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the case of Westerbork camp commander, Albert Gemmeker

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Criminal law 02.02.2021 Göran Sluiter

Mens Rea and complicity during the Holocaust – the case of Westerbork camp commander, Albert Gemmeker

1. Introduction

In 2019, Dutch journalist Ad Van Liempt published a biography on Nazi official Albert Gemmeker, who acted as commander of Dutch detention camp Westerbork from October 1942 to April 1945. Westerbork is situated in the east of the Netherlands in the province of Drenthe, and served as a transition camp for Jews and others residing in the Netherlands. Some time after their arrival in Westerbork, detained persons were transported by train to camps in East Germany and Poland, to Auschwitz in particular. Around 80,000 Jews were transported from Westerbork and almost all of them were killed.

Van Liempt's biography of Gemmeker offers an intrusive, horrific and meticulous picture of the living conditions in Westerbork. In addition, there is quite some attention to what happened to Gemmeker after the war and, in that context, the crucial question of whether Gemmeker knew about the fate awaiting Jews in Auschwitz and other camps at the time of the transportations from Westerbork.

The present blog takes the case of Gemmeker as a starting point to argue that an appropriate standard of knowledge should sufficiently take into account all relevant facts and circumstances in situations of aiding and abetting international crimes, and should not depend too much, as happened in the case of Gemmeker, on a lack of direct evidence (such as a confession). Before making this argument, I will briefly describe the legal proceedings in which Gemmeker was involved after the war.

2. After the war: limited prosecution in the Netherlands and two-time dismissal of Gemmeker's case in Germany

Before Gemmeker passed away in 1982, he was the object of three criminal investigations into his role as Westerbork commander.

Immediately after the war, Gemmeker was prosecuted in the Netherlands. These were based on special criminal laws, Wet over de Bijzondere Rechtspleging and Besluit Buitengewoon Strafrecht. After a thorough investigation, Gemmeker's criminal trial at the Special Court in Assen, the Netherlands, took place from December 1948 to January 1949, and covered three days. Because the prosecution service did not find there was sufficient evidence of Gemmeker's knowledge about the extermination of the Jews transported to Germany and Poland, the charges against Gemmeker were limited to the war crime of deportation for the purposes of forced labour. The Special Court agreed with this in its verdict. The Court, however, also found that 'the deported persons would be subjected to extremely bad circumstances during their detention in Germany and Eastern-Europe, circumstances which are so terrible that a considerable number of them would not survive their detention' (quote in Van Liempt's book, footnote 56). Despite this consideration, it did not result in a harsh sentence. Gemmeker was convicted to 10 years of imprisonment. The Court considered it a mitigating factor that, among other things, Gemmeker's administration of Westerbork was 'reasonable' compared to that of other German officials' conduct in similar positions. Van Liempt rightfully points out that Gemmeker's sentence seems particularly light when compared to Dutch nationals who were sentenced to the death penalty in other trials (commuted to life imprisonment) on account of handing over and betraying Jews to Nazi officials. Interestingly, as Van Liempt points out, in all of these other cases it was not necessary to prove that the accused knew about the extermination of the Jews; it was sufficient they knew more generally that a terrible fate awaited them. Gemmeker withdrew his appeal against his conviction, and effectively only served 6 of the 10-year sentence.

Upon release in 1951, Gemmeker returned to Germany to live out the rest of his life. Following a TV interview given by Gemmeker at the end of the 1950s on German TV, the German prosecution opened a preliminary investigation into his case in April 1960. This investigation included a search and seizure operation into his home, and an interrogation of a few witnesses and the suspect. Van Liempt describes how the German authorities eventually decided not to pursue the prosecution because under German law at the time, Gemmeker should have had knowledge of the extermination the Jews, or should have knowingly accepted the possibility of such extermination at the moment of transportations from Westerbork. According to the prosecution service of Düsseldorf in 1961, this could not be proven.

