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The enigma of accomplice liability in the Rome Statute

A comparative analysis of article 25(3)(c) and 25(3)(d)

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Abstract

The modes of liability found under article 25(3) of the Rome Statute is the cause for a continuing debate within the International community. Complicity in a crime exists as a punishable offence in almost every modern legal system, in the Rome Statute it is captured by article 25(3)(c) as well as 25(3)(d). It does, however, exist uncertainty as to what differentiates them from each other. This thesis aims to find such a difference and clarity on what aspects are relevant to apply one or the other. To do this it compares the articles specifically in relation to three different topics. Firstly, if the crime being committed by a group with a common purpose entails a difference. Secondly, the physical elements demanded by the two articles are compared. Thirdly, the mental element required. This thesis argues that the group aspect and physical element does not entail enough of a difference between article 25(3)(c) and (d). Instead it seems like the mental element is the important factor where 25(3)(c) demands a higher mens rea than 25(3)(d).

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1. Introduction

'Most evil in the world is only partly because of an evil person. Most of it is because of the complicity of bystanders'

-Tim Kaine[1]

Complicity means the participation in the wrongdoings committed by another.[2] Within the legal sphere the concept of complicity in a crime as a punishable offense is a widely accepted phenomenon and present in every mature legal system in one version or another.[3] The international legal system is not an exception to this rule. The Genocide convention includes complicity by using that exact term in its list of punishable acts[4] while article 16 of ARSIWA covers the prohibition of aiding and assisting a breach committed by another state.[5]

In international criminal law the concept of complicity being able to invoke responsibility can be traced all the way back to the end of the second world war.[6] In the aftermath of the war, the international community concluded that individual responsibility could not be limited solely to the person who committed the crime and both the charter of the Nurmberg and Tokyo tribunal specified that accomplices to a crime should be held responsible for that crime.[7]

The Rome Statute is the treaty that established the international criminal court (ICC). The purpose of the court is to investigate and prosecute the most serious of international crimes committed by individuals when the relevant state is unable or unwilling to do so.[8] Article 25 of the statute concerns individual responsibility and paragraph (3) of the article lists modes of liability. These describe what role a person must have had in the commission of the crime for the court to hold them responsible.[9]

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[1] Sarah Wasilak, 'Tim Kaine Says Donald Trump is Trying to "Sabotage the System"' *Cosmopolitan* (16 November 2016) https://www.cosmopolitan.com/politics/a8672679/tim-kaine-interview-donald-trump/ [accessed 8 Novemer 2024].
[2] Cambridge English Dictionary, 'Complicity' https://dictionary.cambridge.org/dictionary/english/complicity [accessed 8 November 2024].
[3] Oona A. Hathaway et al., 'Aiding and Abetting in International Criminal Law' (2019) 104 *Cornell Law Review* 1593, 1597.
[4] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 3(e).
[5] Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission, 2001) UNGA Res 56/83, Annex (28 January 2002) (ARSIWA) art 16.
[6] Flavia Zorzi Giustiniani, 'The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals' (2009) 20(3) *Criminal Law Forum* 417, 417–418.
[7] Charter of the International Military Tribunal (adopted 8 August 1945) 82 UNTS 279, art 6. Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, art 5.
[8] Mahmoud Cherif Bassiouni and William A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd revised edn, Brill Nijhoff 2016) 133.
[9] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 563.

In the case of article 25(3)(a) and (b) it is quite easy to distinguish one from the other, as (a) concerns directly participating in the commission of a crime and (b) tackles, for example, the responsibility of ordering a crime to be committed.[10] Article 25(3)(c) and (d), on the other hand, both seem to tackle very similar versions of complicity. They state that a person can be held liable if they:

> '(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;
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime;'[11]

Even if the term 'complicity' in itself is absent in both of the articles, the root of the concept is very much present in the text. Aiding, abetting, assisting and contributing to a crime are all ways for a person to participate in its commission. The question then becomes that if both article 25(3)(c) and (d) are meant to cover the liability for complicity in a crime, how do they differ from one another?

How article 25(3)(c) and (d) are meant to be interpreted is a much debated topic within the international community.[12] It is unclear as to how these two articles are meant to interact with each other. Whether they cover complicity in for different kinds of crimes or if their interaction includes a residual element where one is meant to capture a specific kind of accomplice while the other functions to include everything else. If the latter holds true it stands to question what such a limitation would entail. What would be the determining factor as to whether an action constitutes an act of assistance but not contribution or vice versa?

1.1. Research question

It is important that the modes of liability are applied in a consistent way within the ICC as this helps to provide the court with credibility.[13] To be able to do this however, the interpretation of the articles need to be clear and without contradictions. This thesis aims to interpret article 25(3)(c) and (d) in a way which sheds light on what circumstances are

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[10] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 25(3)(a) & (b).
[11] Rome Statute art 25(3)(c) & (d).
[12] Oguzhan Ozturk, 'Does the Purpose Clause of Article 25(3)(c) of the Rome Statute Cause Impunity? Applying the Purpose Clause to the Uyghurs as a Case Study' (2021) 28 *Australian International Law Journal* 145, 154.
[13] Gabrielle Louise McIntyre, 'The Impact of a Lack of Consistency and Coherence: How key decisions of the International Criminal Court have undermined the Court's legitimacy' (2020) 67 *QIL Zoom-In* 25, 26.

relevant when deciding which of them should be applied in a case. To do so the articles will be interpreted both by themself as well as in relation to each other. The interpretations will be based in relevant case law, academic writings and rules on treaty interpretation. By comparing different elements of the two articles the purpose of this thesis is to answer the question,

- What differentiates the accomplice liability under article 25(3)(c) from the one under 25(3)(d)?

2. Treaty interpretation

The first step in understanding any article is to understand how one should think and what to take notice of when interpreting a treaty. The VCLT provides the international community with the basic rules of treaty interpretation.[14] Article 31 contains the fundamental rules that a treaty should be interpreted in good faith and that terms should be understood, unless otherwise specified, in such a way that they correlate to their ordinary meaning within the context of the treaty and its purpose and object. It also includes what context outside of the relevant treaty that should be taken into account.[15]
Article 32 describes when an interpretation should be reconsidered even if it corresponds to article 31, such as when the result of the interpretation is absurd or goes against the purpose of the treaty as a whole.[16]

2.1. Principle of effectiveness

One specific aspect of treaty interpretation relevant for this thesis in particular is the principle of effectiveness. While the principle of effectiveness is not explicitly included in article 31, the commentary of the 1966 Draft Articles on the Law of Treaties specifies that the principle, which it refers to as maxim *ut res magis valeat quam pereat,* is a true and general rule of treaty interpretation and should be considered included under 'good faith'.[17] This principle states that, when trying to understand a treaty, it is preferable to interpret articles or words in a way that gives them a meaning rather than one that would not.[18] Consequently this means that if parts of an article or the article as a whole is interpreted in a way that doesn't provide them any reason or meaning they should be reconsidered.[19]

As both article 25(3)(c) and (d) relates to accomplice liability the fundamentals of their purpose is quite similar. This will make the principle of effectiveness an important tool throughout this thesis since the understanding of one of the articles should not render the other one redundant.

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[14] Richard K Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 6.
[15] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.
[16] VCLT art. 32.
[17] International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' (1966), art 27, Commentary 5, in *Yearbook of the International Law Commission*, 1966, vol II. Article 27 of the 1966 draft became article 31 in the 1969 convention.
[18] Peter Benson Maxwell, *Maxwell on Statutory Interpretation* (12th edn, Sweet & Maxwell 1969) 45 as cited by Chile Eboe-Osuji, 'Complicity in Genocide' versus 'Aiding and Abetting Genocide': Construing the Difference in the ICTR and ICTY Statutes (2005) 3 *Journal of International Criminal Justice* 56, 59.
[19] International Law Commission, 'Yearbook of the International Law Commission' (1964), vol II, 55.

