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Aiding and Abetting and Causation in the Commission of International Crimes

The Cases of Dutch Businessmen van Anraat and Kouwenhoven

GÖRAN SLUITER AND SEAN SHUN MING YAU*

Introduction

An increasing amount of attention is being paid to the roles of companies and businessmen assisting in the commission of international crimes, for example through the delivery of weapons. The mode of criminal liability that corresponds to unlawful assistance in the commission of crimes is generally referred to as aiding and abetting. It requires an act of assistance that has contributed to the commission of the crime (*actus reus*) and that the suspect has done so with the requisite degree of intent or knowledge (*mens rea*).

This chapter will focus on the *actus reus*; to be more specific, the standard of causation, in the context of companies and businessmen who contribute to mass atrocities. It will do so through the lens of two well-known Dutch cases, concerning two businessmen, Mr van Anraat and Mr Kouwenhoven, who delivered weapons in situations of armed conflict and mass atrocities (Iraq in the 1980s and Liberia in the 1990s). While both men have been convicted for aiding and abetting war crimes, the requisite standard of contribution appears to differ considerably between the two cases. This chapter addresses the question as to what the degree of causation should be for aiding and abetting liability of companies and businessmen who have assisted in the commission of mass atrocities. This question will be answered in the context of aiding and abetting in Dutch domestic criminal law and international criminal law.

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In order to answer this question, it will first be necessary to provide, as a background, a short introduction to the theoretical debate on causation as a requirement for liability of aiders and abettors. Next follows an analysis of the requisite standards for causation under both Dutch and international criminal law. The cases of van Anraat and Kouwenhoven – and the diverging approaches in these cases – will be analysed in the subsequent section against the backdrop of these theories and legal standards. As a synthesis of the preceding sections, we will offer some reflections on the need for a revised or *sui generis* approach to the standard of causation in case of complex situations of assistance in atrocity crimes. The last section will contain concluding observations.

Theory on Causation in Aiding and Abetting

There is an interesting theoretical debate among scholars, especially legal philosophers, as to the required degree of causation in situations of complicity. For our purposes it suffices to address the two contrasting views on causation, one in which causation matters and the other in which it does not. This requires a consideration of the underlying rationales and theoretical justifications for these diverging views.

Gardner is among the scholars who argue that complicity can exist only where a suspect participates in the wrongs of others by making a causal contribution to them.[1] He takes the view that only assistance which has made a difference to the overall incidence of wrongdoing should result in (accomplice) liability. The fundamental issue is thus whether as a result of the assistance there are more wrongs in the world than without it. If this is not the case, there should not be any criminal liability, 'because it seems odd that someone should be expected to pay attention (in her practical reasoning) to features of the world that will come out no better whatever she does'.[2]

Gardner's philosophical and moral justification for causation in complicity appears to have received considerable support. Stewart, for example, has argued that there should be actual causation, namely whether the accomplice's help could have contributed to the criminal action of the principal.[3] Moore has taken the position that causation is crucial for

[1] J. Gardner, 'Complicity and Causality' (2007) 1 *Criminal Law and Philosophy* 127.
[2] Ibid. 138.
[3] J. G. Stewart, 'Complicity', in M. D. Dubber and T. Hörnle (eds.), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014), p. 18.

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responsibility.[4] Petersson has argued that 'undetectability of causal links between acts and effects should make us cautious before assigning responsibility, precisely because the causal involvement condition is an essential and practically important element in our practices of holding agents morally to account for events that have made the world worse'.[5]

Contrary to Gardner, Kutz has argued in 'Causeless Complicity' that accomplice liability does not require causation.[6] One can be an accomplice in various ways; some situations require causation and others not. Kutz offers the example of a guard who can render himself complicit in a burglar's theft by doing nothing, deliberately failing to sound the alarm.[7] What binds together all the complicity cases is the mental state of the accomplice – a mental state directed both towards the accomplice's own agency (including the agency involved in refraining) and towards the agency of the principal.'[8]

There is considerable support for Kutz's position on causeless complicity. Lawson has argued that '[b]y centering on the wills of individual participants, the complicity principle is able to take note of the fact that individual contributions vary in terms of how closely they resemble the collective goal', and 'causal contributions can still be relevant, but only within the context of the kind of role played by the participants'.[9] It has also been said that 'aiding is required, but the degree of influence is immaterial'.[10] Farmer supports Kutz, by arguing that various types of (non-causal) contribution may sustain, intensify or legitimate the wrong in legally relevant ways, and while some of these may be reconstructed in causal terms, it would seem both artificial and unduly constraining to do so.[11]

The two opposing views on the role of causation in accomplice liability can in our view be described as a harm-caused doctrine on the one hand and a risk-based doctrine on the other. The essential question for this chapter is whether the unique nature of international crimes, notably the core crimes as set out in the International Criminal Court (ICC)

[4] M. Moore, 'Causing, Aiding, and the Superfluity of Accomplice Liability' (2009) 156 *University of Pennsylvania Law Review* 395, 397.
[5] B. Petersson, 'Co-Responsibility and Causal Involvement' (2013) 41 *Philosophia* 847, 865.
[6] C. Kutz, 'Causeless Complicity' (2007) 1 *Criminal Law and Philosophy* 289.
[7] Ibid. 300.
[8] Ibid.
[9] B. Lawson, 'Individual Complicity in Collective Wrongdoing' (2013) 16 *Ethical Theory and Moral Practice* 227, 242.
[10] J. Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings Law Journal* 91, 102.
[11] L. Farmer, 'Complicity beyond Causality: A Comment' (2007) 1 *Criminal Law and Philosophy* 151, 155.

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Statute,[12] could lead to a preference for either school of thought on causation.

Two aspects of mass atrocities that are relevant in answering this question need to be mentioned. First, international crimes generally result in extreme harm. They tend to be characterized by extreme brutality and numerous victims. This certainly sets the core crimes apart from many of the examples of 'ordinary' criminal wrongdoing that have been discussed in the scholarly literature on the theory of causation and complicity, and which do not result in a similar degree of harm. Second, core crimes often manifest themselves in a widespread and systematic manner, and involve a high plurality of actors, which is generally not the case with the commission of 'ordinary' crimes. The commission of core crimes is often a form of 'system criminality', involving the state or a similarly organized group such as a rebel army; this results in a very high number of principals committing a high number of crimes.[13] It almost goes without saying that the number of possible accomplices who provide various forms and degrees of assistance can be extremely high.