But these were not the final efforts. In the 1960s, criminal investigations were launched in the south of Germany against Gemmeker's superiors, Wilhelm Harster and Willi Zöpf, responsible for organizing the arrest and transportation of Jews from the Netherlands. Both suspects admitted to being aware of the fate awaiting the Jews after their transportation. This resuscitated interest in a renewed preliminary investigation against Gemmeker. Harster and Zöpf, admitting their knowledge, were convicted by the Munich Court in 1966. In addition, a co-accused, while denying knowledge of the 'Endlösung', was convicted because the Court refused to believe this denial. This seemed to pave the way for successful prosecution of Gemmeker for aiding and abetting in the extermination of Jews transported from Westerbork. In the years 1973 and 1974, another lengthy investigation against Gemmeker followed, this time a judicial investigation, and again Gemmeker was interrogated as a suspect. After the results of the judicial investigation were transferred to the prosecution service, the latter dismissed the case. This dismissal was confirmed by a Court in December 1976. Again, the dismissal of the case was based on the apparently crucial issue of lack

of sufficient proof of knowledge on the part of Gemmeker about the extermination of the Jews transported from Westerbork.

In the chapter 'The central question', Van Liempt pays a good deal of attention to whether or not Gemmeker knew about the fate awaiting the Jews after leaving Westerbork. On the basis of a variety of facts and circumstances, Van Liempt concludes that Gemmeker must have known about the extermination of Jews and that he had simply been lucky that he escaped a conviction for aiding and abetting in this extermination. That said, one has to acknowledge that clear and direct evidence of Gemmeker knowingly sending the Westerbork-inmates to their death was not available. Gemmeker was intelligent and consistent in his defence. Not only did he consistently claim that he was unaware of the fate of the Jews and that he was convinced they would be sent to various camps to be subjected to forced labour, he also claimed to have made inquiries about what would happen to the Westerbork-transports. According to him, his superiors—those organizing the deportation of Jews (the Dutch branch of the Judenreferat), including Willi Zöpf and Wilhelm Harster—told him that any stories about Jews being killed were false 'enemy propaganda', which, according to Gemmeker, 'reassured him'.

Van Liempt, with reason, criticised the prosecution services placing too much weight on the statements of Gemmeker. He convincingly points out some inconsistencies – or lies – in Gemmeker's statements, such as his denial of being present at a visit by Eichmann to The Hague, when the minutes of that meeting mention his name. But by and large, over the years Gemmeker had made consistent statements about his lack of knowledge about the fate of those leaving Westerbork.

Such statements can, of course, be undermined when there is clear evidence to the contrary. However, none of the many witnesses interrogated provided direct evidence, based on personal knowledge and perception, that Gemmeker knew about the fate of Jews transported from Westerbork. There were certainly witnesses assuming that he must have known, or witnesses making inferences, for example that Gemmeker was seen talking in a serious way with the train personnel before the train left Westerbork, and therefore must have known about what happened at Auschwitz. Gemmeker was also fortunate enough that his superiors, Zöpf and Harster, who were in charge of the deportation of Jews residing in the Netherlands and who confessed fully to their crimes, stated that they were aware of Jews being killed after leaving the Netherlands, but did not offer evidence that Gemmeker knew this as well.

3. Construing mens rea

Looking at the available evidence, one could say that Gemmeker is one of those borderline cases when it comes to the requisite mens rea standard for aiding and abetting international crimes. Applying the criminal law principle of *in dubio pro reo*, a dismissal of his case may therefore have been the inevitable result. But what matters is not only the evidence, but also the application of an appropriate mens rea standard in the context of assistance to mass atrocities. Here I offer a few reflections on this matter.

