

**Complicity: Elements of the Crime****Additional Questions**

The following Questions Six-One through Six-Three are intended to provide comparative research data on national practice in applying complicity statutes. The Questions were discussed at the workshop held in Geneva on September 7, 2006. The results will provide invaluable information to be used by the International Commission of Jurists and by the UN Special Representative, John Ruggie, in formulating his final report to the UN Human Rights Council. 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.

Please respond by November 30, 2006, in time for the information you provide to be useful to the ICJ and Mr. Ruggie.

**GENERAL PROVISIONS**

Argentina's complicity laws are found mainly in articles 45 and 46 of the Penal Code in a Chapter called "Criminal Participation".

1. Article 45 punishes what is called "primary complicity", which requires "necessary cooperation" with the crime, i.e., the crime cannot be committed without that kind of cooperation (for example, to hold the victim while the perpetrator kills someone with a knife). Sometimes it is not easy to distinguish between a perpetrator of a crime and a primary accomplice, but in any case that is an abstract problem, because article 45 punishes both the perpetrator and the primary accomplice with the same sanction.

2. Article 46 punishes what is called "secondary complicity", which requires any other kind of cooperation different from the "necessary cooperation". It also includes support from the accomplice after the commission of the crime, based on previous promises. This complicity is punished with the sanction of the principal crime, reduced in 1/3 or 1/2 (for example, if a robbery is punished with 6 years of prison, a secondary accomplice of that crime may be punished with 4 or even 3 years of prison).

Any kind of cooperation provided after the commission of the crime without previous promises is not complicity but "encubrimiento" (cover up), which is contemplated in articles 277, 278 and 279 of the Penal Code and punished with another sanction.

3. Last sentence of article 45 regulates Instigation, and punishes anyone who "directly determines" another one to commit a crime, with the same sanctions of the crime. Instigation can be committed not only by words, but also by any symbolic mean: gestualic, written words, attitudes, etc.

**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.

- 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)

Both primary and secondary complicity, and Instigation as well, require *dolo* (there is not a such a thing as *dolo specialis*). The *dolo* requirement is a *subjective* aspect of the conduct of the accused, i.e. intention, which might be inferred from his action.

- 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”)

Accomplice must have actual knowledge that the assistance provided would assist the perpetrator to commit a specific crime. This means that he must know and understand that the assistance provided is capable of producing the results, i.e. the commission of the crime by the perpetrator.

If the crime committed by the perpetrator is different from the crime that the accomplice had in mind when he provided assistance, then the accomplice would be punished for this last crime.

- 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.

Technically it would be sufficient to show *dolus eventualis* (*accept the chance...don't care if the crime occurs!*).

- 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 . . .”)

No, it would not be sufficient. The concept of “*foreseeability*” is not acceptable in complicity and instigation law. It is required at least *dolus eventualis*.

- 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)?

No. The existence of the *mens rea* would depend on the circumstances and the evidence of the case.

- 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?

Argentina’s laws do not impose criminal liability on legal persons or government agencies, including state-owned enterprises, for acting as accomplices.

Civil law provides remedies for damage recovery, when a legal person or a government agency acts as an accomplice.

On the other hand, there are administrative mechanisms against members of governmental agencies who act as accomplice, which allows removal from office.

**Comment:** 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. The questions posed are not intended to be exhaustive as to the possible ways in which a court might determine that the accomplice had the requisite *mens rea*, but do suggest several categories for your analysis. The jurisprudence in your jurisdiction may indicate additional tests and forms for establishing *mens rea* for complicity. If the answers to these questions does not present an accurate or complete picture of the state of your country's laws on this issue, please feel free to elaborate further.

### **QUESTION SIX-TWO:**

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

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

No it doesn't. The assistance may be physical or in other forms.

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

Yes, the assistance can also be moral o verbal.

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

Yes, the assistance could consist of a failure to perform a legal duty.

- 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, complicity may be committed by omission.

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

- f. May the assistance be provided after the crime has been committed?

If the assistance is provided after the commission of the crime, without previous promises, it is not complicity or instigation but "encubrimiento" (cover up).

**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?

For an accomplice to be charged, the perpetrator must proceed at least to the point at which he could be charged with an “attempted”. The same is required for instigation.

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

For an accomplice to be charged, the perpetrator must proceed at least to the point at which he could be charged with an “attempted”. The same is required for instigation.

- 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.

FORD.

In an indictment issued in December 2006 against two ex agents of Ford Motor Argentina, (the security chief and the human resources manager) the prosecutor concluded that according to the evidence gathered, they have participated directly as perpetrators in the crimes against humanity (arbitrary and illegal detention and torture) suffered by Ford union leaders. Therefore, no complicity rules were applied.

However, the workers, acting as private accusers, intended to obtain an indictment of two other former executives from Ford, the General Manager of the Plant and the President of the Company. In these cases, complicity rules would apply. This issue would arise at some point.

VON WERNICH, Cristian Federico.

Von Wernich is a priest and as such he was part of the military during the dictatorial regime. He has been accused of being accomplice of crimes against humanity.