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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT  
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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MEMORANDUM FOR  
THE OFFICE OF THE PROSECUTOR

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ISSUE 1:

A COMPARATIVE ANALYSIS OF THE MENS REA  
REQUIREMENT FOR COMPLICITY AS APPLIED IN  
THE INTERNATIONAL TRIBUNALS AND THE  
COMMON-LAW JURISDICTIONS OF  
THE UNITED STATES, ENGLAND & AUSTRALIA

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# I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

## A. ISSUES

This research memorandum is a comparative analysis of the mens rea requirement for the offense of Complicity in Genocide as applied under the ICTR and ICTY, as well as the common-law jurisdictions of the United States, England and Australia.

The theory of accomplice liability for the criminal acts of others is one of the most contested areas of modern criminal jurisprudence. With the emergence of the Yugoslavia and Rwanda tribunals in the past decade, the international community has placed a high premium upon prosecuting those who aid or abet the crime of genocide and other crimes against humanity. Despite the unanimity throughout the international community that punishment for the crime of genocide should extend beyond the principal offender, there seems to be substantial discord both between and within the two tribunals as to what the appropriate mens rea for complicity in genocide should be. The first part of this memorandum will be devoted to discussing the similarities and differences between the two tribunals with respect to this issue.

The lack of a coherent standard for the requisite mental state of complicity is the natural consequence of the diverse approaches taken to the issue among legal systems worldwide. The second part of this memorandum will be a comparative analysis of three of those legal systems; 1) The United States; 2) England; and 3) Australia. By examining the approaches taken in these three systems, the full range of issues inherent in determining the proper mens rea for complicity will be discussed.

The International Criminal Tribunal for Rwanda, in *Akayesu*<sup>1</sup>, held that the mens rea requirement for complicity in genocide is knowledge. However, the Trial Chamber created much confusion when it attempted to distinguish between “complicity” and “aiding and abetting”. Two seemingly contradictory provisions in the Statute of the Rwanda Tribunal prompted this distinction. Article 6(1) of the Statute requires that prosecution for aiding and abetting the crime of genocide requires specific intent, whereas Complicity in Genocide under Article 2 3(e) has been interpreted not to require specific intent.

The International Criminal Tribunal for the Former Yugoslavia attempted to reconcile the confusion that the *Akayesu* court caused. The *Stakic* court, in a 98 BIS decision, refused to acknowledge the distinction from *Akayesu* and instead held that aiding is a form of complicity in genocide, and therefore the appropriate mens rea should be knowledge<sup>2</sup>.

The *Stakic* court’s holding raises more questions than it answers, however. There is no textual basis in either the Yugoslavia or Rwanda Statute for the position that knowledge is the appropriate mental state for determining the guilt of an accomplice. Furthermore, as we shall see, this position goes against the great weight of authority under Common Law jurisdictions, which tend to take one of two positions. The first, and most prevalent, requires the accomplice to possess the same mens rea as the principal actor. The alternative theory requires foreseeability that the principal offense may be committed. This foreseeability standard, however, applies where the accomplice and the principal actor are engaged in a joint “enterprise” or “venture”. Rarely have courts extended liability to the disinterested accomplice.

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<sup>1</sup> Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T [Enclosed at Binder Tab 4 ]

<sup>2</sup> Prosecutor v. Milomir Stakic, Case No. IT-97-24-T, Decision on Rule 98 *Bis* Motion for Judgment of Acquittal at ¶ 65 (October 31, 2002) [Enclosed at Binder Tab 6 ]

It is troubling that the international tribunals have interpreted complicity so broadly as to encompass nearly all persons who aid or abet a person who commits genocide. Genocide is the worst of all crimes against humanity, and therefore prosecution and punishment of persons who aid others in the commission of this crime should be limited only to the worst of all such persons. In other words, prosecution for the crime of complicity in genocide should be limited to those who give assistance with the *purpose* of carrying out a genocidal act.

