Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (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;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Literature:

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PURL: https://www.legal-tools.org/doc/e8ad48/
article 25  
Part 3. General principles of criminal law

A. Introduction/General Remarks

The provision, in particular paragraphs 1 and 2, confirms the universal acceptance of the principle of individual criminal responsibility as recognized by the International Military Tribunal1 and reaffirmed by the ICTY in the Tadic jurisdictional decision with regard to individual criminal responsibility for violations of common article 3 of the Geneva Conventions2. The drafting history has been described elsewhere3.

Subparagraphs (a)–(c) of paragraph 3 establish the basic concepts of individual criminal attribution4. Subparagraph (a) refers to three forms of perpetration: on one’s own, as a co-perpetrator or through another person (perpetration by means, of Mankind 5, the Statutes of the ad hoc Tribunals and the so-called mixed tribunals (Special

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1 In THE TRIAL OF THE MAJOR WAR CRIMINALS (Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H.M. Attorney General by HMSO, London 1950, Part 22, 447) it was held that individual criminal responsibility has “long been recognized” and further stated: “enough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced”.


4 See also supra note 3, K. Ambos, § 7, margin No. 3.

Court for Sierra Leone and the Cambodian Extraordinary Chambers\(^ {9} \)) in paragraph 3 distinguishes between perpetration (subparagraph (a)) and other forms of participation (subparagraphs (b), (c), (d), (e), and (f)), with the latter establishing different degrees of responsibility\(^ {7} \). This approach confirms the general tendency in comparative criminal law to reject a pure unitarian concept of perpetration (Einheitstäterschaft) and to distinguish, at least on the sentencing level, between different forms of participation\(^ {4} \). The approach is also followed, albeit less elaborate, by the internationalized panels for East Timor\(^ {10} \); for example the act of providing the means for the commission of a crime is not made explicitly punishable\(^ {10} \). In fact, article 25 differentiates already at the level of allocation of responsibility, at least terminologically, between different forms of participation and thereby follows a unitarian concept of perpetration in a functional sense (funktionelle Einheitstäterhaftung) as known, for example, in Austrian and Swedish law\(^ {11} \).

Subparagraphs (d), (e) and (f) provide for expansions of attribution: contributing to the commission or attempted commission of a crime by a group, incitement to genocide, attempt.

3 Thus, in sum, article 25 para. 3 contains, on the one hand, basic rules of individual criminal responsibility and, on the other, rules expanding attribution (which may or may not still be characterized as specific forms of participation). A *grosso modo*, an individual is criminally responsible if he or she perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court (articles 5–8). It must not be overlooked, however, that criminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person’s individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently the individual’s own contribution to the harmful result is not always readily apparent\(^ {12} \).

\(^{6}\) See article 7 para. 1 ICTY Statute (U.N. Doc. S/RES/827 (1993), in: 14 HUM. RTS. L. J. 211 (1993)) and (the identical) article 6 para. 1 ICTR Statute (U.N. Doc. S/RES/955 (1994)): “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime …”.

\(^{7}\) See also article 6 para. 1 Special Court for Sierra Leone (SCSL) Statute in C. Laucci, DIGEST OF JURISPRUDENCE OF THE SPECIAL COURT FOR SIERRA LEONE 63 (2007) as well as article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea in K. Ambos/M. Oldman (eds.), NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (2003).


\(^{10}\) Unlike article 25, paras. 3 (c) and (f) of the ICC Statute respectively.


B. Analysis and interpretation of elements

I. Paragraph 1

As far as the jurisdiction over natural persons is concerned, paragraph 1 states the obvious. Already the International Military Tribunal found that international crimes are "committed by men not by abstract entities"\(^\text{13}\). However, the decision whether to include "legal" or "juridical" persons within the jurisdiction of the court was controversial. The French delegation argued strongly in favour of inclusion since it considered it to be important in terms of restitution and compensation orders for victims\(^\text{14}\). The final proposal presented to the Working Group was limited to private corporations, excluding States and other public and non-profit organizations\(^\text{15}\). Further, it was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities. Despite this rather limited liability, the proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court’s jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems\(^\text{16}\). Consequently, the absence of corporate criminal liability in many States would render the principle of complementary (article 17)\(^\text{17}\) unworkable.