2.2. A hierarchical reading of article 25(3)

One interpretation specifically related to article 25(3) is that the modes of liability is given by the article in a hierarchical order. That will say from most blameworthy to the least.[20] An argument in favor of this interpretation is a comparison to statutes of the Ad Hoc tribunals, the ICTR and the ICTY. In similarity with the Rome Statute the statutes of these two tribunals include different roles a person must have in a crime to be held individually liable for it. In contrast to the Rome Statute however, these are all included under one article, 6(1) and 7(1) respectively.[21] The choice for the Rome Statute to differentiate from this arrangement and instead specify the roles in a list format seems to suggest that this entails a degree of relevance.[22]

The hierarchical reading of article 25(3) does also find support in which crimes that are grouped together. Commiting the crime or committing the crime through another is two different roles in a crime precisely like committing a crime and ordering a crime to be committed. Still the first two are grouped together under article 25(3)(a) while ordering the crime is found under article 25(3)(b).[23] This suggests that the different roles found under article 25(3)(a) or 25(3)(b) respectively have something in common that justifies grouping them together. One such factor could be blameworthiness.[24]

For the sake of this thesis it might be necessary to take the perspective of a hierarchical order of article 25(3) into account when trying to find a difference between 25(3)(c) and (d). While it is not a certainty that this is how the article should be interpreted it could be helpful to keep it in mind as it would suggest that the difference between 25(3)(c) and (d) should entail a reason for the latter to capture what could be regarded as a less blameworthy accomplices than the first.

3. The Group aspect

One of the first differences between Article 25(3)(c) and (d) makes itself apparent just by comparing the text. Article 25(3)(c) only demands a crime to be assisted without giving any specifics in regards to that crime. Article 25(3)(d) on the other hand requires that the crime being contributed to is committed by a "group of persons acting with a common purpose".[25]

The particularisation of including the group aspect in article 25(3)(d) has led to a debate and differentiating opinions in relation to which persons and what kind of crimes the article is

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[20] *Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10-465-Red (16 December 2011) (*Mbarushimana* Confirmation Decision) 279.
[21] Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) UN Doc S/RES/955, (ICTR Statute) art 6(1), Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) UN Doc S/RES/827, (ICTY Statute) art 7(1).
[22] Gerhard Werle &Boris Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute' (2005) 3 *Journal of International Criminal Justice* 301, 307.
[23] Rome Statute 25(3)(a) & (b).
[24] Werle and Burghardt (n 22) 307.
[25] Rome Statute 25(3)(d).

intended to incapsulate.[26] The Ad Hoc tribunals have constructed the doctrine of joint criminal enterprise (JCE) which is meant to handle liability for participation in collective criminality.[27] JCE is not a mode of liability in the Rome Statute. It has, however, been argued that the use of the word 'group' in article 25(3)(d) indicates that it is an equivalent to the JCE doctrine.[28] Others argue that the phrasing instead indicates that the purpose of the article isn't to invoke the responsibility of a person belonging to the group with the common purpose but is meant to be applied in the cases of outsiders providing contribution.[29]

The Mbarushimana Chamber concluded that a contribution within the frames of article 25(3)(d) could be provided both by an individual who was a member of the group and someone who wasn't. The reason behind this decision was that a limitation in regards to the contributors relation to the group would drastically restrict the applicability of the article,

> '25(3)(d) liability limited only to non-group members would restrict criminal responsibility for group members making non-essential contributions in ways not intended by the Defence's primary supporting authority'[30]

Furthermore, the article never explicitly states any specifics on the relation between the contributor and the group, whether including or excluding. Consequently, if such a limitation is to be interpreted as implied by the text there needs to exist adequate ground which support it.[31]

A similar argument can be made when it comes to article 25(3)(c). The phrasing of article 25(3)(d) demonstrates the concept of negative-implication, that will say that specifically including one thing implies the exclusion of others.[32] By including that the crime has to be committed by a group with a common purpose it excludes every contribution to a crime not corresponding with those circumstances. However, this is not the case when it comes to article 25(3)(c) which makes no mention of anything limiting in which cases it can be applied.[33] Just because article 25(3)(d) only applies when the contribution is to a crime committed by a group with a common purpose doesn't mean that article 25(3)(c) isn't also applicable. The modes of liability under article 25(3) are not mutually exclusive and can entail a degree of overlapping.[34]

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[26] Tomas Hamilton 'Arms Transfer Complicity Under the Rome Statute' in Nina H.B. Jørgensen (ed.) *The International Criminal Responsibility of War's Funders and Profiteers*. (Cambridge University Press; 2020) 148, 162.
[27] Jens David Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 69, 70.
[28] *Prosecutor v Duško Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) (*Tadić* Appeals Judgment) 222.
[29] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008) 213.
[30] *Mbarushimana* Confirmation Decision (n 20) 273.
[31] Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (W Maxwell & Son 1875) 12.
[32] The Writing Center at GULC, 'A Guide to Reading, Interpreting and Applying Statutes' (2017) 5.
[33] *Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona* (Prosecution's Application for Notice Pursuant to Regulation 55(2)) ICC-01/14-01/18-503-Red (1 May 2020) (*Yekatom* Prosecution's Application) 39
[34] *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) (*Lubanga* Trial Judgment) - Separate Opinion of Judge Adrian Fulford 7.

How article 25(3)(c) and (d) is used in the court also goes against an interpretation of the two articles as mutually exclusive. Let's say that 25(3)(c) can only be applied when the party being aided isn't a group with a common purpose while 25(3)(d) can only be applied when it is. If this is the case there should never exist an overlap where they both are regarded to hold relevance as an applicable mode of liability. This does, however, not reflect reality. In the case of Yekatom both article 25(3)(c) and (d) were proposed as applicable alternative modes of liability.[35] This was also true in the Bemba et al.case where all paragraphs of article 25 from (a)-(d) were proposed as possible modes of liability[36] and while (d) was dismissed on the grounds that the others were more relevant it was never stated that it had anything to do with the group aspect.[37] If this is proof of anything it is rather a hierarchical reading of article 25(3) since if 25(3)(d) in any way could be seen as invoking higher responsibility than 25(3)(c) it would certainly not have been dismissed without further considerations.

The JCE doctrine only concerns crimes committed by members of the criminal enterprise.[38] Hence, since article 25(3)(d) includes both contributions by members of a group as well as outsiders the article can not be seen as a codification of JCE. However, since JCE and article 25(3)(d) share similarities as the only mode of liability in respective legal frameworks *solely* concerned with crimes committed by a criminal enterprise, the framework given by the JCE can still be used as a tool to interpret article 25(3)(d).[39] Still, article 25(3)(c) could equally as much as 25(3)(d) be applied as a mode of liability in relation to contributions to a crime committed by a group of persons.

The specification of the contribution needing to be to a crime committed by a group in article 25(3)(d) certainly represents a deviation between 25(3)(d) and (c), which lacks such a criteria. This deviation does, however, appear to exist more as a limitation of 25(3)(d) than to differentiate it from 25(3)(c). While 25(3)(d) can only be applied to contributions made to group crimes there exists no proof that 25(3)(c) would not also be applicable in those cases. The same holds true when it comes to the accused's relation with the hypothetical criminal enterprise. Neither 25(3)(c) nor (d) specifies that the accused needs or can't be a part of the group. To include this limitation would only make sense if article 25(3)(c), in some other way, constitutes a stricter mode of liability than article 25(3)(d). Crimes committed by a JCE are often more serious than the ones committed by individuals.[40] For that reason it would be logical to include a more lenient mode of liability for contributions failing to constitute aiding and abetting specifically made to crimes committed by a JCE.

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[35] *Yekatom* Prosecution's Application (n 33) 29.
[36] *Prosecutor v Jean-Pierre Bemba Gombo et al.* (Document Containing the Charges) ICC-01/05-01/13-526-Anx B1 (30 June 2014) 110–146.
[37] *Prosecutor v Jean-Pierre Bemba Gombo et al.* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/13-749 (11 November 2014) 51.
[38] *Tadić* Appeals Judgment (n 28) 190.
[39] *Mbarushimana* Confirmation Decision (n 20) 282.
[40] ibid 278.

