or incite or procure the commission of a wrong. This should be no surprise. In our everyday description of events it is common to trace out participants in wrongdoing beyond the principal wrongdoer. Moreover, this linguistic attention matches a strong moral intuition about the responsibility of those who instigate others to do wrong.¹³¹ Indeed, to take this point one step further, it would be more surprising if legal systems did *not*, in one way or another, sanction such a common form of complicit behaviour.

5. Transposing the General Principle

A. Introduction

It is clear, then, that in a representative set of domestic jurisdictions it is wrongful for an actor to instigate another to commit an act that it would be wrongful for it to do itself. Recognition *in foro domestico* is not, itself, enough. It is widely accepted that there is another step in the analysis – the principle must be transposable into international law.¹³² As Schachter wrote, the ‘most important limitation on the use of municipal law principles arises from the requirement that the principle be appropriate for application on the international level.’¹³³ This section proposes that it would be appropriate to transpose the general principle into the international legal system. First, it argues that all of the arguments that justify the embrace of the rule prohibiting aid or assistance are present, if not heightened, when we consider instigation. Second, it considers three objections to the transposition of the general principle.

B. Justifying the principle in the international legal system

At the outset, it can be noted that the rule on aid or assistance in Article 16 has relatively quickly grounded itself in international practice. As far as is possible to tell, no state has objected to the basic principle in Article 16 since its inclusion in the Articles on State Responsibility or, more importantly, since the ICJ declared it to reflect customary international law. This acceptance is remarkable given that, in Lowe’s description, Article 16 represents ‘a significant development in ... the moral sophistication of international law.’¹³⁴

That increased sophistication lies in the rule’s demand that states attend to the consequences of their conduct beyond their direct bilateral relations.¹³⁵ In doing so, it serves the legal interests protected by the relevant primary norms.¹³⁶ Where those primary rules are peremptory, there is additional justification based on the normative value of the underlying

¹³⁰ Study Group on a European Civil Code, ‘Non-Contractual Liability Arising out of Damage Caused to Another’ (2006).

¹³¹ See generally Gardner, *supra* note 12.

¹³² Gaja, *supra* note 41, para. 7; Pellet, *supra* note 46, at 840; Redgwell, *supra* note 43, at 16.

¹³³ O. Schachter, *International Law in Theory and Practice* (1991), at 78. See also Akehurst, *supra* note 65, at 816.

¹³⁴ Lowe, *supra* note 18, at 12.

¹³⁵ Lowe, *supra* note 18, at 12-13. For a nuanced discussion, see Aust, *supra* note 14, at 11-49.

¹³⁶ See Lanovoy, *supra* note 68, at 165-168.

interests.¹³⁷ In addition, the rule in Article 16 serves the interest of the international community in the stability of legal relations.¹³⁸ Whether located in a general principle of abuse of rights or more broadly in the idea of an international rule of law, the prohibition of aid or assistance is of potentially systemic importance.¹³⁹

For present purposes, the key point is that whatever justifications may be found for a complicity rule based on *assistance* are present, and indeed heightened, when we consider conduct that amounts to instigation. To reiterate, in the classic case, the instigating state provides to the principal state a reason for action – it ‘renders some course of action more *eligible* in the eyes of the second actor than it would otherwise have been.’¹⁴⁰ Although it is possible to construct hypotheticals pointing the other way, there is an intuitive sense in the ordinary case that instigators bear a closer connection to the commission of the principal wrong than assisters. To use Lanovoy’s telling phrase, a prohibition on instigation is a way for international law to ‘endeavour for its own legality.’¹⁴¹

Moreover, there are at least two features of inter-state relations that render the introduction of a prohibition on instigation especially appropriate. First, although states may formally be bound by the same obligation, the constraining force of that rule in practice can vary radically from one state to another. To take the example set out in the introduction from refugee law, it is certainly the case that some states feel unconstrained both externally and internally by their international obligations. Other states, particularly those with effective internal avenues of accountability – through parliamentary oversight, judicial review, or strong civil society – may be pulled into compliance. To allow a state to instigate the breach by another state of an obligation they share is to undermine whatever legality constraints exist within the former state. It is to allow a state to do its dirty work through another state.

Second, and relatedly, the international legal system is marked by substantial disparities in power and resources among its primary subjects. These disparities, which need not be laboured, open up the particular possibility that powerful states will secure their ends through weaker states. Two examples will suffice. First, after the adoption of the Rome Statute, the US was able to secure bilateral non-surrender agreements with a number of state parties, despite the likely inconsistency of such agreements with those state parties’ obligations under the Statute.¹⁴² Second, Australia’s determination to ensure offshore processing of refugees and asylum seekers prompted it to engage in consultations with Kiribati, Fiji, Palau, Tuvalu, Tonga, and France (in respect of French Polynesia), as well as Papua New Guinea and Nauru

¹³⁷ See relatedly art 41 ARSIWA.

