

Complicity in International Criminal Law

Marina Aksenova

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are
trademarks of Bloomsbury Publishing Plc
First published in Great Britain 2016

First published in hardback, 2016
Paperback edition, 2019

Copyright © Marina Aksenova 2016

Marina Aksenova has asserted his right under the Copyright, Designs and Patents Act 1988 to
be identified as the Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by
any means, electronic or mechanical, including photocopying, recording, or any information
storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or
damage occasioned to any person acting or refraining from action as a result of any statement in it
can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown
Copyright ©. All House of Lords and House of Commons information used in the work is
Parliamentary Copyright ©. This information is reused under the terms of the Open Government
Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except
where otherwise stated.

All Eur-lex material used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998-2019.

1145932

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Aksenova, Marina, author.

Title: Complicity in international criminal law / Marina Aksenova.

Description: Oxford ; Portland, Oregon : Hart Publishing, an imprint of Bloomsbury Publishing Plc,
2016. | Series: Studies in international law ; volume 63 | Based on author's thesis
(doctoral - European University Institute, Florence, Italy, 2014). | Includes bibliographical
references and index.

Identifiers: LCCN 2016034352 (print) | LCCN 2016036386 (ebook) | ISBN 9781509900084
(hardback) | ISBN 9781509900091 (Epub)

Subjects: LCSH: Accomplices (International law)

Classification: LCC KZ7094 .A47 2016 (print) | LCC KZ7094 (ebook) | DDC 345/.04—dc23

LC record available at <https://lcn.loc.gov/2016034352>

ISBN: HB: 978-1-50990-008-4

PB: 978-1-50992-890-3

ePDF: 978-1-50990-010-7

ePub: 978-1-50990-009-1

Series: Studies in International Law, volume 63

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find
extracts, author information, details of forthcoming events and the option to sign up for our
newsletters.

Contents

<i>Table of Cases</i>	xi
1. Introduction	1
2. Origins of Complicity: The Domestic Law Intake	8
Introduction	8
I. The Comparative Method in International Criminal Law	10
A. General Principles of Law as a Source of Law and Inspiration.....	10
B. Critique of the Comparative Method	15
C. Methodology	19
II. Complicity in Domestic Law	23
A. Complicity in Germany	23
B. Complicity in France	28
C. Complicity in England.....	30
D. Complicity in the US	34
E. Complicity in Italy.....	37
F. Complicity in Russia	39
G. Complicity in India.....	42
H. Complicity in China	44
III. Lessons Learned from Comparative Studies	45
A. Trends in Domestic Legal Systems: In Search of a Common Dimension.....	45
B. Applicability of the Findings to International Criminal Law.....	49
Conclusion	52
3. The Evolution of Complicity as a Construction for Dealing with Collective Criminality	53
Introduction	53
I. Conspiracy versus Complicity at Nuremberg and Tokyo	56
A. Conspiracy as a Method of Dealing with Collective Criminality	56
B. The Sentencing Policy	61

viii *Contents*

II. Domestic Law versus International Law during the Subsequent Trials.....	64
A. The British Approach	64
B. The US Approach.....	66
C. The French Approach.....	69
D. Corporate Complicity	71
III. Defining the Contours of Complicity: The ILC's Contribution	72
IV. Historical Trends	76
4. Complicity in the Jurisprudence of the Ad Hoc Tribunals and Hybrid Courts	81
Introduction.....	81
I. Forms of Participation in the Statutes of the Ad Hoc Tribunals and Hybrid Courts	84
A. Requirements of Individual Criminal Responsibility.....	84
B. The Scope of Complicity.....	86
C. Committing.....	89
D. Planning.....	96
E. Instigating.....	98
F. Ordering.....	101
G. Aiding and Abetting.....	103
H. Complicity in Genocide	112
II. Problems with Building a Coherent Account of Complicity	113
A. Fragmentation.....	114
B. Unclear Standard of Causation.....	117
C. Mismatch between Facts, Law and Forms of Liability.....	124
D. Problem with the Sources.....	128
Conclusion	131
5. Complicity and the Hierarchy of the Participation Modes at the International Criminal Court	133
Introduction.....	133
I. Modes of Participation at the ICC	137
A. 'Commits Such a Crime, Whether as an Individual, Jointly with Another or through Another Person...'	140
B. 'Orders, Solicits or Induces the Commission...'	150
C. 'Aids, Abets or Otherwise Assists in its Commission...'	154
D. 'In Any Other Way Contributes to the Commission...'	156

II.	Hierarchy of the Participation Modes.....	164
A.	'Control over Crime' is Not a Basis for Hierarchy.....	167
B.	Modes of Responsibility: Distinguished But Not Ranked.....	170
C.	The Level of Contribution is Not the Criterion for Differentiating Modes of Responsibility	173
	Conclusion	176
6.	Complicity in International Criminal Law and Law of State Responsibility: A Comparative Analysis	178
	Introduction	178
I.	Complicity in the Law of State Responsibility.....	180
A.	Historical Perspective	180
B.	Legal Requirements of Complicity.....	182
II.	Comparative Analysis of Complicity in International Criminal Law and the Law of State Responsibility	185
A.	Complicity in Genocide	185
i.	The <i>Akayesu</i> Case	185
ii.	The Genocide Case	187
B.	Complicity in Torture	190
i.	The <i>Furundžija</i> Case.....	190
ii.	The <i>Binyam Mohamed</i> Case.....	191
III.	Treatment of Complicity in Two Areas of Law: Common Trends and Divergences	195
	Conclusion	201
7.	The Correlation between Complicity and Sentencing.....	203
	Introduction	203
I.	The Correlation between Complicity and Sentencing.....	206
A.	Statutory Sentencing Principles.....	206
B.	Case Law	210
II.	Sentencing Objectives at the Crossroads: Domestic and International Law	221
A.	Sentencing Objectives in International Criminal Law.....	221
B.	Sentencing Objectives in Domestic Law	225
i.	Retribution	226
ii.	Deterrence	227
iii.	Rehabilitation	228
iv.	Restorative Justice.....	228
C.	The Challenges of Adapting the Sentencing Objectives to International Law	229
III.	Embracing Judicial Sentencing Discretion in International Criminal Law.....	234
	Conclusion	239

x *Contents*

8. Conclusion: The Place of Complicity in International Criminal Law	241
Introduction	241
I. The Limitations of International Criminal Law.....	244
A. Conservative versus Progressive.....	244
B. Deviance versus Conformity	245
C. Legitimacy through Enforcement versus Legitimacy through Fairness.....	247
D. Individual versus Collective Aspect	248
II. Symbolism as an Overarching Aim.....	249
III. Improving the Current Practices of Attaching Liability for Complicity.....	257
Appendix I: National Legislation on Complicity	260
Appendix II: The Correlation between the Forms of Liability and Sentencing	280
<i>Bibliography</i>	303
<i>Index</i>	313