

Extract from Sabine Michalowski, *The Mens Rea Standard For Corporate Aiding And Abetting Liability - Conclusions From International Criminal Law*, 18 UCLA J. INT'L L. & FOR. AFF. 237 (Spring 2014)

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### c. The Rome Statute

Another source of authority for the view that the mens rea standard recognized in international criminal law is purpose rather than knowledge might potentially be found in the Rome Statute of the ICC. It is noteworthy that the Rome Statute does not apply to corporations, as Article 25(1) of the Statute limits the ICC's jurisdiction to natural persons. Under the ATS, however, it is regarded as a relevant source for determining the mens rea standard for aiding and abetting that is recognized in international law.<sup>78</sup> Article 25(3)(c) of the Rome Statute requires that the aider and abettor acted with the "purpose of facilitating the commission" of a crime by the principal actor. The Talisman court accepted this provision as a confirmation of its view that the mens rea standard under customary international law is purpose rather than knowledge.<sup>79</sup>

#### 1. The Rome Statute and its Relationship with Customary International Law

Even Judge Katzmann expressed some doubts as about whether the Rome Statute mirrors customary international law with regard to the mens rea standard of purpose, admitting that it "has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat [\*255] uncertain."<sup>80</sup> Nevertheless, quoting Furundzija, Judge Katzman ruled that, given the large number of countries that signed and ratified the Rome Statute, it constitutes "an authoritative expression of the legal views of a great number of States."<sup>81</sup>

To use this quote from the Furundzija decision as supporting the view that the Rome Statute reflects an international consensus regarding the relevant mens rea standard in international law is rather questionable. In the same paragraph in which the Trial Chamber in Furundzija issued the above quoted statement, it also opined that "depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law."<sup>82</sup> Moreover, the Trial Chamber considered the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission, to be an "authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are uncertain contents or are in the process of formation, or at the very least, (iii) be indicative of the legal views of eminently qualified publicists

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<sup>78</sup> See, e.g., [Presbyterian Church of Sudan v. Talisman Energy, Inc.](#), 582 F.3d 244, 259 (2d Cir. 2009); [Aziz v. Alcolac, Inc.](#), 658 F.3d 388, 400 (4th Cir. 2011); [Khulumani v. Barclay Nat'l Bank Ltd.](#), 504 F.3d 254, 275-76 (2d Cir. 2007) (Katzmann J., concurring).

<sup>79</sup> [Presbyterian Church of Sudan](#), 582 F.3d at 259. See also [Khulumani v. Barclay Nat'l Bank Ltd.](#), 504 F.3d 254, 276 (2nd Cir. 2007) (Katzmann J., concurring); See also [Id. at 332-34](#) (Korman J., dissenting); [Nestle](#), 748 F. Supp. 2d at 1085-87.

<sup>80</sup> [Khulumani v. Barclay Nat'l Bank Ltd.](#), 504 F.3d 254, 275-76 (2d Cir. 2007) (Katzmann J., concurring).

<sup>81</sup> [Khulumani](#), 504 F.3d at 276 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, P 227 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10 1998)) In [Aziz v. Alcolac, Inc.](#), 658 F.3d 388, 400 n.12 (4th Cir. 2011) the court stated, "We have no quarrel with the view of the Doe VIII majority that the Rome Statute does not express a rule of customary international law. We simply find the Rome Statute's mens rea standard for aiding and abetting liability, reached after prolonged negotiations among delegates from over 100 signatory nations, to be a more authoritative barometer of international expression on the subject."

<sup>82</sup> Furundzija, Case No. IT-95-17/1, at P 227.

representing the major legal systems of the world." <sup>83</sup> The Draft Code advanced knowledge, not purpose, as the relevant mens rea standard. <sup>84</sup>

Based on the Draft Code and Article 30 of the Rome Statute with its reference to knowledge as the main authoritative international instruments, as well as on its overview of case law, the Trial Chamber concluded in Furundzija that the internationally recognized mens rea standard was [\*256] knowledge rather than purpose. <sup>85</sup> A view that the Rome Statute constitutes an authoritative expression that the recognized mens rea standard in international law is purpose is thus evidently misguided.

