

## **QUESTION SIX-ONE**

**6-1 What is the test in your country’s complicity laws for determining that an accomplice had the requisite *mens rea* in providing assistance, encouragement or means to the principal perpetrator of a crime? In some circumstances, your jurisdiction may find that more than one test satisfies the *mens rea* requirement.**

- a) **Must the prosecution prove that the accomplice *wanted* the perpetrator to carry out the particular crime, i.e. the accomplice *intended* that the crime be committed? This is the *dolus specialis*, or “shared intent” test. (Note: Please indicate if an accomplice’s shared intent might be inferred from his actions as an evidentiary matter )**

Since complicity in a crime includes within its scope three different categories, namely being a co-principal, incitement (abetting), and being an accessory (aiding) under Japanese criminal law, as explained in our answer to Question 6 in the previous report, we discuss the issue in regard to each of the three respectively.

### **1. Must the prosecution prove that the accomplice *wanted* the perpetrator to carry out the particular crime?**

#### **Co-principals**

While proof of communication between co-principals about their intention to jointly commit a crime is a required element of being a co-principal as discussed below, proof that a co-principal wanted another co-principal to carry out a crime is not required. Awareness and acceptance of a co-principal’s commission of a crime is sufficient grounds for a person to be punished as a co-principal (although there is another view on this issue that doesn’t require proof of “acceptance” but only proof of “awareness that the crime would probably be committed by the perpetrator.” See the answer to Question (c)). On the other hand, a crime committed due to negligence is considered differently. A crime committed due to negligence is punishable only when a specific provision for punishment exists (Penal Code Art. 38 Para. 1). When such a provision exists, according to the precedents, the law considers “co-principals through negligence” to have violated a shared duty of care, even in a case where the co-principal was unaware of the perpetrator’s commission of a crime.<sup>1</sup>

#### **Incitement**

Proof that a person was aware of and accepted the perpetrator’s commission of a crime is required for the person to be convicted as an inciter, since incitement is defined as causing another person’s criminal intent and having that person commit the crime (although there is another view that only requires proof of the “awareness of the probability”). However, proof that an inciter willingly (proactively) wanted the perpetrator to carry out a crime is not required.<sup>2</sup> Incitement through negligence (i.e., a case in which a person is unaware that the perpetrator is to commit a crime) is not recognized under the law as a type of incitement.<sup>3</sup>

#### **Being an accessory**

Proof of a person’s awareness and acceptance of the perpetrator’s commission of a crime is also required for the person to be convicted as an accessory (although there is another view that only requires proof that a person was “aware that the crime would probably be committed by the perpetrator”). Proof that

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<sup>1</sup> Masahide Maeda, *Keihou Souron Kougai* [Lectures on the General Theory of Criminal Law], at 451. Examples of precedents are as follows; Nagoya District Court, Judgment of September 30, 1986 (39-4 KOUKEISHU 371); Tokyo District Court, Judgment of January 23, 1992 (1419 HANREI JIHOU 133).

<sup>2</sup> Minoru Ohya, *Keihou Souron* [The General Theory of Criminal Law] at 459.

<sup>3</sup> Maeda *supra* at 450; Ohya *supra* at 462.

an accessory willingly wanted the perpetrator to carry out a crime is not a required element under the law.<sup>4</sup> Accessoryship through negligence (a case where a person is unaware that the perpetrator is to commit a crime) is not recognized under the law as accessoryship.<sup>5</sup>

## **2 Is shared intent of commission of a crime between a principal perpetrator and an accomplice required?**

### **Co-principals**

Although there is a view that a person who had the intention to jointly commit a crime and a person who didn't may be punished as co-principals, the predominant view requires that the principal perpetrator and the accomplice share the awareness and foreseeing of the completion of the joint commission of a crime in order for an accomplice to be punished as a co-principal; in other words, the latter view does not recognize the existence of a so-called "one-way co-principal," (i.e., an accomplice who does not share communication of intent).<sup>6</sup>

### **Incitement**

Although there is a view that the existence of the shared intent of the commission of a crime is required for conviction in a case of incitement, the predominant view is that a person who actually caused another person's intention to commit a crime may be punished for incitement, even if the principal perpetrator decided to commit a crime without being aware of the act of incitement.<sup>7</sup>

### **Being an accessory**

Though there is a view that the existence of the shared intent of the commission of a crime is required for conviction in a case of accessoryship, the predominant view is that communication of the mutual intent between a principal perpetrator and an accessory to commit a crime is not always necessary. The grounds for this view are that the act of an accessory can facilitate the criminal act of a principal and thereby cause the criminal result (one of the constitutive elements), even when there is no communication of mutual intent between the principal perpetrator and the accessory.<sup>8</sup>

## **3 The proof of shared intent**

An accomplice's shared intent may be inferred from and evidenced by his actions. A statement of the accomplice him/herself is not necessary.