II. Paragraph 2

The provision repeats the principle of individual criminal responsibility.

A person may "commit" a crime by the different modes of participation and expansions of attribution set out in the following paragraph 3. In other words, commission in this context is not limited to perpetration within the meaning of paragraph 3 (a).

"A crime within the jurisdiction of the Court" refers to genocide, crimes against humanity and war crimes according to articles 5 para. 1 (a)–(c) and 6 to 8. The crime of aggression also falls within the jurisdiction of the Court; this jurisdiction cannot be exercised, however, until an acceptable definition has been adopted (article 5 para. 2). It is doubtful whether this will ever be the case given the fact that – more than eight years after the adoption of the Rome Statute – the Working Group on Aggression\(^\text{18}\), established within the Preparatory Commission, has not arrived at a commonly agreed upon definition\(^\text{19}\). Moreover there has not been any agreement on what role the UN Security Council would have to play. Its permanent members (USA, France,

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\(^{13}\) See already supra note 326.


\(^{17}\) C.f. A.S. Williams/W.A. Schabas, article 17, margin Nos. 1 et seq. and 21 et seq. (in this volume).


Great Britain, China and Russia) insist on the fact that the presentation of the elements of the crime of aggression must be subject to approval from the Security Council.20

The possible "punishment" follows from article 77: imprisonment up to a maximum of 30 years or life imprisonment, additionally a fine and forfeiture of proceeds.21

III. Paragraph 3

The chapeau repeats paragraph 2 and serves as an introduction to the modes of participation and commission set out in subparagraphs (a) to (f).

(a) Perpetration, co-perpetration and perpetration by means

q) "commits ... as an individual ... jointly with another or through another person"

The first part of subparagraph (a) distinguishes between three forms of perpetration: direct or immediate perpetration ("as an individual"), co-perpetration ("jointly with another") and perpetration by means ("through another person").

The characterization of direct perpetration as committing a crime "as an individual" is unfortunate since it does not make clear that the direct perpetrator acts on his or her own without relying on or using another person.22 As it stands the formulation only repeats the principle of individual responsibility. While the original French version ("à titre individuel") was more precise, the new one ("individuellement") is identical to the English one; thus, only the Spanish version ("por sí solo") clearly refers to the concept of direct perpetration.23 This view was also taken by Appeals Chambers of the ad hoc Tribunals. Tadic held that the word "committed" as used in article 7 para 1 ICTY Statute means "first and foremost the physical perpetration … by the offender himself".24 Similarly, in Celebic it was stated that "commission" constitutes primary or direct responsibility.25 It must not be overlooked, however, that the term "committed" as such is broad enough to include the other forms of perpetration contained in subparagraph (a), especially if they are not explicitly mentioned as is the case with articles 7 para. 1 and 6 para. 1 of the ICTY and ICTR Statutes respectively.26 In fact, the case law of the ad hoc Tribunals employs such a broad definition as will be seen below (margin No. 9).

20 For more on the crime of aggression see reports on the work of the "Assembly of State Parties Special Working Group on the Crime of Aggression" <www.iccnow.org/?mod=aggression> (last visited 30 June 2008).


23 Conc. supra note 7, A. Eser, Responsibility 789 with fn. 89.


26 See recently Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, Trial Chamber, 31 July 2003, paras. 438 et seq., esp. 439 where "committing" is defined as participating "physically or otherwise directly or
Co-perpetration is no longer included in the complicity concept but rather is recognized as an autonomous form of perpetration. It is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfills a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime.

