

PUBLIC
ANNEX E

S. J. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) & (c) of the Rome Statute of the International Criminal Court* (Melbourne Law School 2011)

view, the causation requirement should not be explicitly set out in the elements, but should rather be included as a footnote to the relevant consequence element. As such, Article 30 would not be applied to it directly, and thus the accused's intent/knowledge would not need to cover the effect that her/his conduct has on the occurrence of the consequence.

V Additional Mental Element

The terms of Article 25(3)(b) do not 'otherwise provide' for mental elements for ordering or soliciting/inducing. Article 25(3)(c), however, contains an additional or special mental element, which applies *in addition to* the general requirements of Article 30: it requires that the conduct of the aider and abettor be done '[f]or the purpose of facilitating the commission' of the principal crime. Therefore, a third mental element for aiding and abetting (which has no corresponding material element), is as follows:

The act of the accused was committed for the purpose of facilitating the commission of the crime by the principal perpetrator.

This represents a significant limit to liability under Article 25(3)(c) because, as Smith points out, '[t]he range of attitudes which an accessory may have towards whether the principal offence occurs is extensive'.²³ The attitude of a potential accessory may range from a vested interest or stake in the crime being committed, to a neutral or indifferent state, or even to a fervent hope that the principal will not go through with committing the crime. Let us take the example of an arms dealer who sells weapons to a rebel group in the knowledge that those weapons will be used to commit genocide. The range of attitudes that the arms dealer may have towards the ultimate crime (genocide) may extend from a desire that genocide be committed, to complete indifference. What about the case of a detainee who, in exchange for better conditions in detention, discloses the names and locations of members of a particular group to the authorities, in the knowledge that the information will be used to capture and torture those individuals.²⁴ The detainee may hope that the members of that group will have fled by the time the authorities get to them; on the other hand, he may be acting on a grudge towards the individuals he has named. Under Article 25(3)(c), the arms dealer or detainee would only be liable if their purpose or reason for acting was to facilitate the crime of the principal perpetrator.

The impact of this additional mental element has been foreshadowed in *Popović* before the ICTY. One of the accused in that trial, Ljubomir Borovčanin, was charged with aiding and abetting the forcible transfer of the Bosnian Muslim civilian population in the area of Srebrenica by allowing the use of his personnel

²³ K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991) 142.

²⁴ This example is provided by Eser: Eser, 'Individual Criminal Responsibility', above n 8, 801.

to assist in the transfer.²⁵ Borovčanin's men assisted in the transfer while at the same time providing relief to a population facing a humanitarian disaster.²⁶ Thus, while he permitted the use of his men in the knowledge that such conduct would assist in the commission of a crime, there was doubt as to whether he engaged in such conduct for that purpose. The Chamber noted, however, that the law of the Tribunal (which does not require this additional mental element) did 'not allow for a distinction to be drawn on this basis in terms of criminal responsibility'.²⁷ Thus, the fact that Borovčanin may have provided the relevant assistance for the purpose of humanitarian relief was not a bar to his conviction on the basis of aiding and abetting. The Chamber did state, however, that this fact would be considered in mitigation of sentence.²⁸

These examples—the arms dealer, the detainee, and the case of Borovčanin—show that this additional mental element may be too restrictive in some cases (by excluding the liability of an individual who knowingly assists the commission of a crime for an illegitimate purpose such as financial or personal gain), but perhaps appropriate in others (by excluding the liability of an individual who knowingly assists the commission of a crime for a legitimate purpose such as preventing greater suffering).²⁹

The approach under Article 25(3)(c) is much more stringent than that taken by the Tribunals. In fact, according to Ambos, the approach taken in the Rome Statute 'ignores the ... jurisprudence of the ICTY and ICTR'.³⁰ Instead of

25 *Popović TJ* at [1501]. Borovčanin was the Commander of a joint force of Republika Srpska Ministry of Internal Affairs Special Police Brigade Units subordinated to the Drina Corps of the Bosnian Serb Army to participate in the Srebrenica operation. The Trial Chamber found that Borovčanin had left the 1st Company of the Jahorina Recruits in Potočari, where they assisted with the boarding of Bosnian Muslim women, children and the elderly onto buses and trucks, separating the men from their families, counting the people as they stepped onto the buses, and patrolling the area in which the Bosnian Muslims were gathered until the forcible transfer was completed: at [1498].

26 *Ibid* [1500].

27 *Ibid*.

28 *Ibid* [1501].

29 Although it may be that liability in such cases should be more properly avoided by pursuing a defence of necessity/duress under Article 31(1)(d) of the Statute. Under this provision, an accused will not be held criminally responsible if, at the time of her/his conduct, s/he was acting in response to a threat (made by either another person or constituted by other circumstances beyond the accused's control) of imminent death or of continuing or imminent serious bodily harm against the accused or another person. The accused's conduct must, however, be both necessary and reasonable to avoid the threat, and must not be intended to cause greater harm than the harm sought to be avoided.