¹³⁸ Lanovoy, ‘Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm’ (SHARES Conference—Foundations of Shared Responsibility in International Law, November 2011) 1, 4.

¹³⁹ See Aust, *supra* note 14, at 50-96.

¹⁴⁰ Hart and Honoré, *supra* note 5, at 54.

¹⁴¹ Lanovoy, ‘Revisiting’, *supra* note 138, at 32.

¹⁴² See Benzing, ‘U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties’, 8 *Max Planck Yearbook of United Nations Law* (2004) 181.

where detention centres were subsequently established.¹⁴³ The potential inducement was a substantial aid package.¹⁴⁴

These examples are not provided as an assessment of international responsibility in the particular case. Rather, they simply show how disparities in power operate in practice and enable states to secure their ends through other states. Moreover, where these disparities map onto different compliance constraints, states may be tempted to instigate other states to do what they cannot do themselves. These structural features of the international system simply serve to strengthen the case for a prohibition on complicity based on instigation, to accompany the existing rule in Article 16 ARSIWA.

C. Three objections to the rule

The previous section argued that it would be appropriate to transpose the general principle from domestic law into international law. The present section considers three potential objections to the transposition of the rule. These concern the potential evasion of responsibility by the principal wrongdoer where an instigator is held responsible; the idea that determining responsibility for instigation would require an implausible assessment of the principal state's psychological *motive*; and difficulties around causation and proof thereof.

So to the first, in his 7th Report on State Responsibility Ago's rejection of responsibility for instigation¹⁴⁵ was strongly influenced by the idea that any such responsibility might imply that the principal state could *absolve itself* of responsibility for its wrongful conduct.¹⁴⁶ To Ago, such an outcome would be inconsistent with the principal state's very sovereignty – its own free choice in committing the internationally wrongful act.¹⁴⁷ As he put it: 'The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice from another State, which it was at liberty not to follow.'¹⁴⁸ In addition to this conceptual worry, it would clearly be deleterious if the existence of responsibility for instigation allowed a principal state to shift blame and, potentially, reduced its incentives to ensure its own compliance with international law.

On reflection, though, this worry is more imagined than real. It is hard to see why the imposition of responsibility on an instigating state means that the principal state need be absolved. Of course, where there is more than one responsible actor, we need to think carefully about the allocation of remedial consequences among those actors, including as to the incentivizing effects of particular rules. But more fundamentally, although Ago is correct that the wrongful conduct of the principal state remains its own, the next step of his argument – that this means there can be no responsibility for instigation – does not follow. In none of

¹⁴³ Senate of Australia, 'Select Committee on a Certain Maritime Incident Report on the "Children Overboard" Incident' (2002) <https://www.aph.gov.au/binaries/senate/committee/maritime_incident_ctte/report/report.pdf> (last visited 1 November 2017) 293.

¹⁴⁴ See e.g. Australia / Nauru, 'Statement of Principles and First Administrative Arrangement' (FAA) (10 September 2001).

¹⁴⁵ As noted above, Ago preferred the term incitement to instigation, though nothing turns on this difference. See Ago, '7th Report', *supra* note 30, at 57, para. 67 using the terms incitement and instigation interchangeably.

¹⁴⁶ Ago, '7th Report', *supra* note 30, at 55, para. 62.

¹⁴⁷ *Ibid.*, at 55, para. 62.

¹⁴⁸ *Ibid.*, at 55, para. 63. See also Graefrath, *supra* note 20, at 373.

domestic private law, domestic criminal law, or international criminal law is responsibility for instigation (or abetment) taken to absolve the principal wrongdoer.

A second objection to responsibility for instigation is also found in Ago's 7th Report. Discussing the responsibility of states for participating in the wrongs of other states, Ago forcefully rejected any analogy to municipal criminal law and its doctrines of incitement to commit an offence – a comparison he described as facile.¹⁴⁹ The basis of his rejection was his understanding of the conceptual foundation of incitement in municipal law: 'This legal concept has its origin and justification in the *psychological motives* determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated.'¹⁵⁰

This second claim – that to impose responsibility for instigation would be to assimilate the 'motives of State conduct in international relations' to the psychological motives underpinning prohibitions on incitement for individuals in domestic law – is not all that easy to understand. If this is an argument about the problems relating to *fault* in a general sense and its applicability to states, it can be noted that wherever the fault element on a prohibition of instigation comes out, it will not raise significantly different questions from the overarching issue of state fault more generally.¹⁵¹ More importantly, it is doubtful that it makes no sense to say that states (and their agents) can influence the decision-making of other states (and their agents). This does not demand an inquiry into some deep-seated *motive* of either party. All it requires is the recognition that states as sovereign actors in the international legal system can be influenced by other states in the exercise of that sovereign will.