The ICTY has in the meantime decided a significant number of cases dealing with this form of participation. First and foremost, the Tadic Appeals Chamber, *inter alia* referring to article 25 para. 3 Rome Statute, held that co-perpetration is contained in article 7 para. 1 ICTY Statute and constitutes a form of participation that is particularly necessary in order to cope with international crimes since "most of ... these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design." It further distinguished three categories of collective criminality on the basis of the case law: *first*, the basic form where the participants act on the basis of a "common design" or "common enterprise" and with a common "intention"; *second*, the systemic form, i.e., the so-called concentration camp cases where crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan; *third*, the so-called "extended" joint enterprise where one of the co-perpetrators actually engages in acts going beyond the common plan but his or her acts still constitute a "natural and foreseeable consequence" of the realization of the plan. On the basis of these categories and the national law of various States, the objective requirements of the responsibility as a co-perpetrator can be stated as follows. There must be a plurality of persons who act on the basis of a – explicit or implicit – common plan or purpose, and the accused must take part in this plan, at least by supporting or aiding its realization. Subsequent decisions have taken up these considerations and refined this so called *joint criminal enterprise* (jce) liability,
This doctrine has so far also been applied by the Special Court for Sierra Leone36 and the East Timorese Special Panel for serious Crimes37. The Furundzija Appeals Chamber38 held that the common plan can also be developed during the execution of the crime and need not exist in advance. In any case, co-perpetration in the sense of the common purpose doctrine exists “[w]here the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time ...”39. The Celibici Appeals Chamber required "the existence of a common concerted plan" and the "shared intent" of the participants to further the planned crimes40. In Kordic & Cerkez, a Trial Chamber referred specifically to the third category of Tadic41. The Krstic Trial Chamber applied the "joint criminal enterprise" doctrine to the "ethnic cleansing" of Srebrenica42 and held that the accused, a general of the Bosnian-Serb Army (VRS), played a central role in the execution of this plan43 and the "genocidal joint criminal enterprise" to kill the Bosnian Muslim men44. The considerable suffering of the victims was a foreseeable consequence of the plan and as such can be attributed to the accused45. In Kvocka et al., the jce doctrine was applied to crimes committed in the prison camp Omarska (Prijedor, Bosnia Herzegovina), i.e., for the first time – to a concentration camp case in the sense of Tadic’s second category46. The Krnojelac Trial Chamber followed Tadic48 and defined the (alternative) forms of participation in a joint criminal enterprise as follows: direct commission of the agreed crime; presence during the commission and assisting/encouraging another person to commit the crime; acting in furtherance of a particular criminal system by reason of a specific position or authority with knowledge of the
system and intent to further it\textsuperscript{49}. The same forms of participation in a joint enterprise were adopted by the Vasiljevic Trial Chamber on the basis of the first and second category of collective commission as developed by Tadic\textsuperscript{50}. In the Ojdanic decision the Appeals Chamber held unequivocally that jce is a form of "commission" pursuant to article 7 para. 1 ICTY Statute insofar as a participant shares the purpose of the enterprise as opposed to merely knowing about it (in this case he would only be an accomplice)\textsuperscript{51}. The Stakic Trial Chamber adopted the three forms of participation in a joint enterprise as developed by Krnojelac\textsuperscript{52}. It further considered that the term "commission" in article 7 para. 1 ICTY Statute includes other forms of co-perpetration than jce\textsuperscript{53} and employs a concept of co-perpetration based on the German doctrine of participation and similar to the definition set out above\textsuperscript{54}. The Ntakirutimana Appeals Chamber extended these principles to article 6 para. 1 ICTR Statute and only required, as to the accused’s concrete participation, a "form of assistance in, or contribution to, the execution of the common purpose"\textsuperscript{55}. Recently, in Brdjanin, an appeal by the Prosecution was successful since the Trial Chamber erred in law and adopted a too narrow definition of jce when it required (1) that physical perpetrators need to be jce members for jce liability to attach to high-level officials, (2) that there should be direct agreement between each jce member regarding the commission of the crimes, and (3) that jce is appropriate for "small" cases only\textsuperscript{56}. Last but not least, the jce doctrine also served as a form of liability to impute Slobodan Milosevic the genocide committed by Serb forces in Bosnia-Herzegovina\textsuperscript{57}. As to the mens rea, the requirements differ according to the form of the jce: The basic form requires the shared intent of the (co-) perpetrators. The systemic form demands personal knowledge of the system of ill-treatment. The extended form requires the intention to participate in the criminal purpose and further it and to contribute to the commission of a crime by a group. Responsibility for a crime which was not part of the common purpose arises if the commission of this crime was foreseeable and the accused (willingly) took that risk\textsuperscript{58}. According to the Brdjanin Appeals Chamber the extended jce may even give rise to the responsibility of a jce participant for a genocide without having the specific intent to destroy a protected group\textsuperscript{59}.