## B. SUMMARY OF CONCLUSIONS

1. The mens rea for complicity in genocide, as applied in the International Criminal Tribunal for Rwanda, requires that at the moment the accomplice acted, he knew of the assistance he was providing in the commission of genocide. The accomplice need not possess the specific intent to commit genocide. Under the ICTR, “aiding and abetting” genocide is distinguishable from complicity inasmuch as a person being prosecuted for “aiding and abetting” genocide must possess the specific intent to commit the principal offense.
2. The International Criminal Tribunal for the former Yugoslavia, unlike its Rwandan counterpart recognizes “aiding and abetting” as a form of complicity, thereby eliminating any distinction between the two. Under the ICTY, the mens rea for aiding and abetting as a form of complicity in genocide only requires knowledge of the elements of the crime of genocide, including the specific intent of those who he aids to commit the principal offense.

3. The mens rea standard for complicity in the United States varies, depending upon the particular jurisdiction. Generally, U.S. courts hold that accomplice liability does not attach to a person unless he had purpose to commit the principal offense. A minority of jurisdictions require that the accomplice only have knowledge that the principal intends to commit the offense, and even fewer still will find accomplice liability where the principal's criminal act was merely foreseeable.
4. In England, a secondary party may be found guilty as a principal if he participates in a joint venture, while realizing over the course of the venture the principal may engage in criminal conduct. It is not necessary for the accomplice to contemplate the particular crime committed. Instead, it is only necessary that he realize or contemplate that one of a number of crimes may be committed.
5. Under Australian law, a party will be liable for an act which he contemplates may be carried out by the other party in the course of a joint enterprise. However, the test for determining whether a crime falls within the joint enterprise is subjective. Therefore, the particular crime must fall within the scope of the shared criminal purpose of the parties.

## **II. FACTUAL BACKGROUND**

In 1994, over 500,000 people were killed in a bloody civil war that ravaged the small central African country of Rwanda. Thousands more were raped, tortured and beaten. Months after the war ended, the United Nations found that genocide and crimes against humanity had occurred in Rwanda and established an international criminal tribunal to prosecute the responsible parties.

On November 8, 1994, the United Nations Security Council passed resolution 955 establishing the International Criminal Tribunal for Rwanda (ICTR).<sup>3</sup> The ICTR was patterned largely after the recently established International Criminal Tribunal for the Former Yugoslavia. Thus, the tribunal derives its authority from Chapter VII of the United Nations Charter.

### III. LEGAL DISCUSSION

#### A. AUTHORITY FOR PROSECUTING COMPLICITY IN GENOCIDE

Genocide is recognized as an international crime under the Genocide Convention of 1948<sup>4</sup> and provides that an international criminal tribunal may prosecute the crime of genocide.<sup>5</sup> In addition to genocide, the Convention also recognizes complicity in genocide as an act punishable under international law.<sup>6</sup>

The ICTR Statute's definition of genocide is identical to the definition provided by the Convention. The ICTR Statute, like the Convention, also provides for the prosecution of complicity in genocide. Article 2 of the ICTR Statute provides as follows:

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

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<sup>3</sup> S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg., U.N. Doc. S/RES/955 (1994) [Enclosed at Binder Tab 1 ]

<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951 GA Res. 96(I) (1951) [Enclosed at Binder Tab 2 ]

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) Genocide;
  - (b) Conspiracy to commit genocide;
  - (c) Direct and public incitement to commit genocide;
  - (d) Attempt to commit genocide;
  - (e) Complicity in genocide.<sup>7</sup>

The prosecution of complicity as a criminal act is universally accepted. Similarly, the prosecution of complicity in genocide is also universally accepted, the origins of which date back to Nuremberg.<sup>8</sup> Complicity in genocide has been prosecuted recently at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

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<sup>7</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951 GA Res. 96(I) (1951) [Enclosed at Binder Tab 2 ]

<sup>8</sup> Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission, GA Res. 177A(II). “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle IV is a crime under international law.” *Id.* [Enclosed at Binder Tab 3 ]