One could argue that these unique aspects of the core crimes support the school of thought in favour of complicity liability without causation, for two reasons. First, there is an undeniable and very clear correlation between the seriousness of the crime, or the harm occasioned by the crime, and the penalization of risk-based conduct. This correlation is already part of international criminal law in, for example, the criminalization of incitement to commit genocide, without necessarily having caused the genocide. In this case the mere risk-enhancing nature of incitement suffices.[14] The crime of terrorism provides another example. We see that, in respect of the crime of terrorism, conduct which increases the risk of a terrorist attack, such as publicly praising terrorism, or

[12] The core crimes are set out in Article 5 (1) of the ICC Statute: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. The crime of aggression raises particular causation issues and can also on other levels be distinguished from the other crimes in the ICC's jurisdiction. When reference is being made in this chapter to mass atrocities, it thus does not refer to the crime of aggression but connotates the – multiple – commission, on a widespread and systematic basis, of genocide, crimes against humanity or war crimes.

[13] See on the various dimensions and complexities related to system criminality, A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press, 2009).

[14] W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009), p. 319.

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apologie du terrorisme, which is broader than incitement, has triggered criminalization, without requiring actual causation in relation to a terrorist attack.[15] In light of these non-exhaustive examples of criminalizing risk-enhancing conduct in respect of very serious crimes, it may seem defensible that a person who has acted in a way that could have assisted in the commission of mass atrocities should be punishable on that basis, without this assistance needing to have made any difference to the crime's actual commission.

The second reason why aiding and abetting without causation could be justifiable in cases of mass atrocities has to do with the plurality of crimes and actors involved and the impossibility of proving causation in certain scenarios. Take for example the selling of weapons to parties to an armed conflict that is characterized by war crimes and crimes against humanity. In case of multiple suppliers of weapons and bearing in mind the chaos that generally reigns in situations of armed conflict, it may be as good as impossible to prove which arms supplier's assistance has caused a specific war crime or crime against humanity. Given that an indictment shall contain clear and specific charges, the causation question – that is, whether or not the indicted arms dealer made a difference for that particular charge – is answerable through the fact that his or her weapons were used in the commission of crimes. It seems hard to swallow under these circumstances, in which the beyond reasonable doubt standard is unlikely to be met, that all arms suppliers would have to be acquitted as accomplices. A risk-based approach towards accomplice liability, without actual causation being necessary, could resolve this problem. It would then be sufficient that the weapons dealer in question has acted, that is, has supplied weapons, with the risk that they would be used in the commission of extremely serious crimes.

Causation in Aiding and Abetting under Dutch Criminal Law and International Criminal Law

Dutch Criminal Law

Article 48 of the Dutch Penal Code (DPC) provides for two types of accomplice liability and attaches criminal liability to:

[15] See B. Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *UNSW Law Journal* 868.

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1. any persons who intentionally aid and abet the commission of the serious offence;
2. any persons who intentionally provide opportunity, means or information for the commission of the serious offence.

On the face of the text, the first paragraph appears to have a broader construction – aiding and abetting generally – than in the second paragraph, which specifies certain forms of assistance. The Dutch Supreme Court has addressed this tenuous distinction and taken the view that the two categories of assistance in Article 48 cannot be strictly distinguished.[16]

For an act of assistance to qualify as aiding and abetting under Article 48, it must satisfy the requirement of causality. The Supreme Court has elaborated on this *actus reus* element to require that the assistance furthered, facilitated or enabled the commission of the offences.[17] The assistance need not be decisive, substantial or indispensable (*condicio sine qua non*) for the commission.[18] Neither must the accomplice have made an 'adequate causal contribution' to the crimes.[19] Instead, the accomplice's assistance must have 'had a certain effect' on the offence, which is a relatively low threshold.[20] In practice, what it means is that the accomplice supported the crime or made it easier for the principal perpetrator to commit the crime.[21] Further, it is not required that the accomplice be physically present at the time of commission, or that he or she cooperated with the principal perpetrator in any way.[22]

[16] Supreme Court, 22 March 2011, ECLI:NL:HR:2011:BO2629, para. 2.2. See also P. J. P. Tak, *The Dutch Criminal Justice System: Organization and Operation* (Boom Juridische Uitgevers, 2003), p. 47.

[17] Supreme Court, 10 June 1996, ECLI:NL:HR:1997:ZD0749. In addition, note that the Dutch criminal law distinguishes between serious offences (*misdrijven*) and lesser offences (*overtredingen*). The qualifier 'serious' is found in Articles 92–206 of the DPC. Furthermore, the crimes enumerated in the International Crimes Act, according to its Article 2(2), are equated to serious offences, thus rendering Article 48 applicable to international crimes cases.

[18] Supreme Court, 8 January 1985, ECLI:NL:HR:1985:AC0143.

[19] Ibid.

[20] As seen later, this 'certain effect' threshold is comparatively lower than that adopted at the ad hoc criminal tribunals, i.e. substantial contribution to the crime but may be similar to the under-developed standard at the ICC.

[21] Supreme Court, 22 March 2011, ECLI:NL:HR:2011:BO2629. See also J. de Hullu, *Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (Wolters Kluwer, 2015), p. 495.

[22] de Hullu (n. 21), p. 496.

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The Ad Hoc International Criminal Tribunals

Aiding and abetting is criminalized in Article 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Article 6(1) of the Statute of the International Criminal Tribunal for Rwanda (ICTR). The debate in ICTY and ICTR case law has focused on two issues: the meaning of 'substantial effect' and whether the assistance must be 'specifically directed' at the commission of the crime. For the purpose of this chapter, the former is determinative of the requisite level of causation in aiding and abetting.

The threshold of 'substantial effect' was first developed in the *Tadić* case. There, the prosecution argued that even 'the most marginal act of assistance' could constitute aiding and abetting. The Trial Chamber rejected this proposition. Having reviewed a number of Nuremberg judgments and the Draft Code of Crimes against the Peace and Security of Mankind, it concluded that the act of assistance must have 'a substantial and direct effect on the commission' of the crime.[23] A year later, another Trial Chamber in *Furundžija* re-examined the causality standard in aiding and abetting and concluded that, according to customary international law, the accomplice's assistance must have 'a substantial effect on the perpetration' of the crime.[24] In doing so, the Chamber essentially left out the qualifier 'direct'.[25] It justified the modification by rejecting the formulation in the 1996 ILC Draft Code on which the *Tadić* finding was based, requiring that the accomplice must participate 'directly and substantially'.[26] On this note, the ILC Commentary further explained that 'participation of an

[23] ICTY, *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94–1-T, 7 May 1997, para. 688, referring to Draft Code of Crimes Against the Peace and Security of Mankind (1996), U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

[24] ICTY, *Prosecutor* v. *Furundžija*, Judgment, Case No. IT-95–17/1-T, 10 December 1998, para. 234, followed by the ICTR in e.g. *Prosecutor* v. *Kayishema & Ruzindana*, Judgment, Case No. ICTR-95–1-A, A. Ch., 1 June 2001, para. 201; *Prosecutor* v. *Ntakirutimana and Ntakirutimana*, Case Nos. ICTR-96–10-A and ICTR-96–17-A, A. Ch., 13 December 2004, para. 530 ('This support must have a substantial effect upon the perpetration of the crime').

