

Complicity: Elements of the Crime

Some additional Questions to consider before the A Round-Table Discussion

**“Emerging Trends in Business Liabilities
Under International Humanitarian and Criminal Law”**

Geneva, 7 September 2006

The following is intended to stimulate discussion at the Round table on September 7. The questions presented are in the form of a supplement to the questionnaire, and probe deeper into the question six of the survey instrument concerning complicity. Please look these over and consider what the answers might be in your jurisdiction.

In keeping with the theme of the Survey and the workshop, the questions should be considered with a view towards how they might apply in the context of business activities carried out in a conflict zone or in a country with a repressive government.

QUESTION SIX-ONE:

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.

In general:

Complicity requires “double intent”: intent towards the aiding and abetting and intent towards the crime.

- 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)*

In principle: yes. The intent that the (specific) crime is committed should be present. The kind of intent can range from *dolus specialis* to *dolus eventualis*. The intent must cover at least a part of the crime.

- 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 of some sort)? (sometimes referred to as a requirement of “knowledge”)*

Important here is the distinction made by the court in the van Anraat case between complicity to genocide and complicity to warcrimes.

In case of genocide: an accomplice has to know about the genocidal intent of the perpetrator. This is a stricter test than Dutch criminal law which requires that the accomplice should have taken the significant possibility into account. Given the special character of the crime of genocide – being the “crime of crimes”- the broader Dutch interpretation was not considered appropriate in this case.

In case of warcrimes: the requirement under Dutch national law are the same as those under international criminal law because special intent (genocide) is missing.

- c. *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 . . .”)*

No, the criterion of “foreseeability” is connected to *culpa* not intent.

- d. *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.*

Yes, in The Netherlands *dolus eventualis* (“voorwaardelijke opzet”) is accepted. An accomplice should have taken into account the considerable chance that the crime would be committed. In the Van Anraat case this was considered inappropriate when it concerns the crime of genocide.

- 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)?*

In principle no. The Van Anraat decision seems to point in the opposite direction where it concerns the crime of genocide. The unique character of this crime requires a more strict test.

- f. *Alternatively, would a court impose a more lenient test for lesser types of offenses? (e.g. misdemeanors)?*

Complicity to misdemeanours is not a crime in The Netherlands.

Comment: The questions posed are not intended to exhaust the possible ways in which a court might determine that the accomplice had the requisite *mens rea*, but are only

suggestions for beginning your analysis. The jurisprudence in your jurisdiction may indicate additional tests and forms for establishing *mens rea* for complicity. Once you have answered these questions to your satisfaction, if the result does not present an accurate or complete picture of the state of your country's laws, please feel free to elaborate further. In responding to this question, please keep in mind how your country's laws might deal with the situation where a legal person engaged in business activities is the purported accomplice and the crimes involved are grave breaches of international criminal law, as incorporated into the laws of your country.

QUESTION SIX-TWO:

What is the test in your country's complicity laws for determining that assistance was provided by the accomplice (the actus reus)?

In general: "to facilitate the accomplishment fo the main offence by the perpetrator"

- a. *Must the assistance be physical, i.e. in the form of money, cash, arms, active physical help, etc?*

No, providing information can be enough.

- b. *Could the assistance be moral, i.e. in the form of encouragement, incitement, approval, planning assistance, etc.*

Yes, however, encouragement is not considered sufficient.

- c. *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?*

Yes, this is known as 'passive complicity' and is only recognized if there is a *legal* duty to act.

- d. *Must the assistance have amounted to a substantial contribution towards the commission of the crime?*

No.

Comment: Please keep in mind that a situation where "corporate complicity" is involved generally presents a highly complex set of facts. A business entity's involvement in the affairs of a perpetrator may give it a special position that is often not available to an "ordinary" accomplice. If a business entity becomes aware of a customer's/supplier's/consultant's criminal practices or intentions, are there any actions that he or she is obligated to undertake? To cease doing?

QUESTION SIX-THREE:

In order to charge an accomplice with complicity:

a. Must an actual crime have been committed?

Yes.

b. Must the perpetrator have proceeded to the point at which he could be charged with an “attempted” crime?

Yes.

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

No.

Comment: The answers to this last set of questions are likely to be relatively straightforward, i.e. almost “yes” or “no.” Please provide citations with short quotations from the relevant decisions or statutes.