

Extract from Mark A. Summers, *Prosecuting Generals for War Crimes: The Shifting Sands of Accomplice Liability in International Criminal Law*, 23 *CARDOZO J. INT'L & COMP. L.* 519

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VI. The Mens Rea Approach to Aiding and Abetting

The language in Article 25 (3)(c) of the ICC Statute and Section 2.06 (3)(a)(ii) of the MPC are functional equivalents.¹⁴⁸ The mens rea of both is with (or for) the purpose of facilitating the commission of a crime.¹⁴⁹ The MPC defines "purposely" as having a "conscious object to engage in conduct of that nature,"¹⁵⁰ i.e., to promote or facilitate the commission of an offense.¹⁵¹

The ICC Statute does not define purpose in relation to conduct.¹⁵² Article 30,¹⁵³ however, defines "intent" as "the person means to engage in that conduct."¹⁵⁴ Since purpose is undefined in Article 25 (3) (c) the ICC Statute, the ICC may look to Article 30,¹⁵⁵ and in turn the MPC,¹⁵⁶ **[*541]** for guidance when it is faced with defining the term.¹⁵⁷ If that eventuates, the similarity in the language used in the MPC and the ICC Statute makes the two approaches virtually indistinguishable;¹⁵⁸ i.e., the accomplice must act with the conscious object (mean) to facilitate the commission of a criminal offense.¹⁵⁹ More importantly, it is clear when it comes to aiding and abetting the ICC

¹⁴⁸ Compare Rome Statute, supra note 13, at art. 25 (3)(c) ("a person shall be criminally responsible ... if that person: (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission") with MPC § 2.06 (3)(a)(ii) ("A person is an accomplice of another person in the commission of the offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he ... (ii) aids or agrees or attempts to aid such other person in planning or committing it ...").

¹⁴⁹ See id.

¹⁵⁰ MPC, supra note 148, at § 2.02 (a)(i).

¹⁵¹ Id. at § 2.06 (3)(a). This means that the accomplice's conscious object must be to facilitate the principal's commission of a crime. For example, an accomplice who drives a robber to the location where the robbery is committed is guilty only if she does so knowing that the principal intends to commit the robbery. Joshua Dressler, *Understanding Criminal Law* 490, § 30.09 [2][a] (6th ed. 2012).

¹⁵² See Markus D. Dubber, *Criminalizing Complicity*, 5 *J. Int'l Crim. Justice* 977, 1000 (2007); see also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 435 (2010).

¹⁵³ Rome Statute, supra note 13, at art. 30.

¹⁵⁴ Id. at art. 30(2)(a).

¹⁵⁵ In this regard, it is significant that "the text [of Article 25] was also burdened with references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text [of Article 30]." Per Saland, supra note 140, at 198.

¹⁵⁶ Like Article 25 (3)(c), Article 30 also was influenced by the MPC. See Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 *Leiden J. Int'l Law* 715, 717 (2009).

¹⁵⁷ See Dubber, supra note 152, at 1000; see also MPC § 1.13 ("General Definitions ... (12) 'intentionally' or 'with intent' means purposely ...").

¹⁵⁸ Purposely is used in the MPC to distinguish the two slightly different mental states that were included in the common law term "intent." MPC, supra note 148, at cmt. § 2.02 ("In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, one of the elements of ambiguity in legal usage of the term "intent."").

¹⁵⁹ See 1 *The Rome Statute of the International Criminal Court* 801 ("He must know as well as wish that his assistance shall facilitate the commission of the crime.").

Statute has raised the mens rea bar because, unlike in the ICTY, "knowing assistance" will not be a sufficient basis for imputation of liability from principal to accomplice.¹⁶⁰

The MPC also contains a specific provision regarding the mens rea of an accomplice where "causing a particular result is an element of an offense."¹⁶¹ In such cases, the accomplice must act "with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."¹⁶² For all intents and purposes, that means that the accomplice must act either purposely, knowingly or recklessly, as those terms are defined by the Code.¹⁶³ This does not, however, mean that the accomplice must "share" the principal's intent with regard to the result. Indeed, it is possible that the accomplice and the principal could be convicted of different crimes, if, for example, the principal committed an intentional homicide and the accomplice was reckless as [*542] to that result. In that situation, the principal would be guilty of murder while the accomplice is guilty of manslaughter.¹⁶⁴

The ICC Statute does not contain a specific provision regarding the accomplice's mens rea vis a vis the result. Accordingly, Article 30 of the ICC Statute applies, since it specifies the mental state required for the commission of an offense, "unless otherwise provided."¹⁶⁵ Article 30 defines "intent" with regard to the consequence element as: "the person means to cause that consequence or is aware that it will occur in the ordinary course of events." Thus, Article 30 would permit conviction even if the principal and accomplice had slightly different mentes reae, i.e., intent and knowledge;¹⁶⁶ however, proof of either is sufficient for conviction.¹⁶⁷

Given the Perisic-Sainovic split over the specific direction element and the evident similarities between the MPC and Articles 25 (3)(c) and 30 of the ICC Statute, the interpretive task facing the ICC will be challenging. In the next section, I will suggest what course the ICC should follow.