30 Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, 2008) 743, 760.

requiring purpose, the Tribunal jurisprudence has taken the view that it is sufficient that the accused *knew* (in the sense that s/he was aware) that her/his acts were assisting the commission of a crime by the principal perpetrator.³¹ While some judgments appear to have required that the aider/abettor *intend to provide assistance*, or, at a minimum, accept that such assistance would be a possible and foreseeable consequence of her/his conduct,³² the Appeals Chamber has since held that such a requirement does not exist.³³ Furthermore, it is clear that under the case law of the Tribunals the aider/abettor need not *intend* that the principal crime be committed,³⁴ even for special-intent crimes.³⁵

The approach taken by the Tribunals follows broadly the position taken in the post-WWII jurisprudence. For example, in the *Zyklon B* case, where the

³¹ See cases cited above at page 193 (n 14). A number of judgments required that the act of assistance be 'specifically directed' to assist, encourage or lend moral support to the commission of a principal crime: see, eg, *Tadić AJ* at [229]; *Kupreškić TJ* at [772]; *Kronjelać AJ* at [33]; *Vasiljević AJ* at [102]; *Ntagerura AJ* at [370], [375]; *Krajišnik TJ* at [885]; *Simić AJ* at [85]. While this requirement has been usually considered part of the material elements of aiding and abetting (see, eg, *Mrkšić AJ* at [159]), in my view it correctly belongs in a discussion of the *mental* elements of aiding and abetting, as it goes to the *purpose* or *object* of the conduct of the aider/abettor. In *Blagojević*, the Appeals Chamber noted that the initial statement to this effect in the jurisprudence had been made in the *Tadić AJ* immediately after a discussion of the elements of JCE liability, and 'was introduced for the purpose of distinguishing aiding and abetting from acting in pursuance of a common purpose or design to commit a crime': *Blagojević AJ* at [185]. The *Blagojević* Appeals Chamber concluded by observing that 'while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting': *Blagojević AJ* at [189]. See also *Mrkšić AJ* at [159]; *Popović TJ* at [1014]. While not itself departing from the *Tadić* definition, the *Blagojević* Appeals Chamber nonetheless refused to overturn Jokić's conviction on the basis that his acts of assistance were not 'specifically directed' towards the commission of the principal crime. Nevertheless, the words 'specifically directed' continue to appear in the judgments of the ICTR and SCSL: *Muhimana AJ* at [189]; *CDF TJ* at [229]; *Nabimana AJ* at [482]; *Seromba AJ* at [44]; *Muvunyi AJ* at [79]; *Zigiranyirazo TJ* at [386]; *Bagosora TJ* at [2009]; *RUF TJ* at [277]; *Renzaho TJ* at [742]; *Nsengimana TJ* at [800]; *Setako TJ* at [450]; *Kanyarukiga TJ* at [621].

³² *Blaškić TJ* at [286]; *Bagilishema TJ* at [32]; *Kvočka TJ* at [255]; *Orić TJ* at [288], [681].

³³ *Blaškić AJ* at [49] (referring the relevant passage in the *Blaškić TJ*, and finding that in this respect the Trial Chamber erred); *Mrkšić AJ* at [159]. See also *Popović TJ* at [1500].

³⁴ *Furundžija TJ* at [236], [245]; *Aleksovski AJ* at [162]; *Kunarac TJ* at [392]; *Kvočka TJ* at [284]; *Kronjelać TJ* at [76]; [90]; *Vasiljević TJ* at [71]; *Semanza TJ* at [388]; *Kronjelać AJ* at [51]; *Brđanin TJ* at [273]; *Blagojević TJ* at [727]; *Strugar TJ* at [350]; *Kvočka AJ* at [88]; *Limaj TJ* at [518]; *Mpambara TJ* at [16]; *Seromba TJ* at [309]; *CDF TJ* at [231], [724], [727]; *Mrkšić TJ* at [556]; *Boškoski TJ* at [403]; *Šainović TJ* at [94]; *RUF TJ* at [280]; *Lukić TJ* at [902]; *Popović TJ* at [1016], [1500]; *Haradinaj AJ* at [58].