[25] This approach was subsequently followed in case law, including the *Tadić* Appeal Judgment. See ICTY, *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94–1-A, A. Ch., 15 July 1999, para. 229, requiring 'a substantial effect upon the perpetration', repeated in ICTY, *Prosecutor* v. *Vasiljević*, Judgment, Case No. IT-98–32-A, A. Ch., 25 February 2004, para. 102; ICTY, *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95–14-A, A. Ch., 29 July 2004, para. 46.

[26] See 1996 Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission to the General Assembly, UN Doc. A/51/10 (1996), Article 2, para. 3(d).

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accomplice must entail assistance which facilitates the commission of a crime in some significant way'.[27] The *Furundžija* Trial Chamber considered such standard to be overly restrictive. It concluded: 'In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime.'[28]

But what does it mean for the assistance to have a 'substantial effect' on the perpetration of the crime? It is generally agreed that the threshold is not one of 'but for', that is, it is not required to prove that the crime would not have occurred had the accomplice not assisted. While the ad hoc tribunals have used 'substantial effect' interchangeably with 'substantial contribution'[29] or sometimes 'significant contribution',[30] these terms suggest that the assistance need not be a *condicio sine qua non* for the commission of the crime.[31] The ICTY Appeals Chamber in the case concerning *Prosecutor* v. *Blaškić* concurred with the Trial Chamber's holding that aiding and abetting requires no causal effect on the perpetration of the crime.[32] It stated: 'In this regard, it agrees with the Trial Chamber that proof of a cause–effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required.'[33] What is required instead is that the effect of assistance produced on the realization of the crime is substantial,[34] or that it substantially contributes to the crime's commission.[35] The *Tadić* Trial Chamber understood the term 'substantial' to require that the

[27] Report of the I.L.C., p. 24; *Furundžija* Trial Judgment (n. 24), para. 231.
[28] *Furundžija* Trial Judgment (n. 24), para. 232. Furthermore, the Trial Chamber found support from the absence of the term 'direct' from Article 25(3)(c) of the Rome Statute. However, it has been criticized that such interpretation appears weak since at the ICTY the causation standard was also not in the text but rather developed in case law.
[29] ICTY, *Prosecutor* v. *Mrkšić and Šljivančanin*, Judgment, Case No. IT-95–13/1-A, A. Ch., 5 May 2009, para. 81.
[30] ICTY, *Prosecutor* v. *Blagojević and Jokić*, Judgment, Case No. IT-02–60-A, A. Ch., 9 May 2007, para. 1.
[31] Ibid., para. 134, citing ICTY, *Prosecutor* v. *Simić*, Judgment, Case No. IT-95–9-A, A.Ch., 28 November 2006, para. 85 and ICTY, *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95–14-A, A. Ch., 29 July 2004, para. 48.
[32] ICTY, *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95–14-T, 3 March 2000, para. 285.
[33] *Blaškić* Appeal Judgment (n. 25), para. 48.
[34] *Mrkšić and Šljivančanin* Appeal Judgment (n. 29), para. 49; ICTY, *Prosecutor* v. *Orić*, Judgment, Case No. IT-03–68-A, A. Ch, 3 July 2008, para. 43.
[35] *Mrkšić and Šljivančanin* Appeal Judgment (n. 29), para. 202.

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contribution 'in fact has an effect on the commission of the crime'.[36] The *Aleksovski* Trial Chamber required that the effect of the assistance for the perpetration must be 'important'.[37] In *Furundžija*, the Trial Chamber endorsed the position from the Nuremberg cases that the contribution must 'make a significant difference to the commission' of the crime and that '[h]aving a role in a system without influence would not be enough'.[38] Overall, it considered an act of assistance substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role the accused in fact assumed'.[39]

This requires a case-by-case assessment of the factual context.[40] The contextual factors probative of the significance of the assistance in the commission of the crime include, inter alia, the accused's position of authority and the nature of his other tasks,[41] the ability to exercise independent initiative, and whether the accused has acted to make resources available for the perpetration of the crime.[42] Thus, in *Blagojević and Jokić*, the Appeals Chamber found that Mr Jokić, in coordinating, sending and monitoring the brigade resources and equipment involved in a mass execution, assisted in carrying out the orders of the commander and thus in the commission of the crime.[43] This is notwithstanding that assistance by way of relaying orders would produce a sufficient effect on the commission of the crimes and is consequently criminal, only if the crimes committed are at least implicit in the order.[44] In order for the contribution to be substantial, the assistance must have

[36] *Tadić* Trial Judgment (n. 23), para. 688. O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing, 2016), p. 1004, interpreting this finding as requiring 'a causal relationship with the result'. It may be recalled, however, that the ad hoc tribunals have unequivocally rejected the need for a 'cause–effect relationship'. See e.g. *Blaskic* Trial Judgment (n. 32), para. 285.

[37] ICTY, *Prosecutor* v. *Aleksovski*, Judgment, Case No. IT-95–14/1-T, 25 June 1999, paras. 60–1.

[38] *Furundžija* Trial Judgment (n. 24), para. 233.

[39] *Tadić* Trial Judgment (n. 23), para. 688.

[40] *Mrkšić and Šljivančanin* Appeal Judgment (n. 29), para. 200. See also ICTR, *Kalimanzira* v. *Prosecutor*, Judgment, Case No. ICTR-05–88-A, A. Ch., 20 October 2010, para. 86.

[41] *Blagojević and Jokić* Appeal Judgment (n. 30), para. 198; ICTY, *Prosecutor* v. *Lukić and Lukić*, Judgment, Case No. IT-98–32/1-A, A. Ch., 4 December 2012, para. 438.

[42] *Blagojević and Jokić* Appeal Judgment (n. 30), paras. 747, 755. See also ICTY, *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98–33-A, A. Ch., 19 April 2004, paras. 135–8.

[43] *Blagojević and Jokić* Appeal Judgment, ibid., paras. 195, 198.

[44] ICTY, *Prosecutor* v. *Strugar*, Judgment, Case No. IT-01–42-T, A. Ch., 31 January 2005, para. 354: 'The Chamber also found that the deliberate and unlawful shelling . . . was not implied in the Accused's order. In the Chamber's view, therefore, the Accused's order to attack Srd did not have a substantial effect on preparations for the crimes.'

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made it easier or more likely for the crime to be realized. This can be done by, for instance, directing victims to the crime scene or providing the means of perpetration.[45] The ad hoc tribunals' jurisprudence thus suggests that although the accomplice's assistance need not be criminal in and of itself, it must pertain to the criminality of the principal's act, in the sense that it is one of the factors in the chain of events cumulatively leading to the commission.[46]

This being said, the focus remains on the effect of the accomplice's assistance upon the act of the principal perpetrator.[47] The fact that the accused provided comparatively more limited assistance to the commission of the crime than others does not preclude fulfilment of the requirement of substantial effect.[48] It is also irrelevant whether the principal perpetrator coordinated with the accomplice or was aware of the accomplice's contribution.[49]

This legal standard on causality applies *mutatis mutandis* in situations where the crime has been perpetrated by a plurality of actors.[50] This is particularly important for cases of international crimes where the ultimate commission is made possible almost always by a network of persons, remotely and at the scene. In such cases, whether the assistance of the accused may fulfil the *actus reus* of aiding and abetting depends on the effect of the accomplice's conduct assessed in itself, not from the perspective of the plurality of actors.