VII. Conclusion

The ICC will have to confront the issue of imposing appropriate limits on the reach of accomplice liability. The ICTY case law and the ICC Statute adopt radically different solutions to the problem. The former imposes control objectively by requiring knowing assistance that substantially effects the commission of the crime. The latter takes the subjective approach - the accomplice must purposely facilitate the commission of the crime. A third alternative, Perisic's specific direction test, contains elements of both. Thus, the accomplice must specifically direct the aid or assistance toward commission of the crime to the exclusion of any other purpose, and the aid or assistance must also have a substantial effect on the commission of the crime.

¹⁶⁰ Dubber, *supra* note 152, at 117 ("knowing assistance doesn't qualify for complicity"); Ambos, *supra* note 125, at 760 ("While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge."); 1 The Rome Statute of the International Criminal Court 810 ("In sum, while the objective requirements of aiding, abetting, and assisting are relatively low, the criminal responsibility of aiders and abettors contains certain restrictions by means of higher subjective requirements.").

¹⁶¹ MPC, *supra* note 148, at P 2.06(4). It should be noted that the most of the crimes within the jurisdiction of the ICC fall into this category. Thus, in the majority of cases this element will have to be satisfied.

¹⁶² *Id.*

¹⁶³ See MPC, *supra* note 148, at §§2.02 (2) (a)-(c). The MPC disfavors negligence as a basis for criminal liability and thus "it should be excluded as a basis unless explicitly prescribed." MPC, *supra* note 148, at cmt. § 2.02 (5).

¹⁶⁴ See Dubber, *supra* note 152, at 118-19.

¹⁶⁵ Rome Statute, *supra* note 13, art. 30 (1).

¹⁶⁶ See Rome Statute, *supra* note 13, at art. 30(2)(b). Defining knowledge as "awareness that ... a consequence will occur in the ordinary course of events."

¹⁶⁷ An unresolved question is whether Article 30, and specifically the phrase "aware that a [consequence] will occur in the ordinary course of events," includes *dolus eventualis* (advertent recklessness). ICC Pre-Trial Chambers have split on this question. See Goy, *supra* note 2, at 23. The ICC's only trial chamber judgment rejected the argument that the language in Article 30 encompasses *dolus eventualis*. Prosecutor. v. Lubanga, Case No. ICC-01/04-01/06, Judgment, P 1101.

A simple hypothetical involving a reluctant accomplice and a forgetful principal will illustrate the differences in outcome, depending [*543] upon which of the three approaches is used. In the first case, a would-be bank robber begs his wife to get him a gun. She, the reluctant accomplice, gives it to him, hoping and praying that he decides not to rob the bank. Under the "substantial effect" test, she is guilty as an accomplice if her husband robs the bank using the gun.¹⁶⁸ The opposite is true if the "purposely facilitates" formula is applied because, in order for her to be guilty as an accomplice, she must want the bank robbery to occur, rather than hoping it does not.¹⁶⁹

In the second case, the wife fervently wants the bank robbery to succeed because she needs the money to feed her hungry children. Unfortunately, her husband, the forgetful principal, leaves the gun behind and ends up robbing the bank by giving the teller a note demanding the money. If the "purposely facilitates" test is applied to these facts, the wife is guilty as an accomplice because it is irrelevant that her aid had no effect on the commission of the crime.¹⁷⁰ If, on the other hand, a "substantial effect" on the crime is necessary, she is not guilty because her aid played no role in the outcome, despite her desire that it be used to commit the crime.¹⁷¹

If the Perisic "specific direction" test is applied, there is accomplice liability in neither case. The reluctant accomplice has not specifically directed her aid toward successful completion of the crime.¹⁷² According to Perisic, "the element of specific direction establishes a culpable link between the assistance provided by an accused individual and the crimes of principal perpetrators."¹⁷³ Because the reluctant accomplice hoped that there would be no crime, she lacks a culpable mental state with regard to it.¹⁷⁴ Likewise, the accomplice, no [*544] matter how enthusiastically she wishes that the crime will take place, will not be guilty if there is a forgetful principal who is not influenced by her proffered aid, since in those circumstances the aid did not have a substantial effect on the commission of the crime.¹⁷⁵

¹⁶⁸ See supra note 12 and accompanying text ("The criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.")

¹⁶⁹ See 1 The Rome Statute of the International Criminal Court 801 ("He must know as well as wish that his assistance shall facilitate the commission of the crime.").

¹⁷⁰ See supra note 145 and accompanying text.

¹⁷¹ Kai Ambos, Article 25, Individual Criminal Responsibility, in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 756-57 (2d ed. 2008) ("'Substantial' means that the contribution has an effect on the commission; in other words, it must - in one way or another - have a causal relationship with the result."). See also Kai Ambos, The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues, 12 Int'l Crim. L. Rev. 137, 147 (2012) (observing that "causality is a basic unwritten requirement of any result crime").