Interestingly, the focus in all criminal investigations into Gemmeker was almost entirely on his knowledge of Jews being killed in Auschwitz, or other camps. On the one hand, this seems logical and also simplifies matters, as it would allow us to connect the assistance provided by Gemmeker to each Westerbork inmate being murdered in one of the extermination camps. However, victims died not only upon arrival in Auschwitz or another camp, but also when they were exposed to the

terrible conditions of the transportation by train. In this respect, it is worth mentioning that in one instance Gemmeker transported sick people from the Westerbork hospital wing; clearly, under these conditions, it could be easily contended that Gemmeker contributed to the killing of several individuals by exposing them to terrible conditions and withholding proper care. Concentrating on the victims who died during transportation and charging Gemmeker with – at least – aiding and abetting in their killing, has as an advantage that undeniably Gemmeker had full and actual knowledge of the conditions he exposed the victims to: he saw and inspected the trains, saw how many persons were put on the train and he was aware of the very long duration of the ride. It is therefore indeed surprising that the victims who died during transportation appear to have been overlooked and were apparently not considered sufficiently important for bringing charges of aiding and abetting their murder.

A second reflection relates to the construction of knowledge in the absence of direct evidence, for example in the form of a confession or a statement by a co-accused. Under these circumstances it should be essential to take all relevant facts and circumstances fully into account in order to determine whether or not the accused had knowledge of the fate of the Jews, or whether, in the absence of actual knowledge, he accepted the killing of Jews as a result of his assistance. The latter standard could be equated with a 'should have known' standard or an application of *dolus eventualis* in relation to knowledge. Under both Dutch and German criminal law this is the minimum threshold regarding the requisite mens rea for aiding and abetting crimes.

It is indeed quite surprising that the Dutch and German prosecution services considered that they would not be able to construe Gemmeker's mens rea, also not in its less stringent form, for the purposes of bringing charges of aiding and abetting in the murder of Jews. Looking at relevant facts and circumstances at the time, a different approach would in my opinion have done more justice to the situation at hand.

In this regard, I acknowledge, as a starting point, that information during WW II was not as easily available and communicated as it is today in this modern age of (digital) media and communication. It is also fair to say that during a war, assessing the veracity of information is greatly clouded by propaganda, and that Gemmeker's capacity of judgement may have been negatively influenced by many years of Nazi propaganda.

That said, it was known to everyone, including Gemmeker, that Jews had been discriminated, mistreated and targeted as an enemy of the German people for many years. It was equally known to everyone that under Nazi rule there was no longer any proper rule of law or due process to speak of, and that the Jews could not rely on anyone or any institution in Germany for their (legal) protection. They were fully at the mercy of the regime and the many Germans who despised them and considered them the enemy of mankind. With that knowledge, Gemmeker must have drawn the conclusion that a terrible fate would await all the Jews he transported out of Westerbork. And even if in his own mind he did not foresee the killing of all transported Jews, or the large majority of them, he could not have drawn any other plausible conclusion than that at least a significant number of them would be killed, which clearly suffices for meeting the mens rea standard. In this regard, it is worth mentioning that 80,000 persons were transported to Germany and Poland from Westerbork alone. Doing the math, Gemmeker knew that the total number of Jews in the same position as the individuals he transported in occupied Europe – and Germany itself – ran into the hundreds of thousands. They could not all reasonably be used for forced labour. Furthermore, Gemmeker did not show any concern for the fate of the many persons who, because of their age

(infants and the elderly), would not have been suitable for forced labour. The obvious conclusion to be drawn, also for Gemmeker, is that they would be killed.

Looking at the above facts and circumstances, I agree with Van Liempt that Gemmeker could, and should, have been prosecuted and convicted for aiding and abetting the murder of a significant portion of the individuals he transported from Westerbork. This also aligns with our sense of justice. It is difficult to accept that Gemmeker's partners in crime, Harster and Zöpf, were convicted for their assistance in the murder of – Dutch – Jews, because they confessed their knowledge of the fate awaiting the transported after leaving the Netherlands, whereas Gemmeker has managed to escape conviction for similar charges. The confessions by Harster and Zöpf should have been all the more reason for the German prosecution service to have assessed Gemmeker's denial of knowledge more critically and apply a mens rea-standard for aiding and abetting that does more justice to the situation, facts and circumstances at the time.

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