- b) Must the prosecution prove that the accomplice had actual knowledge that the assistance provided would assist the perpetrator to commit a specific crime (or alternatively a crime or some sort)? (sometimes referred to as a requirement of "knowledge")**

Under Japanese criminal law, a person who only had a general intent to provide assistance to another to perform "some crime" (without qualifying the assistance for a specific crime) cannot be punished as an accomplice. A person is only punished in a case where the offense that was actually committed by a principal perpetrator and that an accomplice foresaw is the same, or within the scope of a certain type of offense (in a case of a co-principal, within the scope where communication of intent existed,

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<sup>4</sup> Ohya *supra* at 468.

<sup>5</sup> Maeda *supra* at 450; Ohya *supra* at 468.

<sup>6</sup> Atsushi Yamada, *Keihou Souron* [General Theory of Criminal Law] (YUHIKAKU, 2004) at 271; Maeda *supra* at 411. Though it is a rather old precedent, the Daishin'in [Great Court of Judicature] of February 25, 1922 (1 KEISYU 79) required the shared intent of joint commission of a crime.,

<sup>7</sup> Maeda *supra* at 455; Ohya *supra* at 464.

<sup>8</sup> Yamaguchi *supra* at 297; Ohya *supra* at 471.

and in cases of an inciter and accessory, within the scope of “substantive overlap”).<sup>9</sup> The following are examples of these types of cases.

- While *A* and *B* mutually communicated their intent of committing an offense of larceny and jointly committed larceny; only *A*, in fact, had the intent of committing robbery and committed robbery..
- *B*'s incitement of *A* to commit the offense of larceny caused *B*'s intent to commit the offense of robbery, and *B* actually committed robbery based on *B*'s intent.
- *A* committed the offense of robbery although *B* lent a tool to *A* with the intent to assist *A* to commit the offense of larceny.

In these cases, although it is impossible to punish *B* for being a co-principal, an inciter, or an accessory of the offense of robbery because *B* didn't have *mens rea*, it is possible to punish *B* for being a co-principal, an inciter, or an accessory of the offense of larceny<sup>10</sup>.

On the contrary, when *A* committed the offense of bodily injury and not murder in spite of *B*'s incitement for *A* to commit murder, *B* may be punished for incitement of the offense of bodily injury because the crime actually committed was only bodily injury and not murder (and the same can be said in cases concerning a co-principal and an accessory).<sup>11</sup>

**c) Would it be sufficient to show that the accomplice was indifferent toward, or accepted the chance that the assistance provided might assist the perpetrator to commit a crime (not a specific crime)? This the *dolus eventualis* test.**

First, under Japanese criminal law, an accomplice must have *mens rea* of a specific crime (or within the scope of a certain type of offense, but not crime, in general) in assisting the perpetrator. Nevertheless the notion of “*dolus eventualis*” is accepted. If the existence of *dolus eventualis* is proved, a person is punished as the crime was intentionally committed. However, there are different views as to the meaning of *dolus eventualis*.

As explained in our answer to question a), it is not required that an accomplice willingly wants the perpetrator to commit the crime. There is no opposition.

There are different views regarding (1) a case in which the accomplice accepted the chance that the assistance provided might assist the perpetrator to commit a crime and (2) a case in which an accomplice, while being aware of the chance, but did not necessarily accept inwardly, the chance that the assistance provided might assist the perpetrator to commit a crime.

From one point of view, the existence of criminal intent is present when a person, who foresees and accepts the result of a criminal act, ventures to commit the crime, and negligence is considered to be if a person only foresees the occurrence of a crime (but does not accept the chance of the occurrence of a crime). From another point of view, criminal intent exists when a person is aware of the probability of the occurrence of a crime, and negligence is considered to be if a person is merely aware of the possibility of the occurrence of a crime. The interpretations of the precedents of the Supreme Court vary from a scholar to a scholar<sup>12</sup>.

As incitement or accessoryship is an intentional crime and “incitement by negligence” or “accessoryship by negligence” is not recognized under Japanese criminal law, an accomplice who accepted the chance that the assistance provided might assist the perpetrator to commit a crime may be punished according to the first view but may not always be punished according to the second view. According to the second view, it is impossible to punish an accomplice when the accomplice thought that the probability of

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<sup>9</sup> Maeda *supra* at 480.

<sup>10</sup> Ohya *supra* at 489.

<sup>11</sup> Maeda *supra* at 482

<sup>12</sup> Maeda *supra* at 208; Ohya *supra* at 183. Tokyo High Court of March 28, 1985 (74 HANREI JIHOU 160) found that the accused, who threw a heavily drunken victim into a river from a bridge which was six meters above the water, had *mens rea* (criminal intention) of murder. The judgment held that the accused, recognizing that the victim would certainly drown, ventured to accept the result and committed the offense. (The decision may be understood as taking the first view.)

the perpetrator committing the crime to be very low, while an accomplice may be punished when he/she thought that it was highly probable that the perpetrator would commit a specific crime. Despite the academic difference between the first and the second views, there is little practical difference between them, since it is very rare to accept the chance of the occurrence of a crime when its possibility was so low to reach the degree of probability.

