

COMPARATIVE CRIMINAL LAW, INTERNATIONAL CRIMINAL JUSTICE

# INTERPRETING “FOR THE PURPOSE OF FACILITATING” IN ARTICLE 25(3)(C)?

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The starting point in this discussion was whether the reference to “purpose” in Article 25(3)(c) requires a volitional commitment to the criminal outcome (to the consummated offence). This translated to the question: does the aider/abettor need to share the principal’s intent, or might something else suffice? We agree with James Stewart’s initial intuition, and the conclusions reached by others in this series of posts, that interpreting Article 25(3)(c)’s reference to “purpose” as requiring that the accomplice share the principal’s intent would set too high a threshold for responsibility, for the reasons that follow.

First, requiring a higher mens rea of accomplices than of principal perpetrators is not necessitated by the framework of Article 25(3) of the ICC Statute. By way of analogy: in U.S. law, there has been a long-standing split between a purpose-based approach (where the aider/abettor must share the intent of the principal to be liable) and a knowledge-based approach (where knowledge of the principal’s intent suffices). These differing mens rea standards can be traced back to the distinction between accessories before the fact and secondary principals, who were present at the scene and aiding in the commission of the offence. As all would be punished for the crime proper, a higher mens rea was required for accessories to balance their comparatively lesser physical involvement in the crime. As pointed out by Flavio Noto, requiring a higher mens rea standard (*dolus directus* in the 1st degree, or shared intent) for aiders and abettors might still be justified in jurisdictions where accessories receive no discount in punishment; similarly it makes sense where juries are barred from lowering sentence for minor involvement in a crime. In these sorts of circumstances, “balancing” an aider/abettor’s comparatively lesser physical involvement with a higher mens rea threshold ensures that only those possessing a sufficient degree of culpability face punishment for the crime. This line of reasoning does not apply at the ICC, where the convicted person’s degree of participation in the

crime is taken into consideration, along with other factors, at the sentencing stage (see Article 78, ICC Statute; Rule 145(1)(c), RPE).

In the absence of necessity for a higher, balancing mens rea for aiders and abettors, the issue is subject to be resolved with reference to policy. This leads to a second point: as matter of policy, requiring that an accomplice possess a volitional commitment to the criminal outcome does not fit the nature of the crimes and would be contrary to the object and purpose of the ICC Statute. It is now commonplace to point out that international crimes are collective and systemic. We agree with Thomas Weigend in the post preceding this one that the commission of international crimes requires the coordination, cooperation and contributions of many actors, who may have vastly differing motives and goals. This broad division of tasks/contributions within, among and from the peripheries of organizations and hierarchies, means that many more participate than do so ardently; personal objectives are easily divorced from passions in organized murder. It would be contrary to the object and purpose of the ICC Statute to exempt from responsibility those who provide assistance knowing to a virtual certainty that they aid the commission of a crime, merely because they do not desire its commission but assist with some other objective in mind.

Deterring international crimes or – to adopt the preferred phrase – fighting impunity, requires that all those who willingly participate are held responsible. Indeed, a parallel development in domestic law has seen a focus on the seriousness of the underlying crime coupled with policy concerns of crime prevention. It lead municipal courts and legislators to adopt knowledge-based approaches [See Westerfield, *The Mens Rea Requirement of Accomplice Liability*, at 183 referring to *People v. Lauria*, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967) and 177; An illustration is *People v. Germany* 42 Cal. App. 3d 414, 116 Cal. Rptr. 841 (1974).]

On the other end of the scale, nor can Article 25(3)(c)'s reference to "purpose" be interpreted away, into non-existence. Primarily, this is because it is self-evident that its inclusion in Article 25(3)(c) has the effect of displacing the application of Article 30 (applicable "unless otherwise provided") and that a standard higher than "knowledge" must be required; in other words, it would make little sense, and would have the effect of making that phrase of the Statute redundant, to displace Article 30 knowledge in favour of an identical Article 25(3)(c) knowledge. More generally, Article 31 of the Vienna Convention on the Law of Treaties requires that the words be given their "ordinary meaning" in light of the treaty's object and purpose. This could lead one to argue that it is not open to the court to read down "purpose".

So how to interpret "purpose" when looking at its wording? How to relate to section 2.06(3) of the Model Penal Code (MPC), from which Article 25(3)(c) – partly – takes its wording? The fact

that Article 25(3)(c) reflects the MPC provision on “purpose” does not imply that it was the intention of the drafters of the Rome Statute to bring in the body of case law that interprets this provision, however, instructive this case law may be. Only part of the MPC provision was adopted. Moreover, as “insiders” have noted, it was the intention of drafters to accommodate different legal traditions. According to Scheffer, Article 25(3)(c) “was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how to describe the actions of an aider and abettor.” (p. 351, “The Five Levels of CSR Compliance”) Drawing on MPC-wording and inserting “purpose” seems to have been nothing more and nothing less than a copy-paste job, to use Cassandra Steer’s words.

In a similar vein, it does not seem appropriate to interpret Article 25(3)(c) in conformity with customary international law or general principles of law. Even assuming that this is possible – especially in the realm of modes of liability there is disparity in the law – several further problems arise, related to the strength of the ad hoc case law’s claim to actually reflect customary international law. It is difficult to maintain that customary international law of aiding and abetting is entirely settled, considering the very recent upheaval in relation to ‘specific direction’ – a debate which, incidentally, parallels many of the same concerns about appropriately establishing the culpability of temporally and geographically remote actors providing neutral (not “purposed”) assistance, as those that might be addressed by a standard of “purpose”. Seeking an interpretation of Article 25(3)(c) that is in keeping with a “knowledge” standard might be akin to trying to anchor to floating debris.

What then, might “purpose” mean? Does it necessarily entail shared intent, or might a looser interpretation be available? Purpose presupposes knowledge of the principal’s intent coupled with voluntariness, or will, to be party thereto. We agree with Thomas Weigend that the actor’s will flows from his conduct: it is artificial to distinguish a person who knows that a certain consequence will follow his act and does it anyway, from one who intends the consequence. Knowledge thus equals intention. The level of knowledge seems key when interpreting “purpose”. An awareness ‘of a likelihood’ would be insufficient for “the purpose of facilitating the commission of such a crime”. As noted by Flavio Noto, citing Markus Dubber, proof of positive knowledge would fulfil the mens rea of Article 25(3)(c): the aider and abettor’s commitment to the criminal outcome can be derived from his certain knowledge about the facilitating effect his assistance has on the crime.

An aider’s knowledge – and his will to facilitate the act of the main perpetrator – can also be inferred from his provision of assistance that is tailored to the crimes (as opposed to neutral

assistance): this refers to the example of providing weapons that can only be used to kill civilians. Indeed, this final example illustrates the parallels between specific direction and purposefulness, as well as the inevitable interplay between mens rea and actus reus, also considered by Weigend.

Finally, for the sake of completeness, it must briefly be noted that we do not share the concern that a mens rea of purposefulness would preclude the responsibility of those acting for cold-blooded profit maximisation, or indeed any other strategic or passionless motive. This is because, as Weigend notes, purpose or object is distinct from motive and goes not to the crime per se but to the facilitation. Consequently, it also seems unnecessary to distinguish between 'primary' and 'secondary' purposes, and argue that secondary purposes are sufficient as discussed by Flavio Noto, as well as Sarah Finnin and Nema Milennia.