[45] ICTR, *Ntawukulilyayo* v. *Prosecutor*, Judgment, Case No. ICTR-05–82-A, A. Ch., 14 December 2011, para. 216.

[46] Ambos has drawn the analogy to the English 'concerned in the killing' theory. See K. Ambos, 'Individual Criminal Responsibility', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing, 2016), p. 1004. See also G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 967, making the comparison that 'unlike the mere aider and abettor, the instigator sets in motion a chain of events that eventually leads to the commission of the crime'.

[47] Ambos (n. 46), p. 1004.

[48] *Blagojević and Jokić* Appeal Judgment (n. 30), para. 134.

[49] *Tadić* Appeal Judgment (n. 25), para. 229. It is therefore irrelevant whether the principal is identified. See ICTY, *Prosecutor* v. *Perišić*, Judgment, Case No. IT-04–81-T, 6 September 2011, para. 127.

[50] ICTY, *Prosecutor* v. *Kvočka et al.,* Judgment, Case No. IT-98–30/1-A, A. Ch., 28 February 2005, para. 90 ('The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons').

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The International Criminal Court

The Rome Statute of the ICC has codified aiding and abetting as a mode of liability in Article 25(3)(c). This provision appears to distinguish among 'aiding', 'abetting' and 'otherwise assisting' as three disjunctive terms. In practice, the Court has rejected the distinction as 'inconsequential' in judicial determination and has treated them as a single mode of liability.[51]

Like the law of the ad hoc tribunals, Article 25(3)(c) is silent on the causal link required. The same debate on how to qualify aiding and abetting thus arose in the early decisions of the Court. On the one hand, the ICC has followed the ad hoc tribunals' jurisprudence in that it considered it unnecessary for the accomplice's assistance to be a *condicio sine qua non*.[52] On the other hand, the level of assistance needed to satisfy the *actus reus* in Article 25(3)(c) remains unsettled. There are three conflicting approaches.

First, various chambers have followed the 'substantial effect' standard set out by the ad hoc tribunals. The Pre-Trial Chamber in *Mbarushimana* held that 'a substantial contribution to the crime may be contemplated'.[53] The Trial Chamber in *Lubanga* determined that Article 25(3)(c) required a 'substantial' contribution from the accomplice.[54] Scholars in favour of this approach, such as Ambos and Schabas, posit that since aiding and abetting is a general principle of criminal law, it should be interpreted consistently without departure from the well-established standard at the ad hoc tribunals.[55]

The second approach requires that the accomplice's assistance 'has an effect [only] on the commission' of the crime.[56] The *Bemba et al.* Trial Chamber departed from the jurisprudence of the ad hoc tribunals and held that '[t]he plain wording of the statutory provision [i.e. Article 25(3)(c)] does not suggest the existence of a minimum threshold'.[57] It reasoned

[51] ICC, *Prosecutor* v. *Bemba et al.*, Judgment, Case No. ICC-01/05–01/13, 19 October 2016, para. 87, confirmed by ICC, *Prosecutor* v. *Bemba et al.*, Judgment, Case No. ICC-01/05–01/13, A. Ch., 8 March 2018, para. 1324.

[52] ICC, *Prosecutor* v. *Blé Goudé*, Decision on the confirmation of charges, ICC-02/11–02/11, 11 December 2014, para. 167.

[53] ICC, *Prosecutor* v. *Mbarushimana*, Decision on the confirmation of charges, ICC-01/04–01/10, 16 December 2011, para. 280.

[54] ICC, *Prosecutor* v. *Lubanga*, Judgment, ICC-01/04–01/06, 14 March 2012, para. 997.

[55] Ambos (n. 46), p. 1008, citing W. Schabas, *Introduction to the International Criminal Court* (Cambridge University Press, 2011), p. 228.

[56] ICC, *Prosecutor* v. *Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05–01/13–749, 11 November 2014, para. 35.

[57] *Bemba* Trial Judgment (n. 51), para. 93.

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that if the drafters so intended, they would have included qualifying elements such as in the 1996 ILC Draft Code, which requires accomplices to assist 'directly and substantially'.[58] According to the Trial Chamber, the assistance must be 'causal' but need not reach the level of substantiality, for a number of reasons. One is that while principal forms of responsibility in Article 25(3)(a) adopt the 'control over the crime' theory[59] requiring principal perpetrators to have the ability to frustrate the commission through withdrawing participation, Article 25(3)(c) does not.[60] In terms of causality, this means that while principal perpetrators have the power to frustrate the commission of the offence by not performing their tasks ('control over the crime'), the accomplice has no such power or control over the realization of the crime. In this sense, the accomplice 'merely contributes to' the offence.[61] Thus, unlike at the ad hoc tribunals, assistance in the sense of Article 25(3)(c) of the Rome Statute can in theory be peripheral or marginal.[62]

Another reason why the Trial Chamber rejected the substantiality requirement was that it deemed the textual construction of Article 25(3)(c) sufficient to filter out contribution not encompassed by aiding and abetting. This is done, firstly, by requiring a causal relationship in that the assistance must have furthered, advanced or facilitated the commission.[63] Furthermore, the Chamber observed that the *mens rea* in article 25(3)(c) ('[f]or the purpose of facilitating') 'goes beyond the ordinary *mens rea* standard encapsulated in Article 30', thus justifying a lower requisite level of assistance than that at the ad hoc tribunals.[64]

In the third and last approach, the Court has focused on the plain text of Article 25(3)(c) and rejected on numerous occasions the need for any qualification to satisfy the *actus reus* of aiding and abetting. According to this approach, assistance need not produce any effect at all. In the *Ongwen* Confirmation of Charges Decision – in line with the pronouncements in *Ble Goude* and *Al Mahdi*[65] – the Pre-Trial Chamber endorsed a strictly textual interpretation:

[58] Ibid.
[59] ICC, *Prosecutor* v. *Lubanga*, Confirmation Decision, para. 338; *Prosecutor* v. *Lubanga*, Appeal Judgment, para. 469.
[60] *Bemba* Trial Judgment (n. 51), para. 85.
[61] Ibid.
[62] Ibid., para. 86: '[T]he assistant's contribution hinges on the determination of the principal perpetrator to execute the offence.'
[63] Ibid., para. 94.
[64] Ibid.
[65] See ICC, *Prosecutor* v. *Al Mahdi*, Decision on the confirmation of charges, ICC-01/12–01/15, 2016, para. 26 (quoting *Ongwen* decision); *Goudé* Decision on the confirmation of