\textsuperscript{49} Ibid., para. 81.
\textsuperscript{50} Supra note 24, Prosecutor v. Vasiljevic, paras. 63 et seq. (67).
\textsuperscript{51} Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR 72, Decision on Dragoljub Ojdanic’s motion challenging jurisdiction – joint criminal enterprise, 21 May 2003, para. 20.
\textsuperscript{52} Supra note 26, Prosecutor v. Stakic, para. 435.
\textsuperscript{53} Ibid., para. 438.
\textsuperscript{54} See already supra margin No. 8 with fn. 348. Crit. supra note 29, A. Zahar/G. Sluiter, 236 et seq., explaining the result with the presiding German judge.
\textsuperscript{55} See Prosecutor v. Ntakirutimana & Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, Appeals Chamber, 13 Dec. 2004, paras. 462 et seq. summarizing and relying on the ICTY case law, and supra note 24, Prosecutor v. Blagojevic & Jokic, paras. 695 et seq. See also supra note 32, Prosecutor v. Kvočka et al., para. 97, where the Appeals Chamber stressed (contrary to the holding of the Trial Chamber), that, "in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise".
\textsuperscript{56} Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment Appeals Chamber, 3 Apr. 2007, para. 414 with regard to ground 1 ("principal perpetrator as a member of jce"); para. 419 with regard to ground 2, second part ("requirement of an additional understanding or agreement"); para. 425 with regard to ground 2, first part ("jce applicable to small cases only"); see further the declaration of Judge van den Wyngaert, 164, para. 1 et seq.; partly dissenting Judge Shahabudden, 170 et seq., who states that "link" between the accused member and the crime can only be provided by showing that the physical perpetrator was himself a member of the jce and therefore within the intention of the accused member to take responsibility for certain crimes when committed by fellow members (para. 18).
\textsuperscript{59} Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on interlocutory appeal, 19 Mar. 2004, para. 6: "... to establish that it was reasonable foreseeable to the accused that an act specified in Art. 4 (2) [ICTYS] would
9a The ICC adopted recently the liability mode of co-perpetration in its narrow sense explicitly in the Lubanga case60 and approved especially the German doctrine of "functional control over the act" ("funktionelle Tatherrschaft")61: "The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task."62

On an objective level the PTC established two requirements, namely the existence of an agreement or common plan between two or more persons63 and a co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime64. As to the subjective side, the PTC generally states the obvious, i.e., that the suspect must fulfil the subjective elements of the crime in question65. More concretely, the suspects must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime66; they must be aware of the factual circumstances enabling him or her to jointly control the crime67.