## B. DEFINITION OF COMPLICITY IN GENOCIDE

Complicity in genocide is prosecuted under the common law theory of accomplice liability. In short, one who aids or abets another in the commission of a crime may be held criminally liable.<sup>9</sup> Although the standard for establishing accomplice liability deviates among jurisdictions, the basic premise, i.e. that the accomplice borrows the criminality of the act committed by the principal perpetrator, is universally understood.<sup>10</sup>

An accomplice in genocide is someone who associates himself in the offense of genocide committed by another. In this regard, complicity can only exist where the crime of genocide has actually been committed. Therefore, it must be proven beyond a reasonable doubt that the crime of genocide has been committed.<sup>11</sup> Note, however, that it is not necessary that the perpetrator to the principal offense have been tried in order for a person to be prosecuted for complicity.<sup>12</sup>

There are two elements necessary to establish culpability for the crime of complicity in genocide: an act, or *actus reus*, and a culpable mental state, or *mens rea*. Although the *mens rea* element is the subject of this memorandum, let us first generally examine the crime of complicity in genocide as defined under the ICTR Statute.

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<sup>9</sup> Stanford H. Kadish, *Complicity, Cause and Blame: A study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 336-37 (1985) [Enclosed at Binder Tab 32 ]

<sup>10</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgment, 15 July 1999 at ¶ 224 [Enclosed at Binder Tab 7 ]

<sup>11</sup> Prosecutor v. Alfred Musema, Case No. ICTR-96-13 at ¶¶ 170-73 [Enclosed at Binder Tab 5 ]

<sup>12</sup> *Id.* at ¶ 174.

## 1. ACTUS REUS

As before mentioned, the first element of culpability for complicity in genocide is the commission of the act, or the *actus reus*. In the case of complicity in genocide, the actor is an accomplice. The ICTR Statute, Article 91 defines an accomplice as:

- (1) A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations, or artifice, directly incite(s) to commit such action or order(s) that such action be committed.
- (2) A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
- (3) A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.

Thus, accomplice participation in genocide can be divided into three basic forms: 1) procuring means; 2) aiding and abetting; and 3) instigation. These forms of accomplice participation are recognized in Civil Code jurisdictions and Common Law jurisdictions alike.<sup>13</sup> Note that complicity in genocide is not merely a lesser-included offense to genocide, but rather an independent offense.<sup>14</sup> The rationale for this approach is that, unlike most other crimes, the accomplice's level of culpability is often greater than that of the principal actor(s).<sup>15</sup>

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<sup>13</sup> Prosecutor v. Alfred Musema, Case No. ICTR-96-13 at 176-177. [Enclosed at Binder Tab 5 ]

<sup>14</sup> Robert T. Sheets, *Memorandum for the Office of the Prosecutor: Complicity in Genocide as an Alternative Count to Genocide* (May 1999) [Enclosed at Binder Tab 36 ]

<sup>15</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes* 286 (Cambridge University Press 2000). (“Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing ‘secondary’ about it. The ‘accomplice’ is often the real villain, and the ‘principal offender’ a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was ‘only’ an accomplice to the crime of genocide.”) *Id.* [Enclosed at Binder Tab 31]

## 2. MENS REA

The second element of complicity in genocide is the mental state of the offender, or the mens rea. To be convicted for complicity in genocide under the ICTR, the Prosecutor must prove that the accused knowingly and voluntarily aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The remainder of this memorandum will focus upon the mens rea element of complicity and how it has been applied in several different tribunals and jurisdictions.