When the accomplice was indifferent to (did not care) the fact that the assistance provided might assist the perpetrator to commit a specific crime, the accomplice may not be punished according to the first view, and may be punished when he/she was aware of the probability of occurrence of a criminal result according to the second view.

- d) Would it be sufficient to show that it was *foreseeable* that the assistance provided would assist the perpetrator to commit a crime? (This test is sometimes stated as “knew or should have known that . . . “)**

In order to punish an accomplice as a co-principal, it is insufficient to simply demonstrate it was foreseeable that assistance would assist the perpetrator, since the communication of mutual intent between co-principals is a necessary element.

Since criminal intent is a required element for a person to be convicted as an inciter or an accessory, it is necessary to prove that the accomplice foresaw that the assistance provided would assist the perpetrator to commit a crime. It is insufficient to only prove that it was foreseeable that the assistance would assist the perpetrator

- e) Would a court impose a more lenient test to determine whether the *mens rea* was present if the crime involved were a particularly serious or egregious one? Alternatively, would a court impose a more lenient test for lesser types of offenses? (e.g., misdemeanors)?**

The elements of awareness and acceptance of the perpetrator’s act, or the communication of intent, as explained above, are discussed as elements common to accomplices of all kinds of offenses. In general, it is not the rule to apply a more lenient test to determine whether *mens rea* was present, depending on the seriousness of an offense.

As discussed above, co-principals may be punished for a crime committed as a result of negligence in spite of the lack of criminal intent, although it is limited to those offenses that have specific provisions for the punishment of such negligence. The crimes resulting from negligence that are punishable under the Penal Code are limited to certain serious crimes that endanger life or body (such as manslaughter caused by negligence, bodily injury caused by negligence, fire caused by negligence, endangering traffic caused by negligence, etc.). Considering this, it is possible to say that some statutes provide a more lenient test for determining whether *mens rea* was present; i.e., for certain crimes, which are particularly serious, the test for the presence of *mens rea* is more lenient. Other statutes also provide a more severe test to determine whether *mens rea* was present for some crimes. For example, the offense of the abduction of an adult requires not only awareness and acceptance of the abduction (although, as already explained, there is a view that requires awareness that the perpetrator will probably commit the crime) but also a specific purpose as follows: profit, performing an obscene act, marriage, harming life or body (Penal Code, Art. 225), ransom (Penal Code, Art. 225-2), or transporting an abducted person to foreign countries (Penal Code, Art. 226).

- f) If your country’s laws do not impose criminal liability on legal persons, or if government agencies (including state-owned enterprises) are not covered by your country’s criminal laws, is there an alternate mechanism whereby victims or foreign governments may obtain administrative remedies against such persons/agencies for acting as accomplices?**

As explained in our answer to Question 3-5 in the previous report, under the system of Japanese criminal law, a legal person is not generally punished and may be punished only when there is a provision that specifically and explicitly provides for the punishment of legal persons, such as “*Ryobatsu Kitei*” (Double Punishment Provision). “*Ryobatsu Kitei*” in general provides that a legal person shall be punished when an employee, etc. commits a crime “in relation to the business or property of such a legal...person” as explained in our answer to Question 3 in the previous report. Statutes that contain “*Ryobatsu Kitei*” generally regulate the business of private business entities and often exclude from their application business directly run by government agencies. Therefore, it is not easy to expect that “*Ryobatsu Kitei*” would be applied to business directly run by government agencies. In addition, as business directly run by Japanese government agencies is limited to such business as forestry of a state-owned forest because of the advancement of privatization, it is hard to assume that Japanese government agencies operate their business abroad in light of the nature of their business.<sup>13</sup>

Some legal persons to which the Japanese government provided capital or grants for administration are expected to operate their business in foreign countries. The examples of such legal persons are the Japanese International Cooperation Agency (JICA; an independent administrative institution); the Japan Foundation (an independent administrative institution); Nippon Export and Investment Insurance (an independent administrative institution); Japan Oil, Gas and Metals National Corporation (an independent administrative institution); Japan Bank for International Cooperation (JBIC), and the Development Bank of Japan. The employees of these agencies are not officials but regarded as officials in the application of criminal law such as the Penal Code.<sup>14</sup> If there are regulations for government agencies similar to those for private business entities regarding certain businesses, government agencies might receive penalty pursuant to “*Ryobatsu Kitei*” (Double Punishment Provision) under such regulations. However, government agencies do not usually receive a penalty because they are treated differently from private business or because they do not operate the same kind of businesses as a private business entity.