10 The perpetration by means presupposes that the person who commits the crime (intermediary, intermédiaire, Tatmittle) can be used as an instrument or tool (Werkzeug) by the indirect perpetrator (auteur médiait) as the master-mind or "man in the background" (Hintermann)68. He or she is normally an innocent agent, not responsible for the criminal act. A typical example is the case where the individual agent or instrument acts erroneously or is not culpable because he or she is a minor or because of a mental defect. The perpetrator by means is also considered a principal at common law70. However, especially in the field of "macrocriminality", i.e., systematic or mass criminality organized, supported or tolerated by the...
State\textsuperscript{71}, the direct perpetrator or executor normally performs the act with the necessary mens rea and is fully aware of its illegality. Thus, the question arises if perpetration by means always presupposes that the direct perpetrator has a "defect", or if it is also possible with a fully responsible or culpable direct perpetrator, i.e., in the case of a "(indirect) perpetrator behind the (direct) perpetrator" (Täter hinter dem Täter). This has been affirmed for cases in which the "Hintermann" dominates the direct perpetrators by way of a hierarchical organizational structure, i.e., where he or she has "Organisationsherrschaft"\textsuperscript{72}. Although there are no precedents in international case law that refer explicitly to this doctrine, it may be argued that the judgment in the Justice Trial was implicitly based on it since the accused were held responsible because of their "conscious participation in a nationwide government-organized system of cruelty and injustice"\textsuperscript{73}, i.e., because of their commission of crimes by way of a hierarchical organizational structure\textsuperscript{74}. Further, the doctrine has been recognized by national tribunals. In Eichmann, the Jerusalem District Court invoked – for the specific macro-crimes in question – a type of organizational responsibility or domination of the act by the man at the desk and thereby developed the concept used in the Justice trial\textsuperscript{75}. In the Argentinean trial against the former commanders of the military junta the Appeals Court argued with a form of perpetration based on Organisationsherrschaft: "The accused dominated the acts since they controlled the organization which carried them out ... who dominates the system dominates the anonymous will of all the men who constitute it"\textsuperscript{76}. In the German trials for shootings at the East German border, the Supreme Court employed the doctrine to hold members of the National Defence Council ("NDC") and generals of the National People’s Army responsible as indirect perpetrators for the killings directly committed by border guards\textsuperscript{77}. With regard to the current investigation of the disappearance of the German citizen Elisabeth Käsemann during the Argentinean military dictatorship it has been argued that the members of the then Junta, the Generals Jorge Videla and Emilio Massera, are responsible as indirect perpetrators on the basis of this doctrine\textsuperscript{78}. Most

\textsuperscript{71} See H. Jäger, MAKROKRIMINALITÄT. STUDIEN ZUR KRIMINOLOGIE KOLLEKTIVER GEWALT (1989).

\textsuperscript{72} See the fundamental work of C. Roxin, TÄTERSCHAFT UND TATHERRSCHAFT 242-252, 704-717 (8th ed. 2006); see also supra note 2, K. Ambos, DER ALLGEMEINE TEIL 590 et seq. with further references; with regard to genocide C. Kreß, MÜNCHNER KOMMENTAR StGB, Vol. III, § 220a§ 6 StGB, margin Nos. 100 et seq. (2003); supra note 28, G. Werle, VÖLKERSTRAFRECHT, margin No. 433 with fn. 232 also considers that the concept of the "Täter hinter dem Täter" is recognized by article 25 para. 3 (a) but expresses doubts as to the application of the German doctrine in international criminal law. The doctrine is not uncontroversial, for a recent critique see T. Rotsch, Neues zur Organisationsherrschaft, 25 NSZ 13 et seq. (2005). With references on this discussion c.f. C. Kreß, Claus Roxin's Lehr von der Organisationsherrschaft und das Völkerstrafrecht, 153 GOLTMANN'S ARCHIV 304 et seq. (2006); also H. Raddke, Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht, 153 GOLTMANN'S ARCHIV 350 et seq. (2006). For a recent reply C. Roxin, Organisationsherrschaft als eigenständige Form mittelbarer Täterschaft, 125 Schweizerische ZSR 3 et seq. (2006). See for a good explanation in English, supra note 35, M. Osiel, 1829 et seq. See further supra note 27; E. van Sliedregt, 70; most recently with a detailed explanation K. Ambos, in: A. Nollkaemper/H. van der Wilt (eds.), System Criminality in International Law, Vol. IV (forthcoming).


\textsuperscript{74} C. f. supra note 2, K. Ambos, DER ALLGEMEINE TEIL 93-4; supra note 2, id., Individual Criminal Responsibility 9.