4. The actus reus

4.1. Aid, abets, assists or contributes?

A possible difference in the physical element between 25(3)(c) and (d) could be related to what kind of act the contribution or assistance is made up of.[41] Both the ICTR and the ICTY include aiding and abetting as actions that invoke individual criminal responsibility in article 6(1) and 7(1) respectively.[42] In the Akayesu trial judgment ICTR clarified that, while being used almost interchangeably, aiding and abetting are not synonyms and does in fact represent two different ways for the accomplice to interact with the crime. Aiding a crime means giving assistance to someone.[43] The example given in 25(3)(c) of providing the means for the commission of a crime, such as weapons or personnel, is an example of aiding.[44] Abetting, on the other hand, covers a sort of moral support of a crime. That will say contributing to the commission of a crime by for example encouraging the commission of it.[45] This interpretation of the meaning is not limited to the Ad Hoc tribunals but shared by the ICC as shown by the Bemba et al. judgement.[46]

Article 25(3)(d) is repeatedly regarded by the ICC as a kind of residual mode of liability meant to fit acts that can't be categorized into paragraphs (a) to (c), a "catch-all" category.[47] When taking that context into account it can be argued that the purpose of adding the "in any other way contributes" given by 25(3)(d) is a way include every kind of assistance that doesn't seem to fall under either the category of aiding or abetting as they are described by the Ad hoc tribunals. Contributing to a crime by an act of omission could be an example of such an act. The description given by the ICTY seems to require some level of positive element for an act to be able to be viewed as either aiding or abetting, simply doing nothing doesn't seem sufficient. This isn't, however, in line with the practice of the Ad Hoc tribunals who, despite the definition seemingly not leaving room for it, rules that acts of omission can equal aiding and abetting.[48]

In the end it is irrelevant what acts one might perceive as standing outside the umbrella of aiding and abetting when interpreting the limitations of 25(3)(c) in relation to 25(3)(d). This dead end is explained by the fact that 25(3)(c) expands the concept of aiding and abetting found in the statutes of the Ad Hoc tribunals by including a third criteria, "otherwise

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[41] Kai Ambos, 'The ICC and Common Purpose: What Contribution is Required under Article 25(3)(d)?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 592, 602.
[42] ICTR Statute art. 6(1), ICTY Statute art. 7(1).
[43] *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) (*Akayesu* Judgment) 484
[44] *Prosecutor v Charles Ghankay Taylor* (Appeals Judgment) SCSL-03-01-A (Judgment, 26 September 2013) 369.
[45] *Akayesu* Judgment ICTR-96-4-T (n 43) 484.
[46] *Prosecutor v Jean-Pierre Bemba Gombo et al.* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (*Bemba et al.* Trial judgement) 87-89.
[47] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (29 January 2007) (*Lubanga* Confirmation Decision) 337. Refers to article 25(3)(d) as a residual mode of liability. *Prosecutor v William Samoei Ruto et al.* (Decision on the Confirmation of Charges Pursuant to Article 61(7) of the Rome Statute) ICC-01/09-01/11-373 (23 January 2012) (*Ruto et al.* Confirmation Decision) 354. Refers to article 25(3)(d) as a "catch-all" mode of liability.
[48] *Prosecutor v Radoslav Brđanin* (Judgment) ICTY-99-36-T (1 September 2004) 274.

assists".[49] Consequently, there is no longer enough to determine what difference exist, if any, between the actions that constitutes an act of aiding and abetting rather than contributing. Instead it becomes necessary to decide if there exists any relevant difference between "otherwise assisting" and "in any other way contributes" making the difference between the two articles more vague.[50]

The kinship of the words 'assists' and 'contributes' in combination with that they are both accompanied by inclusionary terms, 'otherwise' and 'any other way' respectively, makes it practically impossible to make any distinction between the two phrases even on a literal level, nevertheless a practical one. It becomes clear that it is not possible to interpret 25(3)(c) and (d) as having different requirements in regards to what kind of assistance that falls under each category.[51] To imply anything else would demand one to read more into the article than the text suggests that the drafters intended which would contradict an interpretation in good faith.[52]

While the nature of the act that constitutes a contribution appears to be irrelevant, other aspects might determine if the assistance would fall outside the scope of article 25(3)(c). One of these aspects is *when* the contribution occurred. Preparatory work on the Rome Statute shows that there existed resistance against the possibility that aiding and abetting would be able to include acts taking place after the commission of the crime.[53] Such an objection can't be found in relation to 25(3)(d). It is therefore possible to argue that while 25(3)(c) can't be applied in cases where the assistance was given after the crime, 25(3)(d) can. This limited use of 25(3)(c) has, however, been rejected by the ICC as the appeals chamber in the Bemba et al case agreed that aid can be provided after the commission of the crime. At least in the specific case where "there was a prior offer of assistance or an agreement between the principal perpetrator and the accessory" and the "principal perpetrator committed [the crime], knowing that he or she would receive assistance in the aftermath".[54] It has also been confirmed by the court that application of article 25(3)(d) is not reliable on when the contribution was provided.[55]

4.2. Necessary effect

Without a clear difference between 25(3)(c) and (d) either related to the kind of act that can constitute the assistance nor when that assistance has to be provided one can instead ask if a difference in actus reus can be found within the effect the contribution had on the relevant crime.

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[49] The Rome Statute art. 25(3)(c)
[50] Gunel Guhiyeva, 'The Concept of Joint Criminal Enterprise and ICC Jurisdiction' (2008-2009) 5 *Eyes on the ICC* 49, 80.
[51] Ambos (n 41) 602.
[52] Richard Gardiner, (n 14) 8.
[53] United Nations General Assembly, 'Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997' (A/AC.249/1997/L.5, 12 March 1997) 21.
[54] *Prosecutor v Jean-Pierre Bemba Gombo et al.* (Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and others) ICC-01/05-01/13-2275-Red (8 March 2018) (*Bemba et al.* Appeals judgment) 1399.
[55] *Mbarushimana* Confirmation Decision (n 20) 287.

The case law for aiding and abetting in the Ad Hoc tribunals has determined that the assistance has to have a substantial effect on the crime to be able to invoke responsibility, meaning that the crime would not have occurred the same way without the help.[56]

To what degree this threshold is to be translated to the Rome Statutes version of aiding and abetting under article 25(3)(c) does, however, remain ambiguous and the necessary degree of assistance remains unsettled.

With the argument that it is very vague what differentiates the assistance in article 25(3)(c) from (d)[57] the defense in the Katanga case brought up the substantial threshold of aiding and abetting in the Ad Hoc tribunals to support that the threshold should be the same for article 25(3)(d). Because of the similarities between the two articles they should not require any different effects on the crime. As put by the defense, "Therefore, there would be no compelling reason to distinguish the level of contribution required under 25(3)(d) from that required under article 25(3)(c)".[58] Hence, if 25(3)(c) requires a substantial contribution to be applicable so does 25(3)(d). However, what the defense acknowledged that this argument lacked was any clear indication that the substantial threshold for aiding and abetting from in the Ad Hoc tribunals actually is required by 25(3)(c) since no ruling of the article had ever been produced by the ICC.[59]

Nowhere in article 25(3)(c) is a substantial effect explicitly demanded.[60] The interpretation of the actus reus required by article 25(3)(c) in the Bemba et al. case went against the assumptions made by the defense in the Katanga case. It opposed the fact that aiding and abetting under the Rome Statute needed to fulfill the same substantial element as the one found in the Ad Hoc tribunals. Instead the trial judgment considered that a contribution under article 25(3)(c) "does not require the meeting of *any* specific threshold" since if one was just to read the article it does not include any specifics on the subject.[61] This interpretation did also find support by the chamber in a comparison to the similar wording of article 2(3)(d) of the 1996 ILC Draft Code which *does* include that the aid provided by the accomplice must be "direct or substantial".[62] While he draft codes on peace and security had no part in the drafting of the Rome Statute[63] it can be argued that if a substantial requirement was meant to be applied to aiding and abetting under article 25(3)(c) the drafter would have explicitly stated so within the text in the same way as demonstrated by the draft codes.