### C. MENS REA UNDER THE ICTR

The ICTR has stated the mens rea requirement for complicity in genocide as knowledge. In *Akayesu*, the Tribunal attempted to distinguish the crimes of genocide and complicity in genocide by holding that “[t]he intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offense. In other words, the accomplice must have acted knowingly.”<sup>16</sup>

However, the *Akayesu* court’s distinction between genocide and complicity in genocide was somewhat unclear due to the Tribunal’s interpretation of Article 6(1) of the Statute of the Rwanda Tribunal, entitled “Individual Criminal Responsibility”. That section provides as follows:

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<sup>16</sup> Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, at ¶ 90 [Enclosed at Binder Tab 4 ]

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

The Akayesu court held that under Article 6(1) of the Statute, a person who aids or abets another in the commission of genocide must have the specific intent for genocide in order to be held individually liable for the crime. However, where a person lacks specific intent, but has knowledge of the principal's intent to commit genocide, such person may be held liable only for complicity:

. . . the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.<sup>17</sup>

The *Akayesu* Judgment, then, begs the question: Is there a legal distinction between aiding and abetting another in the crime of genocide pursuant to Article 6(1) and complicity in genocide? Should there be? If so, what is it?

#### D. MENS REA UNDER THE ICTY

The case *Prosecutor v. Milomir Stakic* was among the first international tribunal case to directly address the questions raised by the *Akayesu* court's blurred distinction between "aiding and abetting" genocide and complicity in genocide. The Trial Chamber, in ruling on a 98 *Bis* Motion for Judgment of Acquittal, declined to adopt the *Akayesu* court's reasoning.

The Trial Chamber observes that in the *Akayesu* Trial Judgment, a distinction was drawn between aiding and abetting, planning, preparing or executing genocide under Article 6(1) of the Statute of the Rwanda Tribunal (individual criminal responsibility), and complicity in genocide. With respect to the former category, the Trial Chamber was of the opinion that specific genocidal intent was required for each mode of participation. This Trial Chamber is reluctant to endorse the

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<sup>17</sup> Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at ¶ 544 [Enclosed at Binder Tab 4]

distinctions drawn in *Akayesu*. Indeed, the Prosecution in the current case pointed out that these distinctions are “not sustainable in law.”

The *Stakic* Trial Chamber clarified the mens rea standard for complicity in genocide, holding that the mens rea for aiding and abetting *as a form of complicity in genocide*, only requires knowledge of the elements of the crime of genocide, including the genocidal intent of superiors or other persons, and acceptance of the course of events, taking into account the foreseeable consequences of providing substantial support.<sup>18</sup> This view is consistent with *Prosecutor v. Tadic*, another ICTY case, which held:

In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.<sup>19</sup>

Nonetheless, the *Stakic* court acknowledged that this concept was a departure from the strict pre-requisite of specific intent related to all forms of committing and participation in genocide without further discussion of the rationale for such a departure.

Commentators on the subject have criticized the Yugoslavia Tribunal’s position, that the mens rea for complicity in genocide is lesser than that of the principal offender of genocide. As discussed earlier, often in the case of genocide, it is more often than not the accomplice who possesses the genocidal intent. William Schabas argues that there should be no distinction between the principal and the accomplice, and criticizes the assertion that the mens rea of the accomplice is knowledge, rather than intent. Schabas offers the following scenario:

The person who procures a machete for a militia member or otherwise incites that person, knowing that an act of genocide will be committed, fully intends to participate in genocide. The mens rea or guilty intent is absolutely comparable

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<sup>18</sup> Prosecutor v. Milomir Stakic, Case No. IT-97-24-T, Decision on Rule 98 *Bis* Motion for Judgment of Acquittal at ¶ 65 (October 31, 2002) [Enclosed at Binder Tab 6]

<sup>19</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, 15 July 1999 at ¶ 229(iv) [Enclosed at Binder Tab 7]

with that of the principal offender. Indeed, that is precisely why criminal law treats the accomplice's guilt on the same plane as the principal's<sup>20</sup>

Schabas' criticism is well taken, however his "guilty intent" approach does not adequately address the issue of whether knowledge is the appropriate mens rea for Complicity in Genocide. His uses of the extreme examples of procuring a machete or otherwise inciting are acts that a trier of fact can reasonably find to constitute purpose or intent. Aiding and abetting can be far broader than just providing weapons or inciting another to commit the principal offense.