¹⁷² See Prosecutor v. Perisic, Case No. IT-04-81-A, Judgment, P 37.

¹⁷³ Culpability is the mental state (mens rea), which the defendant must have with regard to each material element of the offense. Dressler, supra note 151, at 139, § 10.07 [A].

¹⁷⁴ Under the ICC Statute, she must either mean to cause the crime or know that it "will occur in the ordinary course of events." Rome Statute, supra note 13, at art. 30 2(b) and 3. Since the accomplice cannot know whether the principal will actually commit the offense, the requisite knowledge would be very difficult to prove. See Kadish, supra note 122, at 344 (observing that "the acts the principal does toward the commission of the crime represent his own choices").

¹⁷⁵ In common law jurisdictions where any degree of influence or assistance suffices, it is possible that an unsuccessful attempt to aid the commission of the offense might provide enough encouragement to result in liability. As Professor Kadish explains:

There is no accomplice liability where the attempted contribution demonstrably failed to achieve its purpose because it never reached its target... . The secondary party may be liable if the principal is aware of the proffered aid, since knowledge of the efforts of another to give help may constitute sufficient encouragement to hold the secondary actor liable. But it is well accepted that the secondary actor may not be held liable where his demonstrably ineffective effort to aid is unknown to the primary actor.

Kadish, supra note 122, at 359. It is highly unlikely that a soldier in the field who is the principal perpetrator of a war crime would be aware of the logistical support provided by senior officers like Perisic and Sainovic.

The question remains which of these models is best-suited to the ICC, and, given the limitations in its statute, which could (should) be adopted by it? The Perisic approach-requiring both specific direction and substantial effect-would too narrowly restrict attribution of liability, particularly in cases involving military or political leaders. This approach would insulate them from liability when it could not be proven that they wanted the aid to be used to commit a crime. Consequently, the result would be impunity in cases where the aid could be used for another (legitimate) purpose.¹⁷⁶ The result would also be impunity in those cases where the commander's aid, no matter how fervently he desired the result, had no substantial effect on the commission of the crime.¹⁷⁷

The ICTY and ICC formulas, while less restrictive, deal with the issue of culpability quite differently. The ICTY approach puts greater emphasis on outcome, so that the accomplice who is aware of, but does not intend, the result is punished if the result comes to pass, so long as his contribution to it is substantial. This method of attributing liability has a greater deterrent effect because commanders risk criminal punishment if they provide the weapons, ammunition, or personnel used [*545] to commit war crimes, even if that aid had other legitimate military uses. By contrast, the ICC Statute requires that the accomplice must act with the intention of facilitating the commission of a crime (the result). This approach should alleviate the concerns of those who fear that an overly aggressive prosecutor could use aiding and abetting to expand criminal liability beyond the bounds of personal culpability. But it would not reach indifferent commanders, like Perisic, who continue to supply troops committing crimes, even after the use to which the aid is put is known.

Since purposeful facilitation is an explicit requirement of the ICC Statute, the Court must find that that element has been satisfied. It should not, however, impose the additional requirement that the accomplice's aid or assistance must have a substantial effect on the commission of the crime. To do so would not only make it incredibly difficult to convict, but it would also be unnecessary, because both purposeful facilitation and substantial effect place meaningful limits on extensions of criminal liability.

Moreover, there are significant impediments to reading "substantial effect" into Article 25 (c)(3) of the ICC Statute. First, there is no textual support for a substantial effect element in the ICC Statute. And, despite its status as customary international law, reading such a requirement into the statute would be inconsistent with the MPC approach to aiding and abetting. Clearly, the MPC is not a source for "general principals of law derived ... from national laws and legal systems of the world," and therefore cannot be applied directly by the ICC to interpret Article 25 (c)(3) of its statute. Nevertheless, the Court should not ignore Article 25 (c)(3)'s roots in the MPC, which do not require a "substantial effect."

Purposeful facilitation may turn out not to be the best choice for international criminal law. It almost certainly will pose difficult problems of proof since establishing a subjective element, like purpose, is always more difficult than proving an objective element, like substantial effect. This will be especially true in cases involving military and political leaders whose participation in the crime is far removed from the battlefield. The substantial effect test may also be better suited to international criminal law because of its potentially greater deterrent effect. Nonetheless, the stricter limits that purposeful facilitation will place on accomplice liability may, in the long run, bolster the credibility of international criminal law by ensuring that only those who are truly culpable are punished.

¹⁷⁶ See supra note 118 and accompanying text.

¹⁷⁷ For example, dissenting Judge Moloto disputed the Perisic Trial Chamber's finding that the assistance the defendant provided to the Bosnian Serb forces had a "substantial effect" on the crimes committed at Srebrenica because out of the 3,644 bullet casings that were recovered only 378 could be traced to the Serbian manufacturing facility. See Prosecutor v. Perisic, Case No. IT-04-81-T, Dissenting Opinion of Judge Moloto, P 12.