³⁵ See above page 194 (n 15).

accused were charged with having supplied poison gas to concentration camps for use in killing Allied nationals,³⁶ it appears that the Court did not require it to be proven that the gas was provided *for the purpose* of killing human beings. The convictions against two of the three accused suggest that the Court accepted the submission made by the Judge Advocate that all that was required to be proved was that the accused *knew* that the gas was to be used for that purpose.³⁷ The fact that the gas was produced by the firm for the purpose of extermination of vermin and was supplied in the course of legitimate business operations was not a bar to criminal responsibility.³⁸

Turning to domestic law, this additional mental element for aiding and abetting has been described as something approaching a 'coincidence of purpose' between the principal perpetrator and the aider/abettor,³⁹ and it is largely traced back to the ALI's Model Penal Code. The Code provides that '[a] person is an accomplice of another person in the commission of an offense if ... *with the purpose of promoting or facilitating* the commission of the offense, he ... aids or agrees ... to aid such other person in planning or committing it'.⁴⁰ A draft submitted by the ALI in 1953 also incorporated a 'median position' which provided for accessory liability where a person acted only 'knowingly' (that is, without purpose).⁴¹ This provision required, however, that the act of assistance 'substantially facilitated' the commission of the crime. This 'median position' reflects the position adopted by the Tribunals. The comments which accompanied this draft demonstrate that the issue of 'whether knowingly facilitating the commission of a crime ought to be sufficient for complicity, absent a true purpose to advance the criminal end' was much debated.⁴² To illustrate the point, the comments quote the case of *Backun*, where Judge Parker stated that:

[guilt] as an accessory depends, not on 'having a stake' in the outcome of the crime ... but on aiding and assisting the perpetrators ... The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a

³⁶ See *Zyklon B* at 93.

³⁷ *Ibid* 101.

³⁸ See also *Furundžija TJ* at [245], where the Trial Chamber, having extensively examined the post-WWII case law, stated that in cases where individuals were convicted for having driven victims and perpetrators to the site of an execution, 'the prosecution did not have to prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor.'

³⁹ For a discussion of this concept of 'coincidence of purpose', see Smith, above n 23, 141.

⁴⁰ Model Penal Code § 2.06(3)(a)(ii) (emphasis added).

⁴¹ Model Penal Code § 2.04(3)(b) (Tentative Draft No 1, 1953).

⁴² *Ibid* § 2.04(3) cmt at 27 (Tentative Draft No 1, 1953).

gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun ...⁴³

In support of the approach ultimately adopted by the Code, the comments quote the case of *Falcone*, where Judge Hand stated '[i]t is not enough that he does not forgo a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.'⁴⁴

The approach under the Rome Statute, which follows that taken by the Model Penal Code, was therefore probably designed to protect individuals from liability for aiding and abetting by virtue of their legitimate daily business activities where those activities may in some way facilitate the commission of a crime (for instance, weapons manufacturers and other businesses which engage in commercial activities in war-torn countries). As Sereni explains:

Ordinary, everyday actions remain within the sphere of the licit unless they are intentionally used in the service of a criminal project. In other words, the exclusion of acts done without the intention of facilitating crime allows the citizen to carry on with normal daily social and business relationships without the risk of being held responsible for crimes committed autonomously by others.⁴⁵

However, the provision will also have the effect of protecting individuals from liability where they facilitate the commission of a crime for *illegitimate* purposes or by virtue of their *illegitimate* activities (for example, individuals or companies who profit from the exploitation of natural resources of war-torn countries). Thus, individuals who take advantage of situations of armed conflict for financial gain may escape liability for any international crimes they contribute to in the process.

The effect which this additional mental element will have on the number of cases which fall within the definition of aiding and abetting under Article 25(3)(c) depends to a large extent on how the Court interprets the phrase 'for the purpose of'. As noted in Chapter Six,⁴⁶ the definitions of 'intent' and 'knowledge' set out in Article 30 probably do not apply to *additional* mental elements. The Court is therefore permitted to look to sources of law outside the Statute to interpret this phrase. Badar takes the view that because the wording of Article 25(3)(c) 'is borrowed from' the US Model Penal Code, the Code's test should be adopted. Therefore he argues that 'the prosecution must demonstrate that the aider and

43 *Backun v US*, 112 F (2d) 635, 637 (4th Cir 1940).

44 *US v Falcone*, 109 F (2d) 579, 581 (1940).

45 Andrea Sereni, 'Individual Criminal Responsibility' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (2004) vol 2, 103, 111.

46 See above page 183.

abettor's *conscious objective* is to facilitate the commission of the crime'.⁴⁷ Eser, on the other hand, would interpret this additional mental element as requiring that the accused '*know as well as wish* that his assistance shall facilitate the commission of the crime'.⁴⁸ There may not be any real difference between the two suggestions. In my view, the Court will probably have to interpret this phrase to mean something similar to direct intent (in the first degree), as discussed in Chapter Six.⁴⁹ This is how the phrase 'for the purpose of' is interpreted in domestic criminal law, so it will be very difficult for the Court to argue that the drafters of the Statute meant something different.