Moreover, we need not think about this point only on the conceptual level. If we look to treaty law we see a set of obligations prohibiting states from instigating other states to do certain things. So, for instance, under Article I of the Nuclear Non-Proliferation Treaty each nuclear weapon state party undertakes 'not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons...'¹⁵² Under Article 1(c) of the Mine Ban Treaty, 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.'¹⁵³ And under Article 1(d) of the Chemical Weapons Convention, state parties likewise undertake never to assist, encourage, or induce anyone to engage in activities prohibited under the Convention.¹⁵⁴

¹⁴⁹ Ago, '7th Report', *supra* note 30, at 55, para. 63 (emphasis added).

¹⁵⁰ *Ibid.*

¹⁵¹ See Diggelmann, 'Fault in the Law of State Responsibility – Pragmatism ad infinitum', 49 *German Yearbook of International Law* (2006) 293.

¹⁵² Art I of the Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

¹⁵³ Art 1(c) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

¹⁵⁴ Art 1(d) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.

The point is not to draw any general rule from this specific treaty practice. Instead, this practice serves to tell us that the idea of state instigation makes sense to states themselves – they are willing to undertake obligations of this kind. Indeed, the inclusion of obligations of instigation in specific treaties undermines Ago’s conceptual claim and also shows that states, in some circumstances, recognize the importance of a prohibition on instigation for sustaining compliance with whatever principal ends they seek to secure.

Moving beyond those conceptual objections, it is nonetheless true that cases of instigation do throw up a particular causal problem. This is the third potential objection to the rule. In cases of instigation, we are dealing with conduct that seeks to affect that decision-making of others states – conduct that renders a particular course of action more eligible.¹⁵⁵ Essential to any coherent idea of responsibility for complicity is that the accomplice’s acts be successful – as Gardner puts it, I am ‘complicit ... only because my assistance *actually* assists and my encouragement *actually* encourages.’¹⁵⁶ We see this idea in the commentary to Article 16 ARSIWA – ‘the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and *must actually do so*.’¹⁵⁷ The problem, then, is how we can know whether one state’s acts of instigation really affected the decision of the other state.¹⁵⁸ It is entirely possible that the putative acts of instigation were causally superfluous.¹⁵⁹

This problem is real, though it should not be overstated. One response is that domestic systems of criminal complicity have long faced a similar problem in respect of the (sometimes inscrutable) human mind.¹⁶⁰ Smith explains that in these cases of instigation (and its related forms), something like a doctrine of presumed effect operates.¹⁶¹ Acts intended to induce another actor to act in a particular way that are brought to her attention are presumed to do so in the absence of evidence to the contrary.¹⁶² There is no reason that a similar doctrine would not work in the international legal system.

A second point of qualification is that there will be cases where it is not difficult to draw a causal inference; factual uncertainty is defeated by the specifics of the case. Again, to draw broadly on the Australian case referred to above, even if there were no public documents relating to the establishment of offshore detention centres, the involvement of Nauru in detaining people seeking to reach Australia would give strong grounds to infer that some inducement has been offered and accepted.

Finally, the factual uncertainty that inheres in the remaining cases of instigation only finds particular salience where the matter comes before a tribunal.¹⁶³ However, to envisage the possible compliance effects of a rule only by the possibility of judicial decision is to miss the

¹⁵⁵ *Ibid.*

¹⁵⁶ Gardner, *supra* note 12, at 137 (emphasis added).

¹⁵⁷ ARSIWA Commentary on Art 16(5) (emphasis added).

¹⁵⁸ See Aust and Nolte, ‘Equivocal Helpers – Complicit States, Mixed Messages, and International Law’, 58 *ICLQ* (2009) 1, at 13.

¹⁵⁹ KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991), at 85.

¹⁶⁰ Jackson, *supra* note 16, at 43-45.

¹⁶¹ Smith, *supra* note 159, at 87.