However, general regulations irrelevant to the approval and permission of certain business, such as regulations concerned with the bribing of a foreign official<sup>15</sup> and money laundering<sup>16</sup> are applicable to government agencies since there are no provisions to exclude them from their applications.

A competent minister is able to take corrective measures when a legal person capitalized by or receiving a grant for administration from the government is involved in a serious human rights violation, even if there is no applicable “*Ryobatsu Kitei*” (Double Punishment Provision) or provision of punishment for overseas criminals (of nationals).<sup>17</sup> Regarding whether victims, etc., may sue for such intervention by a

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<sup>13</sup> Participation in a peacekeeping operation is an example of the way in which government agencies act directly abroad. In the case of a peacekeeping operation, as a peacekeeping force is established under the International Cooperation Headquarters of the Cabinet Office, a member of the force holds the status of a government official. Under Japanese criminal law, a range of offenses that have provisions for the punishment of overseas criminals is extended when a criminal holds the status of a government official. However, there are no “*Ryobatsu Kitei*” (Double Punishment Provisions) for such offenses as rape and murder (as explained in our previous report).

<sup>14</sup> Independent Administrative Institution Japanese International Cooperation Agency Law, Art. 12, Independent Administrative Institution Japan Foundation Law, Art. 11, Trade and Investment Insurance Law, Art. 12, Independent Administrative Institution Japan Oil, Gas and Metals National Corporation Law, Art. 10, Japan Bank for International Cooperation Law, Art. 20, and Development Bank of Japan Law, Art. 18.

<sup>15</sup> Unfair Competition Prevention Law, Art. 11 Para 1, Art. 14, Para 1, No. 7, Para. 3 (a provision of punishment for overseas criminals), Art. 15 (“*Ryobatsu Kitei*” [Double Punishment Provision])

<sup>16</sup> Law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters, Art. 9~Art. 11, Art. 12 (A provision for punishment for overseas criminals), Art. 17 (“*Ryobatsu Kitei*” [Double Punishment Provision]).

<sup>17</sup> Independent Administrative Institutions Regulation Law provides that a competent minister may order an institution to report its operation and property, and carry out an on-the-spot inspection. A minister also may order necessary correction measures when such an institution commits an illegal act in relation to its business or when there is a threat of such an institution committing an illegal act. Furthermore, the law authorizes a competent minister to dismiss a chief and/or auditor of the independent administrative institution when he/she conducts an illegal act (Independent Administrative Institutions Regulation Law Art. 23, Para. 3, Art. 64, Art. 65). Although the JBIC and the Development Bank of Japan are not independent administrative institutions, the statutes establishing both institutions have provisions for the dismissal of

competent minister, when a competent minister doesn't intervene in spite of the existence of an illegal act of a legal person, based on the notion of "obliging litigation" (one type of administrative litigation) to obtain redress might be possible in theory, although the effectiveness of such litigation is uncertain as there is no relevant precedent.<sup>18</sup> In addition, JICA and JBIC set out guidelines for environmental and social considerations and established objection systems in which external examiners review objections regarding compliance to the guidelines. However, room for doubt on the effectiveness of the systems still remains, since the systems are only applied to projects adopted after the establishment of the systems.<sup>19</sup>

Lastly, we will discuss how a test for determining that an accomplice had the requisite *mens rea*, which is explained above in our answer to question a) to f), can be applied to cases of legal persons in order to organize our discussions over the relation between "Ryobatsu Kitei" (Double Punishment Provision) and the punishment of an accomplice. We need to organize the discussions since the punishment of legal persons is generally limited to the offenses provided as "Ryobatsu Kitei" under Japanese criminal law.

When an accomplice B provided certain assistance for a principal perpetrator A's commission of a crime, a test is required to determine whether the accomplice B had the *mens rea* described above. When the conduct of both the accomplice B and the perpetrator A, or of one of them, was performed in a foreign country, they cannot be punished unless a provision for the punishment of overseas criminals exists. As explained in our answer to Question 6 in the previous report, a provision to punish overseas criminals is sometimes only applicable to either the accomplice B or the perpetrator A.

In other words, when it is determined that accomplice B had *mens rea* and that the provision of punishment for overseas criminals also exists (or the act of assistance of B can be found to have been committed domestically), B may be punished. In this case, if B's conduct was considered normal conduct in the course of business, then a legal person C, who employed B, has criminal liability pursuant to "Ryobatsu Kitei" (Double Punishment Provision). However, such a case is limited to offenses which have provisions of "Ryobatsu Kitei." A legal person C is not required to have such *mens rea* as explained in our answers to questions a) to f).