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[56] *Prosecutor v Duško Tadić* (Judgment) IT-94-1-T (7 May 1997) 688.
[57] Guhiyeva (n 50) 80.
[58] *Prosecutor v Germain Katanga* (Defence Observations on Article 25(3)(d)) ICC-01/04-01/07-3369 (15 April 2013) (*Katanga* Defense Observations) 48.
[59] ibid.
[60] *Prosecutor v Dominic Ongwen* (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-Red (23 March 2016) 43.
[61] *Bemba et al.* Trial Judgment (n 46) 93. (emphasis added).
[62] International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind* (1996) UN Doc A/51/10, (1996 ILC Draft Code) art 2(3)(d).
[63] *Bemba et al. Trial Judgment* (n 46) 93.

When it comes to article 25(3)(d) the Mbarushimana case can be used to determine what degree of effect the contribution needs to have. In the case they determined that a substantial contribution was excessive to raise responsibility under the article but that the assistance needed to at least be significant.[64] This seems to correspond with the Rome Statute as a whole since Article 17(1)(d) of the Statute states that a case shall be found inadmissible by the court if "the case is not of sufficient gravity".[65] Acts committed by people that on a completely fundamental level could be viewed as contributing to the crime, such as landlords, grocers etc would be dismissed by the court on the basis that their contribution was too insignificant.[66] Judge Fernandez de Gurmendi opposed this opinion by the court, expressing that article 25(3)(d) does in fact not require any threshold and that other parts of the Statute can't be used as a way to prove the opposite.[67] While the status and credibility of judge Fernandez de Gurmendi might seem to give this opinion relevant weight this goes against the basics of treaty interpretation which makes it clear that articles should be interpreted within the context of the treaty as a whole not by itself.[68]

With the background at hand it becomes challenging to determine if there even exists a clear difference between the effect of the physical element required by article 25(3)(c) and (d). While the defense in the Katanga case correctly determines that a substantial contribution is needed for aiding and abetting in the Ad Hoc tribunals the standards and working of those courts is not binding on the ICC.[69] The nature of the Ad Hoc tribunals made it necessary for them to just include elements in their jurisdiction that could already be seen as customary law since they did not possess legal personality to create new international law**.** The Rome Statute did not have as harsh limitations.[70] The draft differences between how the two courts are functioning has led to hesitance in regards to whether or not the Ad Hoc tribunals should even be used as guidance by the ICC.[71] It is therefore worth questioning whether an argument that is fully reliable on the practice found within the Ad Hoc tribunals holds any real relevance in determining the necessary threshold in this case.

The argument that 25(3)(c) and (d) are too similar to differentiate between the required effect the assistance needs to have on the crime rather appears to support a less restrictive threshold for 25(3)(c) then a substantial threshold for 25(3)(d) when taking other context into account. If article 25(3)(d) are 25(3)(c) are to have the same threshold, as reasoned by the Katanga defense[72], it can then be reasoned that they should both only require a significant contribution rather than a substantial.

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[64] *Mbarushimana* Confirmation Decision (n 20) 283.
[65] Rome Statute art 17(d).
[66] *Mbarushimana* Confirmation Decision (n 20) 277.
[67] *Mbarushimana* Confirmation Decision (n 20) - Separate opinion of Judge Fernandez de Gurmendi 10
[68] VCLT art. 31.
[69] Rome Statute art 21(1). This list of the sources ICC should consider in its rulings and decisions from Ad Hoc tribunals is not included. *Bemba et al.* Appeals judgment (n 54) 1327.
[70] Hathaway et al. (n.3) 1622.
[71] Volker Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 305, 325.
[72] *Katanga* Defense Observations (n 58) 48.

The Bemba et al. case does, however, raise uncertainty on whether even a significant contribution is necessary under article 25(3)(c). The case only specifies that the assistance must have "furthered, advanced or facilitated the commission of such an offence" which would only suggest a casual relationship between the contribution and the crime.[73] It would, however, disrupt a potential hierarchical relationship between article 25(3)(c) and (d) if the effect demanded by the first one was less than the one needed by the latter. Although, it is worth noting that, precisely as with article 25(3)(c), article 25(3)(d) does not explicitly require that the effect reach any threshold. The threshold was applied to the article as a way to exclude the crimes without sufficient gravity in relation to article 17 which applies to all cases brought up in the ICC.[74] Hence it seems unclear why the same wouldn't apply to article 25(3)(c). On the one hand it is possible that a casual contribution made with the "purpose of facilitating" as required by article 25(3)(c) would satisfy the gravity threshold of article 17 without the contribution needing to be significant.[75] On the other hand it becomes uncertain why the same wouldn't hold true for a casual contribution made with the very similar requirement "aim to furthering the criminal activity"[76] in line with 25(3)(d)(i). In fact, the relation between both relevant articles and article 17 seems to be the only certain factor when it comes to the necessary threshold for the contribution, something that would imply that the threshold of both the articles are the same.

The understanding that it is challenging to justify that there exists any real difference between the physical element required by article 25(3)(c) and (d) can be viewed as supported by the Pre-trial chamber in the case of Lubanga which states,

> **'**Hence, in the view of the Chamber, article 25(3)(d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made'[77]

This statement from the court seems to imply that the difference between 25(3)(c) and (d) is related to "the state of mind" of the accomplice rather than the contribution itself. This implies that the answer to what differentiates 25(3)(c) from (d) should be found within the mental element required by each article.

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[73] *Bemba et al.* Trial Judgment (n 46) 94.
[74] Schabas, (n 9) 462.
[75] *Bemba et al.* Appeals judgment (n 54) 1327.
[76] Antje K. D. Heyer, 'Corporate Complicity under International Criminal Law: A Case for Applying the Rome Statute to Business Behaviour' (2012) 6 Hum Rts & Int'l Legal Discourse 14, 54.
[77] *Lubanga* Confirmation Decision (n 47) 337.

5. The mens rea

5.1. The mental element of article 25(3)(c), the purpose clause

What mental element that is required under article 25(3)(c) is a heavily debated topic. The cause of this debate can be found in the use of one word, namely 'purpose' and that the article specifies that the aid has to be given "for the *purpose* of facilitating the commission" of a crime within the court's jurisdiction.[78] What follows is a number of interpretations of how the use of purpose in 25(3)(c) should be interpreted and which effect it has on the mental element of the article.

5.1.1. Knowledge

As previously mentioned, aiding and abetting a crime is also a possibility for invoking individual criminal liability in the Ad Hoc tribunals. In the Ad Hoc tribunals knowledge has been presented as the only necessary mental element and has been the requirement repeatedly upheld and conformed to by the courts.[79] As put by the Vasiljević case:

> 'In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal.'[80]

One interpretation of the mental element required by Article 25(3)(c) is that there is no reason for the article to differ from the needed requirement for aiding and abetting in the Ad Hoc tribunals and that the use of 'purpose' is meant to correspond with this.

Different explanations have been provided as to how the term 'purpose of facilitating' still holds relevance if article 25(3)(c) only requires knowledge. One explanation has been that the purpose clause does not relate to the primary purpose of the accomplice but whether that purpose is dependent on facilitating the crime. This means that the contribution is designed in a specific way deliberately for the purpose that it will contribute to the crime.[81] For example, if someone sells precious stones way below market value as a way to quickly be able to finance the commission of a crime the buyer's purpose is probably to make a good affair. However, since the only reason the sale is happening is for the purpose of facilitating the crime, the main purpose of the buyer becomes dependent on this secondary purpose even if the buyer might have nothing to gain on the crime actually being committed. To be held liable the buyer would consequently only need knowledge that their purchase will facilitate the commission of a crime.[82]

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[78] Ozturk (n 12) 154. Rome Statute art 25(3)(c) (emphasis added).
[79] Andrea Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for Trading with the Enemy of Mankind' (2005) 5 *International Criminal Law Review* 623, 639-640.
[80] *Prosecutor v Mitar Vasiljević* (Judgment) IT-98-32-T (29 November 2002) 102.
[81] Heyer, (n 76) 51-52.
[82] ibid 52.