The analysis of international case law carried out above demonstrates that prior to the Rome Statute, the prevalent standard of mens rea in international criminal law was one of knowledge. <sup>86</sup> It follows that if the Rome Statute required a rigorous purpose standard for aiding and abetting liability, it would deviate from, rather than reflect customary international law at the time of its drafting. <sup>87</sup> The Rome Statute does not seem to have aspired to codify customary international law principles in the area of aiding and abetting, <sup>88</sup> but rather expressed a political compromise on the relevant mens rea standard for the specific purpose of providing rules for litigation before the ICC. <sup>89</sup> Moreover, Articles 10 and 22(3) of the Rome Statute specifically express "the drafters' intent to ensure the preservation and development of customary international law independent of the Statute." <sup>90</sup> All these are strong indicia that the Rome Statute is not a reflection of and did not alter the mens rea standard existing under customary international law at the time of its drafting. <sup>91</sup> Conversely, the fact that the mens rea test [\*257] under customary international law is one of knowledge does not necessarily stand in the way of interpreting the Rome Statute as adopting a different and more rigorous mens rea standard. <sup>92</sup>

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<sup>83</sup> Id.

<sup>84</sup> Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind art. 2.3, in Report of the International Law Commission on the Work of Its Forty-Eight Session 15, 18, U.N. Doc. A/51/10, (May 6-July 26, 1996), available at <http://www.un.org/law/ilc/index.htm>

<sup>85</sup> Furundzija, Case No. IT-95-17/1, at P 245.

<sup>86</sup> See also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011).

<sup>87</sup> See Robert Cryer, The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth," 6 J. Conflict & Security L. 3, 23 (2001). See also Sebok, *supra* note 39, at 885; Wim Huisman & Elies van Sliedregt, Rogue Traders, Dutch Businessmen, International Crimes and Corporate Complicity, 8 J. Int'l Crim. Just. 803, 822 (2010); Gallagher, *supra* note 36, at 674; Bhashyam, *supra* note 35, at 270-71.

<sup>88</sup> See Cryer, *supra* note 87, at 23, 30-31; Prosecutor v. Ojdanic, Case No. IT-05-87-A, Application for Permission to file an Amicus Brief on behalf of David J. Scheffer, PP 6-18, (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber July 29, 2010); See also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 778-89 (9th Cir. 2011) (Pregerson, J., concurring in part and dissenting in part).

<sup>89</sup> See David Scheffer & Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 *Berkeley J. Int'l L.* 334, 352-53 (2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit, Brief of Amici Curiae International Law Scholars, 16 (April 30, 2010) [hereinafter Brief of Amici Curiae International Law Scholars], available at [http://www.scotusblog.com/wp-content/uploads/2010/07/09-1262\\_Amicus-brief-of-International-Law-Scholars-William-Aceves-et-al..pdf](http://www.scotusblog.com/wp-content/uploads/2010/07/09-1262_Amicus-brief-of-International-Law-Scholars-William-Aceves-et-al..pdf).

<sup>90</sup> See Brief of Amici Curiae International Law Scholars, *supra* note 89, at 18-19. See also *Jurists Brief for Petitioner*, *supra* note 40, at 11.

<sup>91</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011).

<sup>92</sup> For a discussion of the relationship between the Rome Statute and customary international law see Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04/01/07, Decision on the Confirmation of Charges, P 508 (Sept. 30, 2008), where the ICC suggests in the context of an analysis of the existence of liability for control over an organisation that "since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the "joint commission through another person' is not relevant for this Court." This suggests that the ICC did not regard it as a given that the Rome Statute reflects customary international law in this respect.

## 2. The Meaning of Purpose in Article 25(3)(c) of the Rome Statute

The Talisman court's interpretation of the Rome Statute, i.e., the accomplice must act with the direct purpose of bringing about the principal offence, remains contentious.<sup>93</sup> The Rome Statute explicitly defines intent and knowledge in Article 30, but the word purpose used only in Article 25(3)(c) of the Statute does not receive any clarification. As the ICC is yet to apply Article 25(3)(c) of the Rome Statute, the meaning of purpose under that provision remains open for discussion.