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> 'It is nowhere required, contrary to the Defence argument, that the assistance be "substantial" or anyhow qualified other than by the required specific intent to facilitate the commission of the crime.'[66]

More recently, the *Bemba et al.* Appeal Judgment again suggested the theoretical possibility that no effect whatsoever is required. At the outset, the Appeals Chamber made clear that it was not bound by the ad hoc tribunals' jurisprudence.[67] It then recalled that the text of Article 25(3)(c) does not indicate 'whether the conduct must have also had an effect on the commission of the offence'.[68] It nonetheless did not exclude per se such a situation:

> 'Whether a certain conduct amounts to "assistance in the commission of the crime" within the meaning of article 25(3)(c) of the Statute even without the showing of such an effect can only be determined in light of the facts of each case.'[69]

Causation in Aiding and Abetting in the Cases of van Anraat and Kouwenhoven

The Dutch criminal cases against van Anraat and Kouwenhoven are well-known and share a number of unique features. Both cases deal with businessmen who have been prosecuted and convicted for aiding and abetting the commission of war crimes committed outside the Netherlands. In addition, both cases raise the complex issue of causation in the context of assisting in mass atrocities: in the case of van Anraat the chemical weapon attacks committed in the 1980s by Saddam Hussein's regime in Iraq and in the case of Kouwenhoven the war crimes committed by former Liberian president Charles Taylor and his armed forces. We will look at both cases, in chronological order, and analyze the Dutch courts' approach towards causation in the context of aiding and abetting in mass atrocities.

charges (n. 52), para. 167 ('In essence, what is required for this form of responsibility [in Article 25(3)(c)] is that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime').

[66] ICC, *Prosecutor* v. *Ongwen*, Decision on the confirmation of charges, Case No. ICC-02/04–01/15, 23 March 2016, para. 43.

[67] ICC, *Prosecutor* v. *Bemba et al.*, Judgment, Case No. ICC-01/05–01/13, A. Ch., 8 March 2018, para. 1325.

[68] Ibid., para. 1327.

[69] Ibid.

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The van Anraat *Case*

Frans van Anraat, a Dutch national, traded in chemicals. He was charged with aiding and abetting the commission of war crimes and genocide (the latter concerning the Kurdish population in Iraq) by Saddam Hussein, through the use of chemical weapons in the attacks against three Kurdish villages in Iraq and five villages in Iran, resulting in numerous deadly casualties and severe bodily harm. The attacks with chemical weapons occurred in the years 1987 and 1988, the attack on the Kurdish village of Halabja on 16 March 1988 being the most known. Van Anraat was accused of having assisted these attacks by arranging the deliveries of large quantities of thiodiglycol (TDG), an important chemical component of mustard gas.[70]

Van Anraat was acquitted of aiding and abetting in the commission of genocide on the Kurdish population for lack of proof of the requisite knowledge of the genocidal intent. On 23 December 2005 he was convicted in first instance for aiding and abetting in the commission of war crimes and sentenced to fifteen years' imprisonment.[71] His conviction was maintained on appeal and the sentence was increased by two years, to seventeen years' imprisonment.[72] The Dutch Supreme Court left the conviction unaltered, but reduced the sentence slightly, to sixteen years and six months.[73]

Throughout the proceedings in the *van Anraat* case, significant attention was paid to the issue of causation. The question that arose was whether the chemicals supplied by van Anraat had contributed to the attacks with chemical weapons as charged in the indictment. The District Court explicitly stated that criminal liability for aiding and abetting can be found only when the chemicals delivered by van Anraat had in fact facilitated the specific attacks charged in the indictment.[74] According to the District Court, this requirement of facilitation means that it must be proven that the chemicals of van Anraat have been used in the attacks as charged in the indictment. We will later discuss whether this is the correct standard for causation. In this particular case, there was strong evidence (including an expert-witness involved in the UN monitoring of disarmament after the Iran–Iraq war) regarding the administration of incoming chemicals and their subsequent use in fabrication of chemical weapons. There was also

[70] District Court of 's-Gravenhage, 23 December 2005, ECLI:NL:RBSGR:2005:AU8685.
[71] Ibid.
[72] Court of Appeal 's-Gravenhage, 9 May 2007, ECLI:NL:GHSGR:2007LBA4676.
[73] Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822.
[74] District Court of 's-Gravenhage, 23 December 2005, ECLI:NL:RBSGR:2005:AU8685, para. 13.

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evidence that van Anraat was a significant supplier of the raw materials necessary for the fabrication of chemical weapons. As a result of this evidence, it was indeed possible to meet the standard of causation as the District Court required it. The Court determined that the charged attacks, which started in the middle of April 1987, had been made possible or at least facilitated by the use of the chemicals supplied by the accused.[75]

In the appeals proceedings – which is a trial *de novo* in the Netherlands – the Court of Appeals appears to continue on the path set by the District Court. In setting out the applicable legal framework for aiding and abetting, the Court also indicates that, in terms of causation, the question is whether the accused has contributed to the attacks as charged in the indictment.[76] The Court emphasises next, in accordance with the Dutch standards on causation, that the assistance need not be indispensable or adequate; merely facilitating suffices.[77] Quite puzzling is the unsubstantiated statement by the Court of Appeals that the requirements in international criminal law are not stricter in this regard.[78] As discussed in the previous section, international criminal tribunals have at times required a substantive contribution for aiding and abetting, which is obviously more demanding than the Dutch standard of 'merely facilitating', and which should have merited more discussion in the appeals judgment. This is especially the case when one bears in mind the year in which the appeals judgment was issued, 2007, in which more flexible ICTY, ICTR or ICC jurisprudence on causation was not yet available.

In its concluding observations on the matter of causation, the Court of Appeals appears slightly torn between the strict causation requirement as articulated by the District Court and a looser approach (which could be a first step in the direction of a risk-based approach towards causation). On the one hand, the Court of Appeals emphasizes that van Anraat was a very important tradesman and delivered at least 38 per cent of the TDG to Iraq in the period 1980–1988, and where others stopped delivering in 1984, the accused continued to do so until spring 1988.[79] On that basis, the Court considers it *plausible* that the chemicals of van Anraat were used in the charged attacks in 1987 and 1988.[80] On the other hand, the ultimate conclusion by the Court of Appeals on this point of causation is that the

[75] Ibid.
[76] Court of Appeal of The Hague, 9 May 2007, ECLI:NL:GHSGR:2007:BA6734, para. 12.4.
[77] Ibid.
[78] Ibid.
[79] Ibid., para. 12.5.
[80] Ibid.