In brief, as explained in our answers to Questions 3 to 6 in the previous report, the following elements are required in order to punish a legal person C;

- (i) An employee B (or a director B) commits a crime (including complicity) (B is required to have *mens rea*),
- (ii) There is an applicable "Ryobatsu Kitei" for the offense of which B is accused,
- (iii) B's criminal act was conducted in the course of business,
- (iv) A legal person C is not without negligence over B's criminal act (under the interpretation of *Ryobatsu Kitei*, the existence of C's negligence is assumed, so the legal person C must prove that C was not negligent).

## **QUESTION SIX-TWO:**

### **6-2 What is the test in your country's complicity laws for determining that assistance was provided by the accomplice (the *actus reas*)?**

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directors, reporting to and inspection by a competent minister, and correction orders (Japanese Bank for International Cooperation Law, Art. 14, Art. 52, Art. 53, Development Bank of Japan Law, Art. 13, Art. 49, Art. 50).

<sup>18</sup> The Administrative Case Litigation Act, Art.37-2 provides that administrative litigation is only permitted when there is a risk of serious damage caused by the omission of a certain administrative disposition and there is no other appropriate means. However, the target of the disposition of correction order in question here is a legal person which conducts an illegal act and not the victims of the illegal act. Therefore, when a third party litigates the disposition, he/she is required to have "legal interest" over the disposition (Administrative Case Litigation Act, Art. 9). There are different views as to whether a victim, who is not the one receiving a disposition, may sue for a disposition to be made on the legal person. On the contrary, the administrative appeal system doesn't have a similar procedure.

<sup>19</sup> The objection system of JICA was established in 2005. According to the annual report of the Examiner Panel (FY2005), there were no objections submitted during the course of fiscal year 2005 (<http://www.jica.go.jp/english/about/policy/envi/objection.html>) [English].

The objection system of JBIC was established in 2003. According to annual reports of the examiners for environmental guidelines, there were no objections from its establishment up to March 2005 (<http://www.jbic.go.jp/english/environ/pdf/objection.pdf>) [English].

- a) **Must the assistance be *physical*, i.e. in the form of money, cash, arms, active physical help, etc?**
- b) **Could the assistance be *moral or verbal*, i.e. in the form of encouragement, incitement, approval, planning assistance, etc.**

Under Japanese criminal law, complicity in a crime can be divided into three different categories; namely, acting as a co-principal, incitement (abetting), and acting as an accessory (aiding), as explained in our answer to Question 6 in the previous report. To be punished as a co-principal, a person is required to commit a part of a criminal act except in atypical cases, as in a case of “conspiracy co-principal” or in the case of “indirect principal.”<sup>20</sup> Therefore, the necessity of physical assistance of the co-principal is determined by the nature of the said crime (i.e. whether the said crime is considered impossible to commit without a physical act).<sup>21</sup>

To be guilty of incitement, the assistance provided by an accomplice to a principal need not necessarily be physical because incitement is defined as causing the criminal intent of another person. Incitement can be explicit or implicit. Additionally, incitement can take the form of flattery or entreaty. It is also possible for incitement to take the form of verbal assistance, encouragement or approval.<sup>22</sup> However, since an accomplice, in order to be found guilty of incitement, must cause the criminal intent of the principal, a person’s failure to prevent another person with criminal intent from committing a crime is not considered to be incitement.

Being an accessory includes within its scope not only material support, such as supplying tools or places (rooms, etc.), but also intangible support such as supplying information related to a crime or strengthening the criminal intent of the principal.<sup>23</sup>

- c) **Could the assistance consist of a failure to perform a legal duty?**

Yes, there is a case in which failure to perform a legal duty is recognized as assistance.

Under Japanese criminal law, the constituent elements of most offenses are provided in the form of the prohibition of a certain action. It is rare that a provision explicitly prohibits omission (i.e., failure to do something). However, when the omission is specifically prohibited, then the said omission is a punishable act.<sup>24</sup>

It is the common view of scholars that for an omission to be punishable where there is no such an explicit provision “a legal duty of action” must exist. A legal duty of action is based on the following grounds: laws and regulations (such as the duty of custody of a child pursuant to Civil Code, Art. 820), contracts and *negotiorum gestio*, etc. (such as nursing based on a nursing contract), custom, and the antecedent illegal act of oneself (for instance, someone who injures another is under a legal obligation to aid the injured party).<sup>25</sup>

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<sup>20</sup> Concerning corporate crimes, when an employee carries poisons or weapons, the employee may or may not be informed that the packages contain poisons or weapons, and believes it normal business activity to transport such items. In this case, while it is impossible to punish the employee, who lacks *mens rea* (the intent of a crime), the employer, who orders the transport could be punished as the indirect principal (*see* Masahide Maeda, *Keihou Souron* [General Theory of Criminal Law], at 430, at 434).