Controversy exists, for example, with regard to the lessons to be drawn from the drafting history of the Rome Statute which, as will be seen, is used both in favour of and against the suggestion that the word purpose in Article 25(3)(c) of the Rome Statute should be interpreted as setting a stricter mens rea test than the knowledge standard prevalent in international case law.

Some authors who suggest that the term purpose needs to be interpreted as containing a volitional element directed towards the commission of the crime by the principal base this on the fact that the compromise reflected in the final version of Article 25(3)(c) of the Rome Statute regarding the mens rea standard of aiding and abetting liability relied heavily on the wording of Section 2.06(3)(a) of the American Model Penal Code (MPC).<sup>94</sup> Section 2.06(3)(a) of the MPC describes as accomplice a person who acts "with the purpose of promoting or facilitating the commission of the offense." Section 2.02(a) of the MPC defines purpose by stating that:

**[\*258]** A person acts purposely with respect to a material element of an offence when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

As Article 25(3)(c) adopted the language of the MPC, some argue, it needs to be interpreted by taking account of the MPC and relevant jurisprudence of US courts.<sup>95</sup> The MPC distinguishes four levels of culpability: purpose, knowledge, recklessness, and negligence,<sup>96</sup> thus clearly regarding purpose and knowledge as different concepts. Even though the US Supreme Court considered the distinction between those two forms of mens rea as "esoteric,"<sup>97</sup> it explained the difference by holding that:

[A] person who causes a particular result is said to act purposefully if "he consciously desires that result, whatever the likelihood of that result happening from his conduct," while he is said to act knowingly if he is aware "that that result is practically certain to follow from his conduct, whatever his desire may be as to that result."<sup>98</sup>

Thus, "conscious object" in Section 2.02(a)(i) seems to equal the desire to bring about the result. It follows that if Article 25(3)(c) of the Rome Statute were to be interpreted with reference to the MPC, it would set a more rigid mens rea standard than that of knowledge in relation to the conduct and result elements of facilitating the principal offence, while awareness would be sufficient in respect of the attending circumstances.

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<sup>93</sup> [Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258-59 \(2d Cir. 2009\).](#)

<sup>94</sup> Burchard, *supra* note 2, at 941; Kai Ambos, General Principles of Criminal Law in the Rome Statute, 10 *Crim. L.F.* 1, 10 n.36 (1999); Mohamed Elewa Badar, The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective, 19 *Crim. L.F.* 473, 507-08 (2008).

<sup>95</sup> Burchard, *supra* note 2, at 941.

<sup>96</sup> See Model Penal Code § 1.13(12)-(15) (1962).

<sup>97</sup> [U.S. v. Bailey, 444 U.S. 394, 404 \(1980\).](#)

<sup>98</sup> *Id.* (quoting [U.S. v. U.S. Gypsum Co., 438 U.S. 422, 445 \(1978\).](#))

Like Section 2.02(a) of the MPC, Article 30(2) of the Rome Statute, the provision which provides the general definition of the mental element of criminal liability under the Statute, requires a different level of mens rea depending on the element of the offence the mens rea refers to. A person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

While both provisions require a different mens rea standard for different [\*259] elements of an offence, there appears to be a substantial distinction between Article 30(2) of the Rome Statute and Section 2.02(a) of the MPC. Section 2.02(a)(i) demands a conscious object in respect of the result of the crime, and thus a desire to bring it about. Article 30(2), on the other hand, requires no more than awareness with regard to the consequences of one's acts.