International Criminal Tribunals of this magnitude should place greater emphasis on the mental element of all offenses that involve accomplice liability. They would do well to consider the approaches taken by common law jurisdictions, which generally require the accomplice to possess the same mens rea as the principal offender.

#### D. MENS REA FOR COMPLICITY IN COMMON LAW JURISDICTIONS

The requisite mental state for complicity varies among jurisdictions internationally. The remainder of this memo will discuss the mens rea for complicity in the common law jurisdictions of the United States, England, and Australia.

##### 1. Mens Rea for Complicity in the United States

The issue of whether a person can be guilty of complicity if he has knowledge that his assistance will further a crime, but lacks the purpose that the crime be committed has been a

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<sup>20</sup> *Id.* at. 303.

subject of debate in U.S. jurisprudence.<sup>21</sup> Although the case law is somewhat mixed on this issue, most courts hold that a person does not have accomplice liability unless he had criminal purpose<sup>22</sup>.

U.S. Courts generally hold that a person is an accomplice in the commission of a crime if he intentionally aids or abets the principal in the commission of the crime.<sup>23</sup> The difficulty in using the word “intent” to define the appropriate requisite mental state for accomplice liability is that it can mean two different things; 1) intent to assist the principal; and/or 2) intent that the principal commit the crime.<sup>24</sup>

There are several different theories of accomplice liability *mens rea* among State courts. Some courts hold that the accomplice must have foreseen the acts of the principal offender, while others hold that the accomplice must have knowledge that the principal intends to commit the offense. Others, however, have adopted the Model Penal Code approach, requiring the accomplice to possess the full *mens rea* of the offense.

Under the Model Penal Code, purpose is a requirement for accomplice liability. Model Penal Code §2.06 provides, in part;

- (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
- (2) A person is legally accountable for the conduct of another person when:

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<sup>21</sup> Wayne R. LeFave, *Substantive Criminal Law* p. 147 (1996) [Enclosed at Binder Tab 34]

<sup>22</sup> *State v. Duran*, 526 P.2d 188, 189 (N.M. Ct. App. 1974) [Enclosed at Binder Tab 8] ; *see also* *People v. Beeman*, 674 P.2d 1318, 1326 9Cal (1984) [Enclosed at Binder Tab 9]; *State v. Gladstone*, 474 P.2d 274, 278 (Wash. 1970) [Enclosed at Binder Tab 10]

<sup>23</sup> *See* *People v. Burns*, 242 Cal. Rptr. 573, 577 (Ct. App. 1987) [Enclosed at Binder Tab 11]; *Virgilio v. State* 834 P.2d 1125, 127 (Wyo. 1992) [Enclosed at Binder Tab 12]

<sup>24</sup> *See* *State v. Harrison*, 425 A.2d 111, 113 (Conn. 1979) [Enclosed at Binder Tab 13]; *State v. Neal*, 14 S.W.3d 236, 239 (Mo. Ct. App. 2000) [Enclosed at Binder Tab 14]

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

(b) his conduct is expressly declared by law to establish his complicity.

Generally, States that have incorporated the Model Penal Code rules for Complicity interpret it so as requiring the principal and the accomplice to possess the same mens rea. One court, for example, held that “[f]or both the accomplice and his partner to be guilty, ‘it is essential that they shared in the intent which is the crime’s basic element. . . .”<sup>25</sup>

Model Penal Code jurisdictions have been less willing, however, to extend accomplice liability in crimes where the mens rea is recklessness. Where a defendant loaned his car to a friend who he knew was drunk, and subsequently killed two people in a car accident, the court held that “our interpretation of the accomplice liability statute effectuates the policy that an accomplice’s liability ought not to extend beyond the criminal purposes that he or she shares.”<sup>26</sup> This interpretation, however, disregards the provision that addresses the appropriate mens rea to be exhibited toward a result element of a crime, in this case a reckless disregard for human life.<sup>27</sup>