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essential role of the deliveries of TDG by the accused since 1985 for the chemical weapons programme of the regime renders the accused guilty of aiding and abetting in the commission of the attacks as charged in the indictment.[81] One could read this final conclusion as an indication that actual use of the aider and abettor's chemicals in the attacks as charged in the indictment is no longer strictly required, as long as in the relevant period, 1987 and 1988, the chemicals delivered by the accused amounted to an essential contribution to the chemical weapons programme as a whole.

The proceedings at the Supreme Court may be seen to give some support to a less strict causation requirement. As happens regularly in proceedings at the Dutch Supreme Court, the more thorough treatment of this matter can be found in the independent advice of the Advocate-General to the Supreme Court and not in the Supreme Court judgment itself. The Advocate-General supports the reasoning and conclusions by the Court of Appeals related to causation. According to the Advocate-General, the reasoning of the Court was that, as time progressed after 1984, the part of the only remaining supplier of TDG – the accused – in the totality of TDG available became increasingly higher and even essential.[82] In conclusion, the Advocate-General said: 'This reasoning is understandable and can substantiate the conclusion that the suspect has actually contributed to the use of mustard gas in 1987 and 1988 by his deliveries.'[83]

One may infer from this that in order to establish causation it is apparently sufficient for the Advocate-General that the accused was at a certain point in time an important supplier in a policy or programme as a whole (in the present case a chemical weapons programme, but it could also be a programme or policy of crimes against humanity), without having to prove beyond a reasonable doubt that the assistance has actually contributed to certain specific elements of the relevant programme, namely, the specific attacks as charged in the indictment.

However, such a view has not been further elaborated on in the *van Anraat* proceedings. Therefore, many questions remain unanswered. To start with, it has never been explicitly stated in these proceedings that the standard of the District Court on strict causation in relation to the specific charges was incorrect. The correct standard in these types of case therefore remains uncertain. If the connection between causation and the commission of crimes by the principal can be slightly looser, then

[81] Ibid.
[82] Supreme Court, Attorney-General Conclusion, 30 June 2009, ECLI:NL:PHR:2009:BG4822, para. 6.18.
[83] Ibid.

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the question arises of under what circumstances? Is this restricted to situations of grave harm, international crimes, and multiple aiders and abettors, or can it also apply to other scenarios? The question also arises as to whether van Anraat would have escaped criminal liability in case of a less essential contribution to the Iraqi chemical weapons programme. The *Kouwenhoven* case offers another opportunity to reflect on the theoretical and moral justification for the distinction.

The Kouwenhoven *Case*

A considerable part of the criminal case against Guus Kouwenhoven was prosecuted in the Netherlands after the *van Anraat* case. Kouwenhoven was active through two companies in the logging industry in Liberia between 1999 and 2003. It was concluded that the business interests of Kouwenhoven were closely intertwined with the political, financial and private interests of the then president of Liberia, Charles Taylor.[84] The charges concentrated, amongst others, on the deliveries of weapons (such as AK47s) by the accused, making staff available for the armed conflict, making means of transport available for the armed conflict, and allowing company premises to be used as a meeting place for Taylor's armed forces. The assistance provided by the accused was, according to the charges, instrumental to the commission of several war crimes, including murders and rapes, in the villages of Guéckédou (Guinea), Voinjama and Kolahun (Liberia), in the years 2000, 2001 and 2002. Kouwenhoven was charged under the following alternative modes of liability in respect of his acts: co-perpetration, solicitation, aiding and abetting and command responsibility.[85]

The *Kouwenhoven* proceedings were lengthy and complex. The Hague District Court convicted Kouwenhoven on 7 June 2006, not for criminal involvement in war crimes but for violations of trading prohibitions, as penalized under Dutch law in the Sanctions Act of 1977 in respect of which he was sentenced to eight years' imprisonment.[86] In the appeals proceedings that followed, Kouwenhoven was fully acquitted by The Hague Court of Appeals, because there were serious problems with the investigations and evidence, especially the eye-witnesses.[87] The

[84] Court of Appeal of 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760, section Q.
[85] Ibid, section 1A–2A.
[86] District Court of The Hague, 7 June 2006, ECLI:NL:RBSGR:2006:AY5160.
[87] Court of Appeal of The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068, para. 9.17.

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prosecution service appealed this acquittal before the Supreme Court. On 20 April 2010, the Supreme Court quashed the acquittal because the Appeals Court had improperly refused to receive further evidence adduced by the prosecution service and the case was remitted to the Court of Appeals of 's Hertogenbosch to be retried.[88] On 21 April 2017, the Court of Appeals of 's Hertogenbosch convicted Kouwenhoven to nineteen years' imprisonment for aiding and abetting war crimes committed by Taylor and his co-accused in the aforementioned villages in Guinea and Liberia.[89] Recently, on 18 December 2018, the Dutch Supreme Court fully confirmed this conviction and sentence, which are therefore now final.[90]

Like the *van Anraat* case, the *Kouwenhoven* case raises the important and complex issue of causation for those who aid and abet in the commission of mass atrocities. However, the matter received far less attention in the *Kouwenhoven* proceedings, essentially because this was not raised by the defence. It is only in the judgment of the Court of Appeals of 's Hertogenbosch of 21 April 2017 that the issue of causation was marginally addressed, in the context of the *proprio motu* obligation for the Court to provide sufficient grounds and reasons for a conviction. This limited attention is, as we will discuss later, not satisfactory for those who would like to gain a greater understanding of the requisite causation standard in these types of situation.

In Section L of the judgment, the Court sets out a number of evidentiary conclusions, such as the accused having an active role in the delivery of weapons, making staff available for the armed conflict, allowing his business premises in Liberia to be used as a hiding place for weapons and encouraging the soldiers to loot. On the basis of these facts, the Court concludes that the accused actively contributed to the acts of war.[91] Later on, the Court simply concludes in respect of the *actus reus* that the accused assisted the persons mentioned in the indictment in respect of the acts charged in the indictment.[92]

This succinct reasoning, almost absent reasoning in respect of causation, is troubling. In light of van Anraat's precedent, one would have expected

[88] Supreme Court, 20 April 2010, ECLI:NL:HR:2010:BK8132.

[89] Court of Appeal of 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760; Kouwenhoven was also convicted for violation of the trading sanctions, criminalized under the Sanctions Act of 1977, but this matter does not seem to have had any significant impact on the sentence.

[90] Supreme Court, 18 December 2018, ECLI:NL:HR:2018:2336.

[91] Court of Appeal of 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760, Section L.1.

[92] Ibid., Section M.