In the context of aiding and abetting liability, this raises two questions: (1) whether acting with the purpose of facilitating the commission of the offence, which seems to refer to a consequence of the act of assistance, requires no more than awareness that this consequence will occur in the ordinary course of events; or (2) whether the aider and abettor must have the conscious object to facilitate the offence. The latter favors the MPC approach over that adopted in Article 30(2) of the Rome Statute. Proponents of this interpretation argued that Article 25(3)(c) does not leave room for an expansion of liability where the accessory did not act with the wish to facilitate the commission of the offence. According to the ordinary meaning of the term purpose, to act with the purpose of facilitating the commission of a crime "means more than the mere knowledge that the accomplice aids the commission of the offence ... . Rather he must know as well as wish that his assistance shall facilitate the commission of the crime." <sup>99</sup>

If this was correct, it would provide an important argument in favor of requiring a volitional element with regard to the facilitation of the offence, as a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose" (Article 31(1) of the Vienna Convention on the Law of Treaties). <sup>100</sup> However, the ordinary meaning of purpose seems far from clear, as the term could be understood as "sole purpose, primary purpose, or simply purpose as inferred from knowledge of likely consequences." <sup>101</sup>

David Scheffer, Head of the US delegation that negotiated the Rome Statute, explained that reference to purpose in Article 25(3)(c) aimed "to [\*260] avoid any agreement on precisely the issue of shared intent" <sup>102</sup> between the principal offender and the accessory, so that it can then hardly be read to introduce the shared intent standard developed by US jurisprudence. He suggests that the word purpose was chosen in Article 25(3)(c) as a compromise between those who insisted on knowledge and those who advocated for intent. <sup>103</sup> This view is supported by the drafting history of the provision, which states:

The final draft submitted to the Rome negotiators by the Preparatory Committee in 1998, bracketed the language of what ultimately became article 25(3)(c). The bracketed language, indicating disagreement among the drafters, would

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<sup>99</sup> Albin Eser, Individual Criminal Responsibility, in *The Rome Statute of the International Criminal Court* 767, 801 (Antonio Cassese et al. eds., 2002); Albin Eser, Mental Elements - Mistake of Fact and Mistake of Law, in *The Rome Statute of the International Criminal Court* 889, 900-902 (Antonio Cassese et al. eds., 2002); Kai Ambos, Article 25, in *Commentary on the Rome Statute of the International Criminal Court* 743, 760 (Otto Triffterer ed., 2008). See also Burchard, supra note 2, at 941; Badar, supra note 94, at 507-508.

<sup>100</sup> Cassel, supra note 28, at 312.

<sup>101</sup> Keitner, supra note 28, at 88. See also Cassel, supra note 28, at 312; *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 261 (S.D.N.Y. 2009).

<sup>102</sup> Application for Permission to file an Amicus Brief on behalf of David J. Scheffer, supra note 88, at P 33.

<sup>103</sup> Id. See also Scheffer & Kaeb, supra note 89.

have imposed responsibility on one who "[with (intent)(knowledge) to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission." <sup>104</sup>

It is then unlikely that the framers of the Rome Statute intended to set a mens rea standard that is more rigorous than intent. This view is bolstered by the fact that the MPC regards intent and purpose as synonymous (according to Section 1(11) of the MPC which defines the terminology used in the Code, "'purposely' has the meaning specified in Section 2.02 and equivalent terms such as 'with purpose,' ... have the same meaning"; while Section 1(12) clarifies that "intentionally" or "with intent" means purposely). Purpose could then be understood as a different way of expressing intent. In the context of Article 30(2) of the Rome Statute, intent only requires a volitional element with regard to the conduct itself, but not with regard to its consequences.

Whether purpose in Article 25(3)(c) should be interpreted in line with the definition of intent provided in Article 30 of the Rome Statute depends on the relationship and interaction between Articles 25(3)(c) and 30 of the Rome Statute. Article 30(1) clarifies that the intent and knowledge requirements set out in Article 30 apply to criminal liability within the jurisdiction of the Court "unless otherwise provided." One suggestion is that in the context of aiding and abetting liability, Article 25(3)(c) requires an additional mens rea element of "intent of facilitating the commission of a crime." <sup>105</sup> According to this view, Article 25(3)(c) does not provide a **[\*261]** comprehensive description of the mental element of aiding and abetting liability but must be read in conjunction with Article 30. Under this approach, it would not only have to be established that the aider and abettor had the purpose of facilitating the crime. Rather, in addition, the general intent as defined in Article 30 with regard to all other elements of the assistance and the principal offence must also be present. <sup>106</sup> Others argue that the fact that Article 25(3)(c) expressly refers to purpose means that the mens rea standard of aiding and abetting liability is provided for comprehensively in Article 25(3)(c), thus excluding the application of Article 30 in cases of aiding and abetting. <sup>107</sup>

Neither of these approaches assists with shedding light on the principal question in the context of this Article, i.e., whether purpose needs to be interpreted as requiring a wish to facilitate the principal offence, or whether knowledge that this would be the outcome to be expected in the ordinary course of events is sufficient.