An alternative explanation is that the contribution of the commission of the crime wasn't only a consequence of the primary purpose, it was also beneficial to the primary purpose.[83] In other words, the accomplice had something to win on the commission of the crime. For example, the sale of Zyklon B during the second world war. While the businessmen knew that it would be used in the gas chambers the commission of the crime was not the primary purpose. The primary purpose was to make money. However, the awful crimes of the gas chambers was not only an unavoidable consequence of the sale, it was also directly beneficial to the businessmen since if the atrocities were to stop the sale of the gas would plummet.[84]

These descriptions of what 'purpose' means bare little to practically no difference from the concept of dolus indirectus. Dolus indirectus means that the perpetrator foresaw almost inevitable illegal or harmful consequences in addition to those desired and still acted.[85] Article 30 of the Rome Statute provides the Statue with a general mens rea that should be applied "unless otherwise provided".[86] Article 30(2) provides a definition of intent, 30(2)(a) intent in relation to conduct and 30(2)(b) intent in relation to the consequences.[87] Taking into account that ordinary meaning of purpose can be understood as a synonym to intent[88] it can be argued that the interpretation of the word should be in accordance with the definition of intent provided by article 30. Hence, since dolus indirectus is represented in article 30(2)(b) by the phrase "aware that [the consequence] will occur in the ordinary course of events"[89] it would indeed be enough to satisfy the necessary purpose in article 25(3)(c). However, the description of dolus indirectus is also verbatim the same as one of the options that would fulfill the knowledge criteria provided by 30(3). Article 30 states that both knowledge and intent is necessary to hold somebody liable, both of which can be fulfilled by dolus indirectus, or knowledge that the consequences will occur.[90] To interpret that the purpose clause only needs to entail dolus indirectus consequently results in it being equivalent to the mental element provided by article 30.

This interpretation corresponds with the opinions of scholars such as Cassesse who have expressed that the knowledge threshold for article 30 should be sufficient since requiring a higher mental threshold then such would result in a much too narrow interpretation of the article.[91]

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[83] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) *Northwestern University Journal of International Human Rights* 304, 315.
[84] ibid 311.
[85] *Lubanga* Confirmation Decision (n 47) 352.
[86] *Lubanga* Trial Judgment (n 34) 1327.
[87] Rome Statute art 30.
[88] Cambridge Dictionary, 'Intent' (Cambridge Thesaurus) https://dictionary.cambridge.org/thesaurus/intent [accessed 28 November 2024].
[89] 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, 484.
[90] Caspar Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court' (2014) 30(79) *Utrecht Journal of International and European Law* 4, 13.
[91] Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol 1 (Oxford University Press 2002) 788 as cited by Jan Wouters and Hendrik Vandekerckhove, 'A Different Type of Aid: Funders of Wars as Aiders and Abettors under International Criminal Law' In Nina H.B. Jørgensen (ed.) *The International Criminal Responsibility of War's Funders and Profiteers*. (Cambridge University Press 2020) 281, 294.

5.1.2. Higher intent

Another interpretation of article 25(3)(c) is that it requires a higher degree of intent than mere knowledge or an equivalent to the one provided by article 30.[92]

The drafting of article 25(3)(c) was not without its controversies. There existed separate opinions on whether the article should state that the facilitation of the crime should be committed with knowledge or intent. The specification that it should be committed with the "purpose of facilitating" was the result of a compromise between the two.[93] The use of purpose in the article is borrowed from the Model Penal Code of the American Law Institute.[94] The meaning of purpose in the text it originated from entails a mental element which exceeds knowledge, stating that it is a "conscious object to engage in conduct".[95]

Furthermore, the relation between article 30 on mens rea and the mental element of 25(3)(c) would not make sense if the addition of 'purpose' in the latter was only there to ensure the application of article 30. Article 30 is the default mens rea in the Rome Statute and should always be applied "unless otherwise provided".[96] If the mental element of article 25(3)(c) was satisfied by applying article 30, mentioning the mental element to any extent would be unnecessary. To suggest otherwise would contradict that treaties are to be understood in their context as a whole in line with the law of treaties.[97] It is in accordance with the principle of effectiveness that the use of 'purpose' implies a mens rea that in some way differentiates from the one achieved by applying article 30 since this wouldn't render the word redundant.

The opinion that knowledge is not enough to be found liable under article 25(3)(c) can be found in cases like Mbarushimana which states that "...knowledge is not enough for responsibility under this article"[98] as well as the case of Gbagbo & Blé Goudé "it is not sufficient that the accused knew that his or her conduct would assist in the commission of the crime".[99] None of these cases does, however, make it clear what this higher degree of mens rea would actually entail.

One possible mental element higher than knowledge would be that the accessory desires the crime they assist to occur, in other words, dolus directus.[100] In this case the deciding factor of whether the accused should be held accountable as a perpetrator under article 25(3)(a) or as

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[92] Kai Ambos, 'Art. 25 - Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, 2016) 743, 760.
[93] Roy S Lee (ed), '*The International Criminal Court: The Making of the Rome Statute'* (1999) 198-200 as cited by Cassel (n 83) 311.
[94] Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1, 10.
[95] Model Penal Code: Official Draft and Explanatory Notes (1985) (as adopted at the 1962 Annual Meeting of the American Law Institute) art. 2.02(2)(a)
[96] *Lubanga* Trial Judgment (n 34) 1327.
[97] VCLT art. 31.
[98] *Mbarushimana* Confirmation Decision (n 20) 274.
[99] *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Second Public Redacted Version of "Annex 1 - Prosecution's Consolidated Response to the Defence No Case to Answer") ICC-02/11-01/15-1207-Anx1-Red2 (8 November 2018) (*Gbagbo & Blé Goudé* Prosecution's Response) 1959.
[100] *Lubanga* Confirmation Decision (n 47) 351.

an accomplice under 25(3)(c) would be the actus reus.[101] Whether the effect of the assistance under article 25(3)(c) does not need to reach any threshold or needs to be substantial, it differs from the one required by article 25(3)(a). Article 25(3)(a) requires an essential contribution to the crime for a person to be able to be regarded as a co-perpetrator.[102] In this way article 25(3)(c) would work as a substitute to 25(3)(a) with the purpose to cover contributions made by someone intending to cause the crime but whose assistance could not be classified as essential.

A criticism of the interpretation that article 25(3)(c) would require more than mere knowledge is that if the Rome Statute in actuality asks for a stricter mental element for aiding and abetting then the one demanded by the Ad Hoc tribunals the result would be a mens rea which exceeds the one necessary for the same crime under customary law.[103] This is, however, not necessarily a relevant argument since the drafting of the Rome Statute was motivated by the functional role the ICC were to have and not the goal to codify international customary law.[104]

5.1.3. The purpose clause according to the Bemba et al. case

The Bemba et al. case provides the international community with the most elaborate and detailed description of the meaning of the purpose clause from the ICC to date.[105] It proposes that the intent necessary within article 25(3)(c) is double and thus require both mens rea in relation to the crime committed by the perpetrator as well as mens rea related to the accomplices own action.[106] Since article 30 should be applied by default the purpose clause does not replace it but adds to it, they should both be applied.[107]

The accomplice must mean to engage in the conduct, must be aware that they will aid the commission and act with the purpose of facilitating the crime. In relation to the consequences however, they must only mean to cause the commission of the crime *or* be aware that it will occur in the ordinary course of events in correlation with article 30(2)(b).[108] It is not necessary to prove that the accused had any stakes or intentions in regard to whether the commission of the crime was successful or not.[109]

Manuel Ventura brings up the case of Popović in his analysis of article 25(3)(c) in the Bemba et al. case as a way to provide a better explanation of the case's unique interpretation of the

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[101] *Gbagbo & Blé Goudé* Prosecution's Response (n 99) 1963.
[102] Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 962.
[103] Ozturk, (n 12) 154.
[104] Hathaway et al. (n 3) 1599.
[105] Manuel J. Ventura, 'Aiding and Abetting and the International Criminal Court's Bemba et al. Case: The ICC Trial and Appeals Chamber Consider Article 25(3)(c) of the Rome Statute' (2020) 20 *International Criminal Law Review* 1138, 1160.
[106] *Bemba et al.* Trial Judgment (n 46) 97.
[107] *Bemba et al.* Trial Judgment (n 46) 98.
[108] ibid.
[109] Thomas Weigend, 'How to interpret complicity in the ICC statute' (James G. Stewart Blog) http://jamesgstewart.com/author/thomas-weigend/ [accessed 26 November 2024].