<sup>21</sup> It is construed that “offense of injury” doesn’t require the exercise of force. For example, deceiving a victim into taking a poison constitutes “offense of injury” (Masahide Maeda, *Keihou Kakuron* [Specific Theory of Criminal Law], at 41). Another example is that the judgment of the Tokyo District Court of August 10, 1979 held that causing neurasthenia by repeated “hate phone calls” constitutes “offense of injury.”

<sup>22</sup> Maeda, *supra* note 1, at 455.

<sup>23</sup> Maeda, *supra* at 480.

<sup>24</sup> Maeda, *supra* at 123. Under Japanese criminal law, there are some provisions of offenses that directly prohibit certain omissions, such as the offense of refusal to leave a residence (Penal Code, Art. 230, the latter paragraph) and the offense of failure to disperse (i.e., failure of the members of a crowd to disperse) (Penal Code, Art. 107).

<sup>25</sup> Judgment of the Daishin’in [Great Court of Judicature] of March 14, 1924 (3-285 KEISYU) held that moral reproach was insufficient and that the violation of a legal duty was required in order to punish omission. This judgment reversed the

Therefore, “failure to perform a legal duty” is grounds for punishment of omission.

**d) Could the assistance consist of remaining silent when the crime is being committed, although the accomplice had the moral, legal or physical ability to prevent the crime, e.g. by withholding the assistance or lodging a protest (sometimes referred to as complicity by omission)?**

Yes, assistance could consist of “remaining silent.” However, as mentioned above, such “complicity by omission” requires the failure of a party to perform a legal duty of action. Among the three categories of complicity under Japanese criminal law, while the notion of “co-principal by omission” is recognized,<sup>26</sup> the notion of “incitement by omission” could not be recognized, since it is generally impossible to incite another person and cause his/her criminal intent by omission.<sup>27</sup>

Accessoryship by omission is generally recognized as one type of accessoryship. However, the nature of a crime and the relationship of a person to the principal determine whether a person is under a legal duty to take some action to prevent the principal from committing a crime. The following is an example of a case in which omission was not determined to be accessoryship<sup>28</sup>. A person lent his business license to the principal but did not prevent the principal from using the business license for a criminal act. Additionally, the person did not report the crime to the authorities even though he came to know of the plan to commit the crime. In this case, the court determined that the person was not an accessory.<sup>29</sup>

**e) Must the assistance have amounted to a *substantial* contribution towards the commission of the crime? (This is the term used in the international standard.)**

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original decision that had convicted the defendant of the offense of abandonment of a corpse. The facts of the case were that the accused, knowing that a juvenile had fallen into a kiln for charcoal and had been burned to death, didn't attempt to rescue the juvenile immediately, left his charred body in the kiln, and let it burn. In this case, the judgment of Daishin'in held that the defendant was not under a legal duty to remove the corpse and provide for a suitable burial.

<sup>26</sup> Maeda, *supra* note 1, at 477; Minoru Ohya, *Keihou Souron* [General Theory of Criminal Law], at 449. While a father and a mother who starve to death their child are obviously co-principals by omission, there are different views as to whether a mother and a person who is not the father of a child can be co-principals when they jointly neglect the nurture of the child based on a shared intention; in other words, whether a person who is under a legal duty of action and a person who is not under such legal duty of action can be co-principals by omission.

<sup>27</sup> Maeda, *supra* at 477.

<sup>28</sup> The facts of the case were that after the accused obtained permission for the principal to operate an eating and drinking establishment under the accused's name and at the request of the principal, the principal started to use the establishment for prostitution. The accused, a name lender, who failed to prevent prostitution from taking place in the establishment, despite knowing about the existence of the prostitution, was prosecuted for being an accessory of the offense pursuant to the Anti-Prostitution Law, Art. 11, Para. 2 (i.e., the provision to punish a person who repeatedly offers a place for prostitution). The court held that the accused was not an accessory. The reasons for the court's decision were that the accused's act of giving permission to the principal to use an establishment was not directly related to prostitution and that it was impossible to foresee that the establishment would be used as a place for prostitution (Osaka High Court, Judgment of January 23, 1990, 731 HANREI TAIMUZU 244).

On the other, the judgment of the Sapporo High Court of March 16, 2000 (1711 HANREI JIHOU 170) is an example of a case in which was convicted for being an accessory by omission. The court held that a mother who failed to prevent the father from inflicting bodily injury on their three-year-old child, which resulted in the death of the child, was an accessory by omission to the crime of inflicting bodily injury resulting in death.