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the Court to be more specific on the issue of causation. It should be mentioned that the indictment in the *Kouwenhoven* case is quite general. Covering a relatively long period, three years, the indictment states that several war crimes have been committed, by, amongst others, acts of killing, torture or rape. No individual victims are mentioned; nor are any specific incidents singled out. In comparison, the charges formulated in the *van Anraat* case, mentioning specific attacks with chemical weapons, on specific villages, on specific dates, are clearly far more concrete. As explained by Fry, the complex nature of international crimes has been stated as a reason to forgive lowering standards of specificity of charges throughout the history of international criminal courts and tribunals. Fry has criticized the use of unspecific charges in international crimes cases, from the perspective of both challenges in fact-finding and the rights of the accused to be put on notice.[93] In addition to that general concern, unspecific charges regarding the crimes committed by the principal should merit further attention from the perspective of the causation requirement when someone is charged with aiding and abetting. Could a situation of relatively broad mentioning of the crimes of the principal spill over into a lower requirement with respect to causation, when charging aiding and abetting? Or, to be more concrete, would it, in order to establish causation in relation to many crimes committed over a longer period of time, be sufficient that the accused's assistance has actually contributed to *some* of these crimes? And, if so, what portion would justify tying the accused's assistance to all crimes as they are being broadly charged?

Another concern with the Court's approach in the *Kouwenhoven* case on causation has to do with the apparent conflation between assistance in acts of war and assistance in war crimes. Under a strict causation approach, the selling of weapons in a situation of armed conflict would not necessarily contribute to the commission of war crimes, because weapons supplied by the accused can also be used in legitimate acts of war. In order to establish causation, one would have expected these two matters to have received proper attention.

First, it seems imperative to have some idea of the percentage of war crimes in the overall military operations in which the accused's weapons have been used. The answer to this question is helpful for the determination of the accused's *mens rea*; a known high frequency of war crimes in an armed conflict means that the accused knew or should have known that the

[93] E. Fry, *The Contours of International Prosecutions: As Defined by Facts, Charges, and Jurisdictions* (Eleven International Publishing, 2015), pp. 79–80.

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weapons he delivered would not only be used in lawful military operations. However, to determine the degree to which deliveries of weapons have in fact been used in the commission of crimes, or have met the standard of causation, information on the proportion between legitimate and unlawful military operations appears important. Here we can discern an essential factual difference from the *van Anraat* case. Once chemical weapons are being used in populated areas, this by definition amounts to a war crime; there is no possible legitimate use in such circumstances. The Appeals Court in *Kouwenhoven* appears to equate assistance in acts of war with assistance in war crimes. This follows from the Court's conclusion that the accused has made an active contribution to the acts of war as a basis for aiding and abetting liability. This may be regarded as fully embracing a risk-based view on causation, in the sense that war crimes are likely to be committed in *any* armed conflict and that *any* delivery of weapons in that situation then satisfies the causation standard. However, if the Court adopts this position, further argumentation and substantiation are needed. An alternative explanation for how the Court has handled this is that it has simply overlooked, in respect of causation, the possibility of the weapons delivered by the accused not being used in the commission of war crimes but essentially, or only, in lawful military operations.

A second issue that required the Court's attention in our view is the following: How many of the totality of the weapons used by the armed forces of Charles Taylor in the period set out in the indictment were delivered by the accused? In comparison, the fact that van Anraat delivered a very large portion and at some point in time was even the only supplier of chemicals appeared to be an important factor in proving causation in his criminal case. The *Kouwenhoven* judgment does not give us any information on the importance of the quantities delivered by the accused in the overall weapons arsenal of the armed forces of Charles Taylor. The judgment does inform us that weapons have been delivered and there is evidence that these weapons have been transported to the combat areas. But we have no idea how many in a totality of weapons and therefore cannot determine, or even make an educated guess, about the chances of Kouwenhoven's weapons being used in the war crimes as charged in the indictment. If the determination of these chances does not matter according to the Court, then this strongly suggests a risk-based approach regarding causation. While there may be arguments in favour of such a position, it needs more argumentation and substantiation on the part of the Court.

In conclusion, it can be said that the preference of the Court of Appeals for 'causeless complicity' in the *Kouwenhoven* case could be inferred from

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the conviction of Kouwenhoven for aiding and abetting in war crimes, and the absence of any discussion on the causation requirement. It is of interest to note that a risk-based approach towards aiding and abetting also resonates in some of the Court's findings on the *mens rea* of Kouwenhoven. Making use of a *dolus eventualis* construction, the Court concludes that by delivering weapons and being aware of the violent character of the Taylor regime, the accused knowingly accepted the risk that these weapons would be used in a variety of war crimes, not only war crimes that are directly the result of the use of weapons, such as killings, but also war crimes committed under threat of weapons, such as looting and rape.[94]

Although it is beyond the scope of this chapter to address the *mens rea* aspects of aiding and abetting, this part of the *Kouwenhoven* case demonstrates both the promise and the pitfalls of the risk-based approach towards causation, especially when combined with a 'broad' *mens rea* construction, such as that of *dolus eventualis*. The consequence may be that the *actus reus* and *mens rea* requirements are merged into one. Of course, some act of potential assistance will always be required. But if the risk that the accused takes that this assistance could have been used in the commission of crimes is ultimately decisive for criminal liability, it can be said that the *actus reus* has very limited independent value, as this same risk is also at the heart of the *mens rea* determination (using *dolus eventualis*). The question arises as to whether Kouwenhoven's conviction in relation to all these crimes, including rapes, is really justifiable on this basis. Conversely, it may also be difficult to accept a full acquittal of Kouwenhoven as a reasonable outcome, as a result of the mere impossibility of proving actual causation in mass atrocity situations. We will reflect more on this dilemma in the following paragraph.

A *Sui Generis* Standard of Causation in Case of Powerful Actors (Companies and Business Owners) Contributing to Mass Atrocities?

Through the lens of the causation problems as they occurred in the *van Anraat* and *Kouwenhoven* cases, we attempt to offer some thoughts on whether there is, or should be, a revised standard of causation in cases of mass atrocities. With aiding and abetting – a mode of liability having its origin in domestic criminal law for ordinary offences – we see a continuous

[94] Court of Appeal of 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760, Section L.2.5.

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struggle in case law dealing with mass atrocities to depart from the strict requirement of a cause–effect relationship. The justice systems we have examined appear to already show a new direction towards which a revised standard of causality is emerging, even if this is not always recognized as such explicitly.

We see that each court and tribunal has attempted to formulate its own approach *de novo*. Among the ICTY, ICTR, the ICC and the Dutch systems – and among chambers and courts within each separate justice system – there appears to be a tendency not to follow precedents in the majority of cases. Courts at times chose to develop the causation standard as they deemed fit, from the plain text of their law or statute. This is particularly true for the international criminal tribunals. At the ICC, the *Bemba et al.* Trial Chamber consequently rejected any qualification of causality from the ICTY and the ICTR, especially because the drafters of the Rome Statute consciously adopted a higher *mens rea* threshold for aiding and abetting in Article 25(3)(c).[95]

For now, it suffices to note that the Dutch courts and international criminal tribunals are heading in a general, normative direction. The baseline they have all agreed on is that the act of assistance need not be the *condicio sine qua non*, that is, there is no need to prove that hypothetically the perpetration would have failed but for the assistance. In a comparative perspective, this is also why aiding and abetting as a mode of individual criminal responsibility has been set apart, legally and conceptually, from principal perpetration. The latter requires a sufficient level of control effected upon the crimes, in such a way that the principal's conduct is capable of frustrating the commission.[96] Building on this common foundation of what the assistance need not be, the question remains what effect the assistance must have had on the principal perpetration. In order to draw out the contours of a *sui generis* standard of causality, we would like to make the following points.