purpose clause.[110] The case revolves around the forcible transfer of Bosninan Muslim Women, children and elderly during the Srebrenica Genocide. In the judgment of the case it is stated that the accused Borovcanin, while being aware of the forcible transfer, ordered personnel to participate in the operation with the knowledge that this would facilitate the crime. While not constituting an obstacle in the ICTY where the case was being handled, since they lack the purpose clause found in 25(3)(c), it was brought up that it could not be proved he intended to aid the forcible transfer.[111] This since it could not be proved that Borovcanin let his personnel be used for the *purpose* of *facilitating* the crime as the transfer of these groups also meant providing humanitarian aid. Consequently the crime might not have been able to be classified as aiding and abetting in the Rome Statute.[112]

However, it is worth questioning whether this separation between knowledge and purpose is only possible to make in the Popovic case because of the specific circumstances that the crime of forcefully transfering entails. Specifically, aiding the crime can be made with a completely separate purpose. If it had been knowingly aiding any other crime, such as murder, it becomes less clear if it is possible to really differentiate between the knowledge of the accomplice and the purpose to facilitate the crime. As stated in the Popovic case,

> 'The Trial Chamber notes that in the vast majority of cases, the acts of the accused, with the requisite knowledge that it assists a crime, will allow for no other reasonable inference than that the accused intended to assist the commission of an offence'[113]

This raises the question of whether the Popović case really supports the double intent argued by the Bemba case as a possible general rule or if it is just an example of one really specific circumstance where it is possible to separate between the purpose of facilitating a crime and being aware that one is contributing to it. If it is so then the general rule would still be that knowledge of one's actions contributing to a crime is equivalent to the purpose of facilitating it.

5.2. The mental element of article 25(3)(d)

Understanding and interpreting article 25(3)(d) is no easy feat, it has been said that "it is impossible to construct a coherent and non-redundant interpretation of article 25(3)(d) on group complicity".[114] Consequently it might be necessary to first try to understand the bigger picture of article 25(3)(d) relation with the mental element before going into the specifics given by (i) and (ii).

The mental element of article 25(3)(d) is threefold, specifying that the contribution must be intentional as well as either made with the "aim of furthering the criminal activity or purpose

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[110] Ventura (n 105) 1162.
[111] *Prosecutor v Vujadin Popović et al.* (Judgment) IT-05-88-T (10 June 2010) 1499-1500.
[112] Ventura (n 105) 1163.
[113] *Popović et al.* Judgment (n 111) 1500.
[114] Jens David Ohlin, 'Joint Criminal Confusion' (2009) 12(3) *New Criminal Law Review* 406, 406.

of the group" or "be made in the knowledge of the intention of the group to commit the crime".[115] The specification seemingly indicates that the mental element is covered by the "otherwise provided" found in article 30, a sentiment shared by the defense in the Katanga case.[116] However, article 30 is the only explicit definition of the mental element in the Rome Statute. Hence it appears in contradiction with the rules on treaty interpretation as to why any understanding of mental elements within the Rome Statute should be interpreted without taking the context of the definition found under article 30 into account. That this is also an opinion shared to a degree by the court is demonstrated by the Mbarushimana case where article 30 is in part used to interpret the meaning of intention under article 25(3)(d).[117]

The mental element of article 25(3)(d) is disjunctive, it is only necessary to prove that the contribution corresponds either with the requirements of (i) or (ii) as well as it being intentional.[118] Any other possible requirements not explicitly stated but included under article 30 is not necessary. This is first and foremost supported by the inclusion of intention in the first section of the article.

For the purpose of this argument the precise meaning of 'intentional', which will be discussed further in the next section, is irrelevant. What is relevant is that it at the very least corresponds with article 30(2)(a).[119] This addition would subsequently be unnecessary if all the criterias of article 30 not already specified in 25(3)(d) where to be required. The only interpretation is that article 25(3)(d) only demands the requirements explicitly stated in the text.

Article 25(3)(d) has been criticized for being a kind of catch-all mode of liability drafted to include the crimes that fail to fall under (a)-(c). It has been commented that this has made the article ambiguous and difficult to apply.[120] This thesis wants to instead make the argument that the catch-all function of 25(3)(d) provides context and that it, with the purpose of interpreting the article, must be taken into account in accordance with the law of treaties.[121] It is only in the gaps that the rest of the modes of liability leaves that the applicability of Article 25(3)(d) can really be understood.

5.2.1. Intention

The Mbarushimana trial chambers concluded that to define an intentional contribution the definition of intent given by article 30(2)(a), stating that a person means to engage in the conduct, should be applied. To avoid including intentional acts that end up resulting in an unintentional or even unforeseeable contribution to the commission of a crime the chamber decided that the 'intentional' part of the contribution must also include an additional factor

[115] Rome Statute art. 25(3)(d).
[116] *Katanga* Defense Observations (n 58) 126.
[117] *Mbarushimana* Confirmation Decision (n 20) 288.
[118] Ohlin, (n 27) 78.
[119] Jens David Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11(2) *Chicago Journal of International Law* 693, 707.
[120] *Katanga* Defense Observations (n 58) 34, 36.
[121] VCLT art 31.

which links the contribution to the crime. Consequently, the court decided that for it to be possible to invoke liability the person must both:

> ‘(i) mean to engage in the relevant conduct that allegedly contributes to the crime and
> (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility’[122]

The Mbarushimana case consequently adds meaning to ‘intentional’ in addition to the one given by article 30(2)(a). Any further interpretation of ‘intentional’ in accordance with the definition provided by article 30 would have to correspond with 30(2)(b), intention in relation to the consequences.[123] This interpretation would still not be certain to demand any degree of knowledge since this is only demanded in one of the two options provided by article 30(2)(b). In addition, if it were to correspond with the option requiring knowledge, the degree of knowledge described by the court of “at least aware” would not be sufficient.

The necessary knowledge, if taken from the interpretation of intent under article 30, is better described by the defense in the Katanga case which took the interpretation of intentional provided by the Mbarushimana case and stated ,

> ‘Thus, based on the wording of article 25(3)(d)(i) and (ii), the Prosecutor must establish, at the very least, that the defendant personally knew that this group planned to commit the specific crime under the Rome Statute. Under this rubric, to demonstrate that the defendant was merely aware of the general criminal purpose of the group would fail to meet the ‘intentional’ requirement’[124]

While it might be possible to determine a difference between what it means that the accused “personally knew that this group planned to commit the specific crime“ or that the contribution was “made in the knowledge of the intention of the group to commit the crime” that difference is obscure enough to argue that including knowledge within the meaning of ‘intentional’ results in to big of an overlap with 25(3)(d)(ii) which an interpretation of the term should avoid.[125] The prosecution did not agree with the defense's interpretation of how intentional should be interpreted. They argued that the intention should be in relation to the act constituting the contribution and not the consequence.[126]

Furthermore, both ‘aim of furthering’ and ‘knowledge of intent’ provided by 25(3)(d)(i) and (ii) respectively works as a link clarifying what intention related to the mental element is necessary between the contribution and the crime.[127] Since the fulfillment of one of these two

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[122] *Mbarushimana* Confirmation Decision (n 20) 288.
[123] Rome Statute art 30(2)(b).
[124] *Katanga* Defense Observations (n 58) 120.
[125] ibid 1638.
[126] *Prosecutor v Germain Katanga* (Prosecution’s Observations on Article 25(3)(d)) ICC-01/04-01/07-3367 (8 April 2013) 15.
[127] Ambos (n 92) 760.

criterias is already necessary it is excessive that ‘intentional’ must also imply a link. In addition, demanding the same link between the contribution and crime for both 25(3)(d)(i) or d(ii) risks interpretations rendering either one or the other redundant, as demonstrated by the defense argument in the Katanga case.