\textsuperscript{75} Judgment 12 Dec. 1961, 36 L.L.R. 5 & 18, at 236-37, para. 197; "... the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command ...;" for a more detailed analysis see supra note 2, K. Ambos, DER ALLGEMEINE TEIL 184 et seq.; supra note 2, id., Individual Criminal Responsibility 17-8.


\textsuperscript{78} C. f. K. Ambos/Ch. Grammer, Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen

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importantly, the Lubanga Pre-Trial Chamber of the ICC recognized that those who have "control over the commission of the offence" are perpetrators ("auteur") since, i.e., they "control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration)". Further, the PTC affirms that the most typical manifestation of the "control over the act theory" is "the commission of a crime through another person", as explicitly provided for in article 25 para. 3 (a) ICC Statute79.

It must not be overlooked, however, that attribution in these cases may go too far if the indirect perpetrator cannot dominate the direct perpetrator sufficiently, i.e. exercise effective control so as to justify attributing to him the latter’s conduct as though it were his own. Generally speaking, perpetration by means requires a sufficiently tight control by the "Hintermann" over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility (article 28)80. Although it cannot be denied that the "man in the background" exercises only limited control over a fully responsible direct perpetrator – he or she may, at any time, decide to abandon the criminal plan –, this lack of control is compensated by the control of the criminal organization, which produces an unlimited number of potential willing executors. In other (more "dogmatic") words, although direct perpetrators acting with full criminal responsibility cannot be considered mere "fungible mediators of the act" (fungible Tatmittler), the system provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned81. Still, it is clear that only very few persons command the control necessary to immediately replace one (failing) executor by another, namely only those who belong to the leadership of the criminal organization or who at least control a part of the organization; only they can dominate the unfolding of the criminal plan undisturbed by other members of the organization82. Although these persons are generally far away from the actual execution of the criminal acts and are therefore normally considered indirect perpetrators or even accessories before the fact, they are in fact, from a normative perspective, the main perpetrators while the executors (the direct perpetrators) are merely accessories or accomplices in the implementation of the criminal enterprise83. Thus, it becomes clear that the system of individual attribution of responsibility, as used for ordinary criminality, must be modified in international criminal law aiming at the development of a mixed system of individual-collective responsibility in which the criminal enterprise or organisation as a whole serves as the entity upon which attribution of criminal responsibility is based (so-called "Zurechnungsprinzip Gesamtmittel")84. In this sense, the individual criminal contributions of the participants must be assessed in the light of their effect on the criminal plan or purpose pursued by the criminal apparatus or organization. One can speak of a system of "organizational domination in stages" (stufenweise Organisationsherrschaft), where domination requires,
however, at least some form of control over part of the organization85. Thus, taking up the
 distinction between main perpetrators and accomplices made above, there are in fact three levels of participation: the first and highest level is composed of those (main) perpetrators who plan and organize the criminal events as a whole and as such belong to the leadership level (Führungstäter); at the second level we find those (still main) perpetrators of at least the mid-level of the hierarchy who exercise some form of control over a part of the organization (Organisationstäter); the third and last level consists of the accomplices who merely execute the crimes (Ausführungstäter)86.

β) "... regardless of whether that other person is criminally responsible"

It is not clear from the English original wording if "that other person" refers to both co-perpetration and perpetration by means or only to the latter. The travaux do not offer an explanation, since the problem was simply not addressed in Rome. The French ("celle-ci") and Spanish ("éste") versions indicate, however, that the reference applies only to the intermediary. This is confirmed by a teleological interpretation.

As explained above (margin No. 8), in the case of co-perpetration all persons involved fulfil a certain function and are, therefore, criminally responsible. Thus, the reference cannot apply to co-perpetration. On the other hand, in the case of perpetration by means, it is typical that the person used ("the instrument") is not criminally responsible. The express recognition of this fact is superfluous. Yet it makes sense in the exceptional case that the instrument is criminally responsible, e.g., in the above mentioned "Organisationsherrschaft" by the indirect perpetrator. For in this case the reference confirms that a perpetration by means is even possible if the direct perpetrator is criminally responsible87.