Proponents of the important role of Article 30 in determining the mens rea standard of aiders and abettors argue that the mens rea required of accomplices under the Rome Statute does not differ from the standard of "knowing participation ... coupled with a conscious decision to participate" <sup>108</sup> that is prevalent in international jurisprudence. In this context, Article 30:

Reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation ... . Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. <sup>109</sup>

The International Commission of Jurists makes an interesting observation about the interpretation of the purpose requirement. While accepting that purpose "implies a specific subjective requirement stricter **[\*262]** than knowledge,"

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<sup>104</sup> Cassel, *supra* note 28, at 310

<sup>105</sup> Gerhard Werle & Florian Jessberger, "Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law, 3 J. Int'l Crim. Just. 35, 48-49 (2005).

<sup>106</sup> See also Eser, *Individual Criminal Responsibility*, *supra* note 99, at 801.

<sup>107</sup> Vest, *supra* note 2, at 862.

<sup>108</sup> Donald K. Piragoff & Darryl Robinson, Article 30: Mental Element, in *Commentary on the Rome Statute of the International Criminal Court* 849, 855 (Otto Triffterer ed., 2008).

<sup>109</sup> Piragoff & Robinson, *supra* note 108. See also Scheffer & Kaeb, *supra* note 89; and Vest, *supra* note 2, at 862.

<sup>110</sup> it questions the practical effect of "this notionally higher subjective standard" for aiding and abetting liability under the Rome Statute, considering how courts assess the state of mind of an aider and abettor:

On the basis of all relevant circumstances, including both direct and indirect or circumstantial evidence. Therefore, practically speaking, if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the official knowingly aided a crime in order to make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime "on purpose". Accordingly, whilst there may be an apparent difference in the mens rea standard, there may well be very little practical difference." <sup>111</sup>

It is apparent that there is a widespread view that purpose can be inferred from the knowledge that the act of assistance will facilitate the commission of the principal offence. <sup>112</sup> To illustrate, a secondary purpose of facilitating the commission of an offence, for example where the primary motive is that of maximizing profit in pursuance of which acts are carried out with the knowledge that they assist in the commission of relevant offences, would then be sufficient to meet the mens rea of aiding and abetting under the Rome Statute. <sup>113</sup>

This interpretation avoids the problem that troubled US courts regarding the application of the purpose standard under the MPC in cases of accomplice liability, i.e., that it provides an escape hatch for defendants who knew their action would likely assist in the commission of a criminal offence but acted with indifference as to whether it would be committed, as opposed to actually wanting the crime to come about. <sup>114</sup> Some US States avoided this undesirable result by deviating from the MPC when addressing this type of case, requiring mere knowledge instead as sufficient to prove [\*263] culpability. <sup>115</sup>

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<sup>110</sup> Corporate Complicity, supra note 76, at 22.

<sup>111</sup> Id.

<sup>112</sup> A similar approach can be found in some ATS cases that adopt the purpose standard of mens rea: e.g., [In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.](#), 792 F. Supp. 2d 1301, (S.D. Fla. 2011); [Garcia v. Chapman](#), 911 F. Supp. 2d. 1222, 1238-39 (S.D. Fla. 2012).

<sup>113</sup> Cassel, supra note 28, at 312.

<sup>114</sup> See 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.7, at 146-48 (1986).

<sup>115</sup> An example of this can be found in [N.Y. Penal Law § 115.00](#) (McKinney 1965). For a discussion see Paul H. Robinson & Marcus D. Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 321, 337 (2007).