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<sup>25</sup> State v. White 98 NJ 122, 484 A.2d 691 [Enclosed at Binder Tab 15]

<sup>26</sup> State v. Etzweiler 125 N.H.57, 480 A.2d 870 (1984) [Enclosed at Binder Tab 16]

<sup>27</sup> Grace E. Mueller, The Mens Rea of Accomplice Liability 61 S. Cal. L. Rev. 2169 (1988) [Enclosed at Binder Tab 33]

Many of the jurisdictions that embrace a common law approach to accomplice liability also require, just as in Model Penal Code jurisdictions, the accomplice to possess the same mental state as the principal offender. In Virginia, for example, the court held that an accomplice to arson “must share the criminal intent of the party who actually committed the arson or be guilty of some overt act in furtherance thereof.”<sup>28</sup>

Other common law jurisdictions actually codify the common law concepts of aiding & abetting, counseling, encouraging, procuring, etc. into statutory form. These statutes do not include an explicit mens rea requirement, but instead rely upon common law applications of the mental state. In Janke v. State, for example, the court held that the prosecution “must demonstrate that a defendant shared the criminal intent of the principal if he is to be found guilty as an aider and abettor.”<sup>29</sup>

Some states, however, require only knowledge to impose accomplice liability, employing a foreseeability standard in determining whether the accomplice possessed a culpable mental state. The mental state in such cases is knowledge. In People v. Beeman, the court held that “The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages.”<sup>30</sup>

The leading case to the contrary is United States v. Peoni,<sup>31</sup> where the court held that traditional definitions of accomplice liability:

have nothing to do with the probability that the forbidden result would follow upon the accessory’s conduct; and that they demand that he in some sort associate himself with the venture, that he

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<sup>28</sup> Augustine v. Commonwealth 226 Va. 120, 306 S.E.2d 886 (1983) [Enclosed at Binder Tab 17]

<sup>29</sup> Jahnke v. State 692 P.2d 911 (Wyo. 1984)[Enclosed at Binder Tab 18]

<sup>30</sup> People v. Beeman 35 Cal. 3d 547, 674 P.2d 1324 [Enclosed at Binder Tab 9]

<sup>31</sup> United States v. Peoni 100 F.2d 401 (1938) [Enclosed at Binder Tab 19]

participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the key words used—even the most colorless, ‘abet’—carry an implication of purposive attitude towards it.

Some states have attempted to reach a compromise position by taking the seriousness of the offense into consideration.<sup>32</sup> Others consider the degree to which the accomplice knowingly aided in the criminal scheme and employ a gradation of offenses for accomplice liability.<sup>33</sup>

There is little or no uniformity among American jurisdictions with respect to this issue. This diversity in the several States’ approaches to the mens rea for complicity provides, however, a rather comprehensive exhibit of the many issues inherent in determining what the proper mens rea standard should be for attaching accomplice liability.

## 2. Mens Rea for Complicity in England

English law on the mens rea of accessories has developed considerably over recent years, particularly as it relates to offenses against the person. Under English law, a secondary party is guilty of murder if he participates in a joint venture realizing that, in the course of the joint venture, the principal might use force with intent to kill or cause grievous bodily harm, and the principal does so. The secondary party has lent himself to the enterprise, and, by doing so, he has

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<sup>32</sup> *People v. Lauria* 251 Cal.App.2d 471 ("For instance, we think the operator of a telephone answering service with positive knowledge that his service was being used to facilitate the extortion of ransom, the distribution of heroin, or the passing of counterfeit money who continued to furnish the service with knowledge of its use, might be chargeable on knowledge alone with participation in a scheme to extort money, to distribute narcotics, or to pass counterfeit money. The same result would follow the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use.") [Enclosed at Binder Tab 20]