Instead it seems more in line with both the context of the statute as a whole and the principle of effectiveness that the ‘intentional’ part in the first paragraph of article 25(3)(d) is not concerned with the knowledge of the accused but solely that they meant to engage in the action which constituted a contribution. Something further supported by the fact that the only specific made in the Katanga judgment determined that ‘intentional’ should be understood in reference to 30(2)(a).[128]

5.2.2. Aim of furthering

Aim to further the crime does not necessarily demand that the accomplice must share the criminal intentions of the group. As put the Gbagbo & Blé Goudé case

> ‘Accordingly, the accused’s intent, which the Prosecution must establish, relates only to his or her facilitation of the group’s criminal activity or purpose. The Prosecution need not establish that the accused intended to facilitate the specific crime itself, nor that he or she intended the commission of the crime’[129]

While the proof of a shared intent might be helpful to prove that the contribution was in fact made with the aim of furthering the commission of the crime it isn't required. The ‘aim of furthering’ does instead seem to fill the same function as ‘for the purpose of facilitating’ found in article 25(3)(c).[130] Something that appears to be supported by the fact that both ‘aim’ and ‘purpose’ as well as ‘facilitating’ and ‘furthering’ is being used as synonyms within the legal casework provided by the court.[131]

The difference between article 25(3)(c) and (d)(ii) is then found in the degree of knowledge required. While mere knowledge that one's actions are contributing to the commission of a crime isn't enough under article 25(3)(c) it is required.[132] Article 25(3)(d)(ii) on the other hand does not explicitly ask for any knowledge and hence does not require any proof of it.[133] However, it can be argued that a degree of awareness is still necessary for it to be possible for a contribution to be made with the aim of facilitating the group's purpose or activity. While an intentional act can certainly constitute an unforeseeable contribution to the purpose of a criminal group it would be difficult to argue that the contribution can ever have been made

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[128] *Katanga* Trial Judgment (n 121) 1638.
[129] *Gbagbo & Blé Goudé* Prosecution’s Response (n 99) 1985.
[130] Heyer (n 76) 54.
[131] *Bemba et al.* Appeals judgment (n 54) 1396. “aim of facilitating" is used as a synonym for ‘purpose to facilitate’. *Gbagbo & Blé Goudé* Prosecution’s Response (n 99) 1985 “facilitation of the group’s criminal activity” is used as a synonym to “
‘furthering’ the purpose.
[132] *Bemba et al.* Trial Judgment (n 46) 98.
[133] Ohlin, (n 28) 78.

with such an *aim* in mind if the accomplice lacked any degree of awareness surrounding the criminal purpose of the group.

The degree of awareness required under article 25(3)(d) must be interpreted as very low. The accused must only possess enough knowledge to make it possible for their contribution to have been made with the aim of facilitating the commission of a crime. A person could for example be aware of the criminal purposes of a group and with the *aim of facilitating* that purpose donate money to the organization. This action would be made with awareness of the criminal purpose of the group and entail knowledge that one's actions contributed to the group since they were the one to receive the donation. The accused would, however, not need to be aware of any specifics surrounding crimes.[134]

While JCE is not a mode of liability within the Rome Statute it bears similarities with article 25(3)(d) and using the framework of JCE can therefore work as a tool when trying to decipher the correct interpretation of 25(3)(d).[135] This, in combination with the context of analysing article 25(3)(d) as a catch-all mode of liability makes it relevant to question whether an understanding of article 25(3)(d)(i) can be interpreted as filling the gaps of invoking liability left by the rest of article 25(3) when it comes to JCE.

Three kinds of JCE have been specified. JCE I, or the basic form of JCE, concerns cases where everyone in the group commits the crime together with the same criminal intent. JCE II handles being part of an organised system of ill treatment such as a concentration camp. JCE III covers responsibility for crimes that, while not intended, were a foreseeable consequence of the group's purpose.[136] While there exists no doubt of article 25(3)'s ability to cover JCE I it is more unclear to what degree JCE II and III has any sort of equivalent under the article.[137]

The court has made it clear that it is not possible to invoke responsibility only on the ground of being a member of a criminal enterprise.[138] However, comparable elements exist between JCE II and Article 25(3)(d)(i). In the case of systematic JCE, such as concentration camps, the members need to have both knowledge of the ill treatment as well as intent to further that purpose. If this is the case they are liable for the crimes committed by other participants in the common design even if they had no knowledge of the specific crime.[139] As previously mentioned, knowledge of the specific crime is not a requirement under article 25(3)(d)(i) either. Participating in a system of ill treatment means helping it continue which entails a contribution to the crimes occurring as a consequence of that system. Furthermore, participation in a common purpose is assumed to mean that the accused shared that purpose

[134] Hamilton, (n 26) 161 .
[135] *Mbarushimana* Confirmation Decision (n 20) 282.
[136] *Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana* (Appeals Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) 463-465.
[137] Guhiyeva (n 50) 84.
[138] *Katanga* Defense Observations (n 58) 40.
[139] Ohlin (n 27) 75.

and participated with the intent to further it.[140] Consequently, the accused participating in a systematic JCE means that they aimed to further the purpose and subsequently contributed to the crimes this purpose entailed. Hence, as long as the purpose of the group involves a crime within the jurisdiction of the court as required by article 25(3)(d)(i)[141], it should be possible to hold the participants responsible under article 25(3)(d)(i) for those crimes even if they lacked specific knowledge regarding the commission of them.

This interpretation of when 25(3)(d) can be applied corresponds with the understanding of the article as a residual mode of liability since it would fill the gap recognised by the international community in relation to the capability of the Rome Statute to cover JCE II.

5.2.3. Knowledge of intent

When it comes to the knowledge criteria of 25(3)(d)(ii) the challenge makes itself apparent in determining what degree of knowledge that is necessary.

In the Katanga case it was stated that the knowledge must correspond to the definition found in article 30, namely knowledge that a circumstance exists or a consequence will occur in the ordinary course of events. Since the contributors knowledge is in relation to the intent of the perpetrator and not the consequence that knowledge must correspond with intention in relation to the consequence as found under article 30(2)(b), namely the accomplice needs to be aware the the group in question means to cause said consequence or that the group are aware that it will occur in the ordinary course of events.[142]

When it comes to the intent in relation to the consequence on the accomplices end, any proof of such must be seen as unnecessary since it is not demanded by the article.[143] An arms dealer selling weapons with the knowledge that they will be used in the commission of a crime can still be held liable even if the sole purpose was to make a profit and they remained indifferent to whether or not the crime occurs.

Article 25(3)(d)(ii) fails to encapsulate the concept of JCE III. Since the article explicitly requires “knowledge of the intention” it would appear that the accused can only be held responsible for the crimes they knew the group intended to commit and not any others they might have ended up contributing to in the process.[144] Consequently, this would exclude the ability to apply the article to invoke responsibility for contributing to a crime that was foreseeable but not specifically intended.[145] This stands in stark contrast to the concept of JCE III which does not require knowledge of the intent to commit a specific crime but merely that the accused had awareness that the crime was a foreseeable risk of carrying out the common purpose of the group and willingly to that risk.[146]

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[140] *Katanga* Trial Judgment (n 121) 1627.
[141] Rome Statute art. 25(3)(d)(i)
[142] *Katanga* Trial Judgment (n 121) 1641.
[143] Schabas (n 9) 582.
[144] *Katanga* Trial Judgment (n 121) 1642.
[145] *Katanga* Defense Observations (n 58) 126.
[146] *Tadić* Appeals Judgment (n 28) 228.