<sup>29</sup> Another relevant decision is Tokyo High Court, Judgment of January 29, 1999, 1383 HANREI JIHOU 153. The court acquitted the accused of being an accessory in this case. The facts of the case were that the accused failed to take any measures, such as reporting to the police the intent of the principal to commit a crime, although an employee (the principal) of the accused, a chief of an amusement arcade, confided to the accused that he was planning to rob a collector of money on the occasion that money from a subsidiary pachinko parlor was collected. The court held “the existence of a legal duty to prevent the commission of a crime of the principal is required in order to conclude that a person who omits to prevent the crime of the principal despite coming to know the plan of the crime is an accessory by omission. Such duty is interpreted to be based on a duty to protect legal interest violated by a crime of the principal (a duty of protection) or a duty directly to prevent the commencement of a crime of the principal (a duty of prevention). Generally, the ground of a duty of protection or prevention is interpreted as laws and regulations, contracts or the antecedent act of him/herself.” According to this standard, the court examined in detail the accused's job description, power of control and supervision over the principal, and the degree of his understanding of the possibility of the realization of the criminal plan, and came to the conclusion that the accused was not under such duty.

**Or will the court otherwise assess the *degree* to which the accomplice's aid contributed to the commission of the crime?**

There are various views regarding how to best determine whether a person is an accessory. The test usually applied is “whether a person facilitates the occurrence of the criminal result by the principal.” This test does not necessarily require physical contribution, as moral facilitation of the commission of a crime may be considered sufficient contribution.<sup>30</sup> When an accessory physically facilitates the occurrence of a crime, it is not necessary for the principal to be conscious of the assistance of an accessory.<sup>31</sup> If a person does not facilitate the occurrence of a crime, either morally or physically, a person is not an accessory.<sup>32</sup>

**f) May the assistance be provided after the crime has been committed?**

A person who incites the principal after a crime has been attempted by a principal with criminal intent cannot be punished for incitement, as incitement requires that the inciter be the cause of the formation of the criminal intent of the principal.<sup>33</sup>

As each co-principal is liable for all of the results of a criminal act, even if he/she commits only a part of the criminal act, a person who joins in a crime after its commencement and before its accomplishment is recognized as a co-principal by succession. For example, in the case that X alone first assaults a victim with murderous intent, and then Y joins and assaults the victim based on a shared murderous intent with X, both X and Y are recognized as co-principals, even if the physical violence of X alone is found to be the cause of death of the victim.<sup>34</sup>

What about an offense for which the constituent elements of the offense are more than one criminal act? For example, the offense of extortion consists of both intimidation and the receipt of property. There are different views as to whether a person who participates in the receipt of property but not in the preceding intimidation is a co-principal of the offense of extortion.<sup>35</sup> While some support the view that a person is a co-principal in the aforementioned case,<sup>36</sup> others insist that one should be punished as an accessory (not as a co-principal). However, in such a case, a victim is first intimidated by one person, and thereafter, another person, who receives property from the victim, usually commits a slight degree of intimidation so that the victim remains intimidated. In this case, all agree that the person receiving the property is considered to be a co-principal, not an accessory. Although there is no precedent, this view may apply to cases of corporate complicity, such as the case in which a Japanese company, planning to construct

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<sup>30</sup> A “watch” (i.e., a person watching for danger) assisting the principal of a midnight robbery is an accessory even in a case where there is no need for the watch because of the absence of passers-by, as the watch facilitates the criminal result by relieving the principal of psychological pressure (Maeda, *supra* at 465).

The precedents have held that a person who morally encourages or assists the principal in committing a crime is an accessory since judgments as early as that of the Daishin'in [Great Court of Judicature] of September 20, 1910 (42 DAISHIN'IN KEIJI HANKETSU SYOUROKU 232).

<sup>31</sup> The judgment of the Tokyo District Court of July 27, 1987 (1300 HANREI JIHOU 153) convicted the accused, who was asked to convey a table with a concealed pistol, of being an accessory to smuggling, as the accused conveyed the pistol with *dolus eventualis*. In this case, the accused and the principal, who requested that the accused transport the pistol, had no common shared intention, since the principal believed that the accused was unaware of the existence of the pistol. However, the accused was held as an accessory because the smuggling of the pistol was physically facilitated by his conveyance.

<sup>32</sup> The judgment of the Tokyo District Court of February 21, 1990 (733 HANREI TAIMUZU 232) denied that the act of insulation was accessoryship in the case. The facts of the case were that the accused, who had been informed of the plan for the principal to shoot a victim dead in a basement and rob him of jewels, insulated the basement to muffle the sound of the gunshot; the basement, however, was not used by the principal, who committed murder on the occasion of robbery in a different way. The reason for the judgment was that the act of the accused didn't physically facilitate the criminal result because the principal didn't use the basement, and it didn't encourage the principal to commit the crime because the principal didn't know about the insulation of the basement.

<sup>33</sup> Maeda, *supra* at 442

<sup>34</sup> Osaka High Court, Judgment of October 27, 1970, 621 HANREI JIHOU 95.

<sup>35</sup> Note that if a person who only participates in receipt of property is the one engaging in conspiracy, he/she will be punished as a conspiracy co-principal, not as a succession co-principal.