The first relates to the dilemma between the causation and the risk-based approaches. Previously, we have pointed out that because of the nature of mass atrocities (enormous harm and high plurality of actors) this can be an additional reason in favour of a risk-based approach towards causality, in contrast to situations of 'common criminality'.

[95] Ambos (n. 46), p. 1009.

[96] ICC, *Prosecutor* v. *Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04–01/06–803-tENG, 14 January 2007, para. 322. See also Ambos (n. 46), p. 479.

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However, we are convinced that actual causation, that is, effect, is the primary method of attributing criminal responsibility with regards to acts of assistance, and the risk-based approach towards causation should have a subsidiary role only. This is probably already the way courts go about it: if the *Kouwenhoven* case had generated evidence proving that the weapons of the accused were used in the indicted crimes like in the *van Anraat* case, the court would certainly have mentioned this and would have used this to substantiate an actual effect on the principal crimes. However, in the interests of legal certainty and securing the rights of the defence, it is recommended that the impossibility to establish actual causation is explicitly mentioned, and the transition to applying a risk-based causation standard is visible to all.

A related, logically subsequent point is that the move from the causation-based to a risk-based approach should be explicitly justified and motivated. By that, we mean that a court should deviate from actual causation *only* when the circumstances at hand justify doing so and under strict conditions. The bottom line, in our opinion, is that a risk-based approach towards causation could justify the establishment of a causal link only if the risk-enhancing act of assistance was substantial or of significant weight and significant potential impact. We propose a (rough) test that could assist the courts in making such a determination.

The purpose of a *sui generis* causation test in aiding and abetting liability for mass atrocities is to distinguish between those who have taken significant risks by their acts of assistance and have been in a position to have actually made a difference and those who have done less and hold less prominent positions. Or, to make it more concrete, risk-based causation may be justifiable in cases of companies and businessmen delivering significant quantities of weapons with which war crimes could have been committed, but not so in cases of assistance of far less significance, or of a more remote or indirect nature. Going back to the *van Anraat* and *Kouwenhoven* cases, one can think of examples of those having assisted these accused in their (commercial) activities. Let us take the example of banks that have financed, through loans, the relevant business operations of van Anraat and Kouwenhoven, and let as assume that these banks' *mens rea* requirement in respect of their assistance in the war crimes via assisting the aiders and abettors would have been fully satisfied. Continuing on an ever-expanding path of risk-based causation and by consistently applying the same logic, one could argue in favour of complicity liability for these banks. Yet, one could equally feel compelled to draw the line here and to consider this assistance of banks too remote,

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too indirect, or simply too insignificant to be within the reach of a justifiable and reasonable risk-based causation approach.

Taking this complex example, it would be impossible as well as undesirable to develop hard criteria distinguishing with precision between situations of accepting and denying risk-based causation. Instead, we suggest that in cases of aiding and abetting mass atrocities, courts, in deciding on (risk-based) causation, are obliged to take a number of factors into account. The four-pronged test for risk-based causation in cases of mass atrocities would be as follows: a) whether or not the assistance provided was capable of making a difference to the crimes committed by the principal; b) whether or not the assistance provided could also be used only or essentially for lawful purposes and how likely this was in light of the evidence; c) whether or not the assistance was provided directly to the principal; and d) how important the acts of assistance provided by the accused were in comparison to the assistance provided by others.

Whether or not, and to what degree, one of these factors applies should in our view not be decisive for establishing (risk-based) causation. It is for a court, taking all these factors into account holistically and providing sufficient reasoning, to determine whether (risk-based) causation can be established in a concrete case. The aforementioned test could assist courts in distinguishing between reasonable situations of causeless complicity and endless complicity. The latter may happen if every situation of risk-enhancing assistance, however minor it may be, leads to causation and therefore criminal liability. This is neither necessary nor desirable.

Conclusion

The criminal cases against Dutch businessmen van Anraat and Kouwenhoven offer a fascinating starting point for an inquiry into the required degree of causation in situations of providing assistance in the commission of international crimes. In other words, and repeating the research question: what should the degree of causation be for aiding and abetting liability of companies and businessmen who have assisted in the commission of mass atrocities? This matter continues to pose challenges for both courts and scholars, especially in complex situations of commission of mass atrocities, in which the actual effect of assistance on the commission of crimes often cannot be discerned, but in which the ultimate harm is enormous.

In our endeavour to answer the research question, we have first looked at the views and approaches of legal and moral philosophers in respect of

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causation. The two contrasting views on causation are one in which actual causation matters and the other in which it does not. Especially when looking at the commission of mass atrocities, in which many aiders and abettors can be involved, the theoretical justifications underlying causeless complicity or risk-based causation appear to be more appealing.

We have then examined what the approach is in the law and practice in the Netherlands and at the international criminal tribunals when it comes to determining causation. While all systems reject a 'but for' (or: *condicio sine qua non*) standard of causation, the approaches differ widely. In the Netherlands, the consistent case law in respect of ordinary crimes is the mere facilitation effect of the assistance provided. At the international criminal tribunals, the initial case law, that of the ICTY, required a substantial effect of the assistance on the commission of the crime. However, the trend within the ICC appears to go in the direction of not requiring any effect at all (causeless complicity).

The analysis of the *van Anraat* and *Kouwenhoven* cases only adds to the confusion. In the *van Anraat* case, actual causation was – certainly initially – a strict requirement, whereas in the *Kouwenhoven* case the accused was convicted without proof of effect of his assistance – the delivery of weapons – on the crimes as charged in the indictment. The diverging approaches and unclear or occasional absence of reasoning fuel the assumption that, even in a well-developed criminal justice system such as that of the Netherlands, there may be a need for a revised, *sui generis* causation standard in the prosecution of mass atrocities.

We have offered a proposal for this *sui generis* standard, taking into account the unique circumstances of mass atrocities and the enormous harm occasioned thereby. Our conclusion is that a risk-based causation standard, that is, one in which assistance need not actually have made but could have made a difference to the commission of the crime, is the most appropriate one in cases of mass atrocities. The attention should focus on the degree to which the assistance provided enhances the risk. In our view, only assistance of significant potential impact could meet the causation requirement. In order to determine 'significant potential impact', we have proposed a four-pronged test that may assist courts in making the causation determination. While this test will not draw a hard line between causation and non-causation, and thus between liability and non-liability, it will in all cases assist courts in better distinguishing between situations where causation is reasonable and those where it is not.

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