(b) "orders, solicits or induces" an (attempted) crime

A number of very different forms of participation are established in this subparagraph. A person who orders a crime is not a mere accomplice but rather a perpetrator by means, using a subordinate to commit the crime. Indeed, the identical article 2 para. 1 (b) of the 1996 Draft Code was intended to provide for the criminal responsibility of mid-level officials who order their subordinates to commit crimes88. The ICTR, in the Akayesu judgment, held that "ordering implies a superior-subordinate relationship" whereby "the person in a position of authority uses it to convince (or coerce) another to commit an offence"89. Such a – at least de facto – "superior-subordinate relationship" is also the first and basic requirement of command or superior responsibility as first confirmed in the "Celebici" case90 and adopted by the subsequent case law of the ad hoc Tribunals91. Consequently, the first alternative in subparagraph (b) ("[o]rders")

87 Conc. supra note 27, E. van Shredregi, 71.

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complements the command responsibility provision (article 28); in the latter case the superior is liable for an omission, in the case of an order to commit a crime the superior is liable for commission for having "ordered". In conclusion, the first alternative in subparagraph (b) actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission "through another person"92.

Soliciting a crime means, inter alia, "urging, advising, commanding, or otherwise inciting another to commit a crime"93. Similarly, inducing entails the "enticement or urging of another person to commit a crime"94. Thus, both terms basically refer to a situation where a person is influenced by another to commit a crime. In fact, the French version of the Statute speaks of "solicite ou encourage", thereby using a form of solicitation to express the English term induce. In substance, in both cases a person is caused to commit a crime95. Such "causal" influence is normally of a psychological nature (persuasion) but may also take the form of physical pressure (coercion) within the meaning of vis compulsiva96. It may also occur in a chain, i.e., a person induces another to induce a third person to commit a crime97. In contrast to cases of "ordering", a superior-subordinate relationship is not necessary.

Subparagraph (c) codifies any other assistance not covered by subparagraph (b). Generally speaking, participation as defined by subparagraph (b) implies a higher degree of responsibility than in the case of subparagraph (c).

"Aiding and abetting" as the weakest form of complicity covers any act which contributes to the commission or attempted commission of a crime. The difficult task is to determine the minimum requirements of this mode of complicity. Article 2 para. 3 (d) of the 1996 Draft Code requires that the aiding and abetting be "direct and substantial"; i.e., the contribution should facilitate the commission of a crime in "some significant way"98. The ICTY referred to these criteria in the Tadic case and held that the act in question must constitute a direct and substantial contribution to the commission of the crime99. "Substantial" means that the contribution has an effect on the commission; in other words, it must — in one way or another — have a causal


In the same vein supra note 7, A. Eser, Responsibility 797 who, however, correctly clarifies (in fn. 123) that the Akayesu Trial Chamber considers 'ordering' as a form of complicity.

Unlike vis absoluta vis compulsiva leaves the person still a certain freedom to act and decide (c. f. supra note 69, H.-H. Jescheck/T. Weigend, 224).
relationship with the result. However, this does not necessarily require physical presence at the scene of the crime. In Tadić, Trial Chamber II followed a broad concept of complicity based on the English "concerned in the killing" theory. In fact, the Chamber did not take the "direct and substantial" criterion very seriously since it included within the concept of aiding and abetting "all acts of assistance by words or acts that lend encouragement or support." This position was confirmed by a Trial Chamber in "Celebici" and, more recently, in Naletilic & Martinovic. The Appeals Chamber stressed that the aiding and abetting must have a substantial effect on the main act.