<sup>36</sup> Maeda, *supra* at 446; Otani, *supra* at 446. Maeda and Ohya are affirmative.

a factory abroad, receives a site for a factory voluntarily provided by local inhabitants after the government of that country forces the eviction of the inhabitants from the aforementioned site by military means.<sup>37</sup>

The offense of robbery and the offense of rape each consist of two independent acts. Namely, the offense of robbery consists of the act of assault or intimidation and the act of seizure of property. The offense of rape consists of the act of assault or intimidation and the act of sexual intercourse. According to the precedents, a person who participates only in the act of seizure of property or the act of sexual intercourse is a co-principal by succession of the offenses of robbery or rape, although there is some academic opposition to this viewpoint. However, in the case of the offense of robbery resulting in death or bodily injury, according to most precedents, a person who only participated in the act of seizure of property was a co-principal of the offense of robbery only, not a co-principal of the offense of robbery resulting in death or bodily injury.<sup>38</sup>

Accessoryship by succession is recognized as one type of accessoryship. However, as in the case of co-principals, there are different views as to whether an accessory of a principal accused of murder on the occasion of robbery should be punished for the same offense as the principal or for the offense of robbery only, in the case where the assistance is limited to the act of seizure of property.<sup>39</sup>

### **QUESTION SIX-THREE:**

#### **6-3 In order to charge an accomplice with complicity:**

- a) **Must an actual crime have been committed?**
- b) **Must the perpetrator have proceeded to the point at which he could be charged with an “attempted” crime?**

In principle, to charge an accomplice with complicity, it is necessary that the perpetrator attempt to commit a crime, at the least (i.e., the perpetrator has proceeded to the point at which he could be charged with “attempted” crime). There are further explanations of this issue in our previous report regarding co-principals (p. 13), incitement (p. 14), and accessoryship (p. 15).

However, Japanese criminal statutes state that the preparation for certain serious crimes is considered an offense, and joint commission of such preparation is generally interpreted as co-principal of preparation (p. 15 of our previous report). Regarding incitement to engage in such preparation, there are propositions both in support of and against the notion.<sup>40</sup> Similarly, there are affirmative and negative propositions concerning the notion of being an accessory in preparation to commit a crime.<sup>41</sup>

In addition, some statutes recognize instigation to be a crime, which is to cause or encourage the criminal intent of many or unspecified people (i.e., a group of unknown persons). To charge an accomplice with instigation doesn't require that the principal attempt to commit a crime.<sup>42</sup>

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<sup>37</sup> Under Japanese criminal law, an object of larceny is limited to movable property. The offense of larceny is not concerned with immovable property. For immovable property, there is another offense entitled the offense of wrongfully taking possession of immovable property (Penal Code Art. 235-2). Beyond the application of this offense, there are different views as to whether the robbery of immovable property is recognizable (and the discussion has practical implications as the penalty for robbery, above 5 years and under 20 years of imprisonment, is remarkably heavy in comparison with the penalty for the offense of wrongfully taking possession of immovable property, which is under 5 years of imprisonment). Please note that immovable property can be the object of an offense of fraud, extortion or embezzlement. Under Japanese law, a Japanese national committing any of these offenses outside of Japan may be punished.

<sup>38</sup> Examples of cases in which the accused was convicted as a co-principle of robbery or rape (only) are as follows: Tokyo High Court, Judgment of July 13, 1982, 1082 HANREI JIHOU 141; Tokyo District Court, Judgment of October 9, 1995, 1598 HANREI JIHOU 155. The latter precedent held that one of the co-principals was the co-principal of robbery (only) while the other co-principal was held to have committed robbery resulting in bodily injury.

<sup>39</sup> Maeda, *supra* note 1, at 418; Ohya, *supra* note 7 at 471.

Though it is rather an old precedent, the Daishin'in [Great Court of Judicature] on November 18, 1938 (17 KEISYU 839) convicted an accessory of the offense of murder on the occasion of robbery (not mere robbery).

<sup>40</sup> Maeda, *supra* at 418 (in support); Hitoshi Otsuka, *Keihou Souron* [General Theory of Criminal Law] at 272 (against).

<sup>41</sup> Ohya, *supra* at 417 (in support); Otsuka, *supra* at 279 (against).

<sup>42</sup> Ohya, *supra* at 464. The following are examples of statutes that provide for the punishment of the offense of instigation: Explosives Control Act Art. 4 (i.e., instigating the use of explosives for the purpose of obstructing security and inflicting

**c) Must the perpetrator have been apprehended or charged with the principal crime?**

No. Please refer to pages 14-15 of our previous report for the explanation.

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physical injury or property damage), Subversive Activities Prevention Act Art. 4 (i.e., instigating insurrection, instigating foreign aggression, and instigating the following offenses for the purpose of promoting, supporting or objecting to certain political principles or policies: riot, arson, endangering traffic, overturning of a railroad train, murder, etc.).