<sup>33</sup> N.Y.--McKinney's Penal Law § 115.00, "criminal facilitation in the second degree," a misdemeanor, requires: (1) conduct which provides another with means or opportunity for the commission of a crime; (2) which in fact aids another to commit a felony; and (3) belief that it is probable that the aid is being rendered to another who intends to commit a crime, § 115.05, "criminal facilitation in the first degree," a felony, is limited to aid which is believed probable to aid and does aid the commission of murder or first degree kidnapping. [Enclosed at Binder Tab 21] See also Ariz.Rev.Stat. § 13-1004 ("acting with knowledge that another person is committing or intends to commit an offense, such person knowingly provides such other person with means or opportunity for the commission of the offense and which in fact aids such person to commit the offense") [Enclosed at Binder Tab 22]; See also Ky.Rev.Stat. 506.080 [Enclosed at Binder Tab 23]

given assistance and encouragement to the principal in carrying out an enterprise which the secondary party realizes may be murder.<sup>34</sup>

To realize the principal offense might be committed, the accomplice must consider it as a real, not fanciful, possibility.<sup>35</sup> It is not necessary, however, for the aider and abettor to know the precise crime that was intended. If he “realizes”<sup>36</sup> or “contemplates”<sup>37</sup> that one of a number of crimes may be committed, and one of those crimes is committed, his intention to assist the commission of any one of those crimes is sufficient mens rea for the crime actually committed.<sup>38</sup> Furthermore, it is not necessary that the person aiding and abetting the commission of the offense actually know that the offense has been committed.<sup>39</sup>

There is no suggestion in these cases that a disinterested party can be held liable as an accomplice. In situations where liability has been imposed, even liability for principal offenses that should have been “foreseen”, the party actually engaged in some sort of joint enterprise with the principal offender. His participation in the enterprise gives rise to his culpability and “guilty mind.” This is a far narrower standard than the naked “knowledge” requirement in the international tribunals.

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<sup>34</sup> R. v. Powell and anor; R. v. English (1999) 1 Cr.App.R. 261. *See also* Chan Wing Siu v. R. (1985) 80 Cr.App.R. 117. [Enclosed at Binder Tab 24 ]

<sup>35</sup> R. v. Roberts 96 Cr.App.R. 291 [Enclosed at Binder Tab 25 ]

<sup>36</sup> R. v. Hyde (1991) 92 Cr.App.R. 131 [Enclosed at Binder Tab 27]

<sup>37</sup> Maxwell v. Director of Public Prosecutions for Northern Ireland (1978) 68 Cr.App.R. 128. [Enclosed at Binder Tab 28]

<sup>38</sup> Archbold from Sweet and Maxwell (2002) Chapter 17 – The Mental Element in Crime, UK ARCH 17-71. [Enclosed at Binder Tab 36]

<sup>39</sup> Johnson v. Youden (1950) 1 K.B. 544, DC (“Before a person can be convicted of aiding and abetting the commission of an offense he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of these things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence . . .”) *Id.* at 546-547. [Enclosed at Binder Tab 29]

### 3. Mens Rea for Complicity in Australia

Australian law takes a similar approach to English law with respect to the mens rea requirement for complicity. Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act.<sup>40</sup>

The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission.<sup>41</sup>

This liability extends to any offenses that arise as a possible consequence to the criminal venture.<sup>42</sup>

The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: "in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose".<sup>43</sup>

Therefore, under Australian law, courts must consider the common purpose of the principal offender and the accomplice. The scope of this "common purpose" is determinative of whether an accomplice liability shall attach. Once again, this standard is significantly narrower than that of the international tribunals.

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<sup>40</sup> McAuliffe v. R. (1995) 183 CLR 108 at 114 [Enclosed at Binder Tab 30]

<sup>41</sup> Id.

<sup>42</sup> R. v. Johns (1978) 1 NSWLR 282 at 287-290 [Enclosed at Binder Tab 31]

<sup>43</sup> McAuliffe v. R. (1995) 183 CLR 108 at 114 [Enclosed at Binder Tab 30]