¹⁶² *Ibid.*

¹⁶³ For a related thought on Art 16 ARSIWA, see Lowe, *supra* note 18, at 14.

other ways that international law affects decision-making. Internally – that is, within the bureaucratic organs of the putative assisting state – these effects may exist regardless of any factual uncertainty faced by an outsider. Externally, the proposed rule gives injured states the language to invoke the responsibility of other states that instigated the breach.

D. Interim conclusion

Before setting out the contours of the proposed rule, it is worth returning to the function of general principles in the international legal system. As argued above, two functions are adopted for the purposes of this article: general principles as gap-fillers; and general principles as an aid in the interpretation of other rules of international law. As to the former, the general principle under consideration is transposed into international law and exists as a primary rule of international law in its own right. As to the latter, the general principle under consideration aids in the interpretation of the conduct element of the customary prohibition on aid and assistance reflected in Article 16 ARSIWA. In either case, it is wrongful for a state to instigate another state to commit an act that it would be wrongful for it to do itself.

6. The contours of the rule

Before concluding, the contours of the proposed rule can be sketched – what the general principle would look like when transposed into the international legal system. This task is simplified by the adoption, entrenchment, and acceptance of the rule on assistance in Article 16 ARSIWA. Indeed, as noted above, the rule proposed herein is simply an extension of the forms of complicity prohibited by international law to capture one that is widely included within other systems of accomplice liability. On this basis, in formal terms, the rule might look like this:

A State which instigates 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.

Much attention has been paid in recent practice and scholarship to the elements of the rule in Article 16 ARSIWA. Borrowing therefrom, four elements constitute the proposed rule. First, as to the conduct of the instigating state, it must provide to the assisted state a reason for action – it must make the breach of international law more eligible in its eyes.¹⁶⁴ This will most likely be a promise of reciprocal benefit either before or simultaneously with the principal act but unconnected to its execution, or subsequent to it. In such cases, the existing rule on assistance in Article 16 does not capture the instigating state's conduct.

Second, the instigating conduct must significantly contribute to the principal state's decision to violate its obligations.¹⁶⁵ This is a materiality requirement, which excludes conduct that makes little difference to overall decision-making process.¹⁶⁶ Such a requirement is justified by complicity's derivative structure – it links one actor to another's wrongdoing.¹⁶⁷ As

¹⁶⁴ Hart and Honoré, *supra* note 5, at 54.

¹⁶⁵ ARSIWA Commentary on Art 16(5).

¹⁶⁶ Jackson, *supra* note 16, at 157-158.

¹⁶⁷ See further V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016) 8-9.

discussed above, it is here where a doctrine of presumed effect might operate in specific cases to defeat factual uncertainty.

Third, the instigating state must act intentionally.¹⁶⁸ As has been widely discussed, the fault element of the rule of assistance is a matter of controversy, one created by the conflicting standards in the text of Article 16 (knowledge) and its Commentary (intention) and exacerbated by cross-jurisdictional peculiarities in understandings of intention. This debate matters less for present purposes, for barring exceptional cases instigation is paradigmatically conduct undertaken intentionally.¹⁶⁹ We instigate others *in order to* get them to act in a particular way.

Finally, the rule requires that the principal conduct that constituted the wrongful act would have been wrongful if committed by the instigating state. This is the double obligation requirement, an element of the rule in Article 16 ARSIWA that has received quite detailed consideration in the literature.¹⁷⁰ Said to flow from the *pacta tertiis* principle, under Article 16 ARSIWA no responsibility arises where State A assists State B's breach of a bilateral treaty between State B and C.¹⁷¹ Thus likewise, it is only where the principal state's conduct would also have been wrongful for the instigating state that responsibility arises.

7. Conclusion

In its commentary to the rule on assistance in Article 16 ARSIWA, the ILC proposed that 'a State cannot do by another what it cannot do by itself.'¹⁷² This basic, compelling idea is as applicable to cases of instigation as to cases of assistance. This is borne out across domestic systems of private law. How a transposed general principle evolves and adapts in the international legal system cannot be determined in advance.¹⁷³ Nonetheless, there is a strong case that international law does prohibit states from instigating other states to do what it would be wrongful for them to do themselves.

¹⁶⁸ ARSIWA Commentary on Art 16(5).

¹⁶⁹ See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (1st edn., 2010) at 436 noting this point in respect of international criminal law.

¹⁷⁰ See e.g. Aust, *supra* note 14, 249-268.

¹⁷¹ See Lowe, *supra* note 18, at 7-8.

¹⁷² ARSIWA Commentary on Art 16(6).

¹⁷³ Ellis, *supra* note 55, at 971.