Some of the difficulties in proving this additional mental element may be avoided if the Court can make an inference from a finding of the accused's *knowledge* that her/his conduct would facilitate commission of a crime that the accused's *purpose* was to facilitate the commission of a crime. There is some support for an argument that purpose may be inferred from knowledge. The ALI has stated that 'often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motive'.⁵⁰ The ICTY Trial Chamber has expressed a similar view, stating that 'in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists the crime, will allow for no other reasonable inference than that the accused intended to assist the commission of an offence' (that is, that the accused acted with the purpose of assisting the commission of an offence).⁵¹ Dubber also states that '[t]he line between knowledge and purpose ... may not be so hard to cross', as '[t]he law has long recognized various ways in which purpose can be inferred from knowledge in general',⁵² particularly where the principal's crime is serious, as in the case of international crimes.⁵³

Finally, there is no reason why the Court should interpret this phrase to mean that facilitating the commission of a crime was the *only* purpose of the accused in providing the relevant assistance. For example, it could hold that the phrase requires only that facilitating the commission of a crime be *a* purpose of her/his conduct, not the *sole* purpose. Thus, in the case of the arms dealer, if it could be shown that s/he acted both with the purpose of making a profit, and with the purpose of facilitating the commission of genocide, s/he would be liable

47 Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473, 507 (emphasis added).

48 Eser, 'Mental Elements', above n 1, 801 (emphasis added).

49 Robert Cryer, 'General Principles of Liability in International Criminal Law' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 233, 248.

50 Model Penal Code § 2.06 cmt at 27 (Tentative Draft No 1, 1953).

51 *Popović TJ* at [1500].

52 Markus Dubber, *Criminal Law: Model Penal Code* (2002) 993; Markus Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *Journal of International Criminal Justice* 977, 116–17.

53 Dubber, 'Criminalizing Complicity', above n 52, n 46.

for aiding and abetting genocide. Therefore, if the Court were inclined to bring the elements of aiding and abetting under the Statute more in line with the current state of customary international law, it could interpret the term 'purpose' more broadly in this way. This would mean that evidence of another purpose would not itself exclude a finding that the accused acted for the purpose of facilitating the commission of a crime.

In my opinion the position taken by the Rome Statute in Article 25(3)(c) is appropriate given that the Court was established to try the most serious crimes of international concern.⁵⁴ A case involving aiding and abetting *without* purpose probably would not reach the necessary threshold for prosecution before the ICC. The problem is, however, that the inclusion of this purpose requirement in the Rome Statute may alter the position under customary international law, as it has developed before the Tribunals. Article 25 of the Rome Statute is already considered to represent the most accepted articulation of the principles of individual criminal responsibility under international law. It has been incorporated into domestic legislation,⁵⁵ and has also been adopted by more recent internationalised tribunals and courts.⁵⁶ Thus, jurisdictions which try individuals for less serious international crimes which do not warrant prosecution before the ICC will be applying the same high standard with respect to the mental element of aiding and abetting.⁵⁷

⁵⁴ Rome Statute, Preamble, Article 1, Article 5(1).

⁵⁵ Article 25 has been incorporated (without any, or any significant, changes) into domestic legislation in Austria (Federal Law No 135, *Cooperation with the International Criminal Court*, Pt 1, s 3), New Zealand (*International Crimes and International Criminal Court Act 2000*, s 12(1)(a)(iv)), and Trinidad and Tobago (*International Criminal Court Act 2006*, s 12(1)(iv)).

⁵⁶ Article 25 (or a slight variation) has been adopted as the provision on individual criminal responsibility by the Special Panels for Serious Crimes in East Timor, and by the Iraqi Special Tribunal (and Iraqi High Tribunal): *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15, 6 June 2000, Section 14; Statute of the Iraqi Special Tribunal, Article 15, in Appendix A to *Delegation of Authority regarding an Iraqi Special Tribunal*, Coalition Provisional Authority Order 48, 10 December 2003; Statute of the Iraqi High Tribunal, Article 15, Law No 10 of 2005, *Official Gazette of the Republic of Iraq*, No 4006, 18 October 2005.

⁵⁷ For an example of a case where this already appears to have happened, see *Presbyterian Church of the Sudan et al v Talisman Energy, Inc et al*, 582 F3d 244 (2d Cir 2009), where the US Court of Appeals for the Second Circuit held that the mental element for aiding and abetting liability in an Alien Torts Statute action is purpose rather than knowledge (at 41). As support for this position, the Court cited (amongst other sources) the Rome Statute.

VI Conclusion

This final substantive chapter of the volume has applied Article 30 of the Rome Statute to the material elements of ordering, soliciting/inducing and aiding and abetting developed in the previous chapters in order to identify the mental elements which accompany each of those material elements. It has thus identified the final elements of each of those accessorial modes of liability. The next chapter, which provides the conclusion to this volume, sets out the proposed elements of each of the accessorial modes of liability under Article 25(3)(b) and (c) in full and illustrates how they will work in practice by applying them to a hypothetical factual scenario.