When looking at the preparatory work of the Statute it is clear that article 25(3)(d) was a highly controversial article even during that stage and what exists today is the result of negotiations on whether to include a mode of liability for conspiracy.[147] The phrasing that ended up becoming the article was taken from art 2(3)(C) of the 1997 Convention for the Suppression of Terrorist Bombings whose wording is practically identical to the one of 25(3)(d).[148] Article 2(3)(c) from Convention on Terrorist Bombings is, however, clearly related to article 3(4) in the Convention relating to Extradition between the Member States of the European Union.[149] Between those two articles a difference can, however, be detected. While the two options in the first article reads exactly like the two provided by article 25(3)(d)(i) and (ii) the latter states the contribution had to be "made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned".[150]

The change appears to imply that the drafters of the Convention on Terrorist Bombings thought that solely knowledge of the purpose was not enough but that the accused must have the intention to further it. If this holds any relevance in relation to the Rome Statute is unclear. On the one hand, excluding that knowledge of the criminal purpose is sufficient might have been a consequence only of the source from which the phrasing of the article was borrowed and not a deliberate intention. On the other hand, the Convention relating to Extradition of Member States shows that if knowledge of the purpose is enough that is explicitly stated in the article and since this is not the case in article 25(3)(d) the conclusion has to be that it is not sufficient. Knowledge of a general criminal intention is thus not enough and the accused must have known of the specific crime the group intended to commit.[151]

However, the accused must not be aware of every detail surrounding the commission of the intended crimes, a knowledge of the essential elements is enough.[152] This is an interpretation very similar to the one necessary for aiding and abetting in article 25(3)(c).[153]

This interpretation of necessary knowledge is also more in line with one view of the degree of knowledge necessary to satisfy the mental element required in the Ad Hoc tribunals. While one view is content with knowledge that the crime will probably be committed the other is more demanding. It requires the knowledge of the specific crimes and awareness of the essential elements of the crime.[154] As put by the Blagojević & Jokić case,

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[147] William A Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)' (1998) 6(4) *European Journal of Crime, Criminal Law and Criminal Justice* 84, 97.
[148] International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256, art 2(3)(c).
[149] Zurab Sanikidze, 'The Level of 'Contribution' Required under Article 25(3)(d) of the Rome Statute of the International Criminal Court' (2012) 83 *International Review of Penal Law* 221, 228.
[150] Council of the European Union, 'Convention relating to extradition between the Member States of the European Union' (1996) OJ C313/11, art 3(4).
[151] Ambos (n 92) 763.
[152] *Yekatom* Prosecutions Application (n 33) 48.
[153] *Bemba et al.* Appeals judgment (n 54) 1400.
[154] Reggio (n 79) 639-640.

> '[I]t is not required that the aider and abettor shared the mens rea required for the crime; it is sufficient that the aider and abettor had knowledge that his or her own acts assisted in the commission of the specific crime by the principal offender. The aider and abettor must also be aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender'[155]

This corresponds with analysing article 25(3)(d) within the context of being a catch-all mode of liability since it would, to a much higher degree than article 25(3)(c) be applicable in cases reaching the knowledge threshold required by the Ad Hoc tribunals while not quite being able to prove the theoretical additional mental element of 'purpose' given by article 25(3)(c).

5.3. The mental element of article 25(3)(c) in relation to 25(3)(d)

'The purpose of facilitating' and 'the aim of furthering' appears to convey the same meaning.[156] Consequently, while article 25(3)(c) might include additional requirements, the meaning specifically given to the purpose clause determines what is required under article 25(3)(d)(i). That means that if the purpose clause is interpreted as only demanding knowledge corresponding with dolus indirectus, as argued under §5.1.1., the same would be required in relation to the criminal activity or purpose under 25(3)(d)(i). If article 25(3)(c) and (d)(i) entail the same requirements the only way to interpret them in accordance with the principle of effectiveness is that it is the group aspect which constitutes a difference between them. As previously discussed, this does not seem to be the case.[157] In addition, crimes committed by the JCE are often more serious than the ones committed by individuals.[158] Hence it would contradict a hierarchical reading of article 25(3)(c) if contributions made to crimes committed by a group followed contributions made to crimes committed by an individual in article 25(3).

Furthermore, if 25(3)(d)(i) already covers that the accused has knowledge that they are contributing to the crime this can't also be what is demanded under article 25(3)(d)(ii) as this would make the need for two options redundant. When assuming that "knowledge of the intention (..) to commit the crime" has to have a definition separate from knowledge that one is contributing to the crime, knowledge of the intent is the one that suggests a higher threshold.[159] If article 25(3)(d)(i) would require more knowledge than 25(3)(c) this would contradict the understanding of article 25(3)(d) as a catch-all mode of liability. This would go against an interpretation corresponding to good faith since "in any other way contributes" very much implies its purpose as a residual article to 25(3)(a)-(c).[160]

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[155] *Prosecutor v Vidoje Blagojević and Dragan Jokić* (Judgment) IT-02-60-T (International Criminal Tribunal for the former Yugoslavia, 17 January 2005) 727.
[156] See (n 127) & (n 128)
[157] See (n 34) & (n 35)
[158] *Mbarushimana* Confirmation Decision (n 20) 278.
[159] Heyer (n 76) 54.
[160] *Ruto et al.* Confirmation Decision (n 47) 354.

However, if it is the case that the purpose clause requires a higher mental element than knowledge this would imply that it is intent that is the main difference between article 25(3)(c) and 25(3)(d). In relation to a hierarchical reading article 25(3)(d) should then only be applied when the mental element of article 25(3)(c) can't be proved and not in every case where the contribution was made to a group.

As of today, this is not how Article 25(3)(c) and (d) is used in the court. Article 25(3)(d) has become a kind of shortcut to prosecute high ranking personnel of criminal groups.[161] If it was difficult to prove the essential effect required by article 25(3)(a) these cases might instead have been more suited for the use of Article 25(3)(c) since that would imply a higher degree of responsibility then (d).[162] For example, in the Ruto el al. trial Mr Sang was accused under article 25(3)(d)(i). The trial brought up that Mr Sang attended preparatory meetings during which the commission of the crimes was planned.[163] His presence at the meetings would seem to suggest that he not only contributed purposefully, which is already necessary under 25(3)(d)(i), he also did so knowingly raising the question if 25(3)(c) would have been a more suitable mode of liability. A reason behind the resistance to apply article 25(3)(c) could be related to the uncertainty surrounding the requirements of the purpose clause. One possible consequence of this is that the present use of 25(3)(d) might alter the consensus on the purpose of the article and its applicability and make it more difficult to invoke in less severe cases where it might actually have been the most appropriate if 25(3)(d) is to be seen as the more lenient mode of liability.[164]

6. Conclusion

It is clear that the fact that both article 25(3)(c) and (d) concerns accomplice liability makes them at times hard to differentiate from one another. While a deviation such as article 25(3)(d) being limited to accomplice liability related to group crime is very much obvious in the text it does not appear to be a sufficient difference to avoid any redundancy between the two articles. Likewise, the two articles share very similar phrasing in relation to the necessary physical element.[165] Consequently it becomes challenging to, with any degree of certainty, conclude that there is a difference in what effect the contribution needs to have on the crime.

Instead it is the mental element of either article that gives the impression of being the factor of relevance when determining a difference between the two. An interpretation that knowledge would satisfy the mental element of article 25(3)(c) is difficult to solidify without it resulting in some aspect of article 25(3)(d) becoming redundant. Instead it must be determined that the mental element of article 25(3)(c) constitutes knowledge that one is contributing to a crime in addition to the higher mental element of one purposefully doing so.

[161] Hamilton (n 26) 165.
[162] Werle and Burghardt (n 22) 315.
[163] *Ruto et al.* Confirmation Decision (n 47) 364.
[164] Hamilton (n 26) 165.
[165] Guhiyeva (n 50) 80.

It is in relation to this that article 25(3)(d) works in correspondence with its proclaimed role as a residual mode of liability[166], by demanding only one of the two requirements from 25(3)(c). Paragraph (i) demands a purposeful contribution even if it is made without the accused necessarily having any relevant knowledge of the specific crime.[167] Paragraph (ii) on the other hand doesn't demand any purpose or intent related to the consequences of the contribution, instead only knowledge of the intent is required.[168] Consequently filling the gap of a liability for complicity based on knowledge in correspondence with the Ad Hoc tribunals.

Article 25(3)(c) does instead serve the purpose of a middle ground in article 25(3). If a contributor fulfills the higher mental element article 25(3)(c) is the suitable mode of liability. At the same, it needs to be proven that a co-perpetrator had an essential effect on the crime for it to fall under article 25(3)(a).[169] Hence article 25(3)(c) would work as a substitute for article 25(3)(a) when the effect can't be proven to be essential. In summary article 25(3)(c) and (d) appears to work as a way to separate accomplices based on the mental state behind the contribution. An accomplice more involved should not be held liable under the same mode of liability as a more distant and indifferent contributor. Furthermore, this separation would simplify arguing that one accomplice is more responsible than another since everyone contributing to a crime would not automatically fall under the same category of liability.

[166] *Katanga* Trial Judgment (n 121) 1618.
[167] Hamilton, (n 26) 161.
[168] Ambos (n 92) 763.
[169] Werle (n 102) 962.

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