In Furundžija the ICTY took a more sophisticated view. The Trial Chamber distinguished between the nature of assistance and its effect on the act of the principal (main perpetrator). Regarding the former it stated that the assistance need not be "tangible" but that "moral support and encouragement" is sufficient. Mere presence at the scene of the crime suffices if it has "a significant legitimizing or encouraging effect on the principals". The term "direct" – used by the ILC – in qualifying the proximity of the assistance is "misleading" since it implies that the assistance needs to be "tangible". Regarding the effect of the assistance the Chamber does not consider a causal relationship in the sense of the conditio sine qua non formula necessary but holds that the acts of assistance must "make a significant difference to the commission of the criminal act by the principal". Thus, it is, for example, sufficient that a person continues to interrogate the victim while it is being raped by another person. The "significant"-requirement, however, implies that it would not be sufficient if the accomplice has only "a role in a system without influence." With regard to the Rome Statute, the Chamber explicitly states that it is "less restrictive" than the ILC Draft Code 1996 since it does not limit aiding and abetting – as article 2 para. 3 (d) Draft Code does – to assistance which "facilitate[s] in some significant way", or "directly and substantially" assists the perpetrator. Rather, subparagraph (c) contemplates "assistance either in physical form or in the form of moral support. ... 'abet' includes mere exhortation or encouragement." In sum, aiding and abetting requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." The Appeals Chamber endorsed this view.

The subsequent case law of the ICTY has confirmed the broad concept of aiding and abetting developed in Tadić, Celebici and Furundžija. The Aleksovski Trial Chamber required

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100 Ibid., para. 688.
101 Ibid., para. 687: "... not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced". For the "concerned in the killing" doctrine, see: 15 L.R.T.W.C. 49–51; also: supra note 24, Prosecutor v. Tadić, para. 691.
102 Ibid., para. 689.
103 Supra note 90, Prosecutor v. Delalic et al., paras. 325–9.
104 Supra note 24, Prosecutor v. Naletilic & Martinovic, para. 63, see also supra note 24, Prosecutor v. Blagojevic & Jokic, para. 726.
105 Supra note 25, Prosecutor v. Delalic et al., para. 352. As to the concrete case the Chamber held that the position as a camp guard is not per se sufficient (para. 364).
107 Ibid., paras. 199, 232.
108 Ibid., para. 273–4; confirmed by the Appeals Chamber in supra note 38, Prosecutor v. Furundžija, para. 126 and supra note 24, Prosecutor v. Naletilic & Martinovic, supra note 344, para. 63.
110 Ibid., para. 231.
111 Ibid., paras. 235, 249.
112 Supra note 38, Prosecutor v. Furundžija, paras. 117 et seq.
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an "effet important" on the main act114 and allowed the act of support to be given at any time115. In *Prosecutor v. Pavle Strugar*116 the Trial Chamber declined to enter convictions against Pavle Strugar for aiding and abetting on the grounds that there was no settled jurisprudence on whether, and in what circumstances, an omission may constitute the *actus reus* of aiding and abetting. Further, it found that Strugar’s failure to carry out an investigation into the offences committed and punish the perpetrators thereof occurred well after the commission of the offences and thus could not have had a requisite direct and substantial effect on them117. As to the issue of a causal relationship between the aiding and the final criminal result, the Trial Chambers in *Aleksovski, Blaskic, Krnojelac, Vasiljevic, and Naletilic & Martinovic* followed *Furundzija* renouncing this requirement118. Presence at the scene of the crime would (only) be sufficient if the accused had an "autorité incontestée" that encourages the direct perpetrator to commit the crime119. At a minimum, the presence of a superior constitutes a "probative indication" in this respect120.

The ICTR defined aiding in *Akayesu* as "giving assistance to someone" and abetting as involving "facilitating the commission of an act by being sympathetic thereto"121. The separate definitions of aiding and abetting do not mean, however, that individual responsibility within the meaning of article 6 para. 1 ICTR Statute is only incurred if both forms of participation – aiding and abetting – have been realized; aiding or abetting is sufficient122. Subsequent case law, however, does not distinguish between aiding and abetting but requires for both, taking the same approach as the ICTY, any form of physical or moral support which contributes substantially to the commission of a crime123. Thus, the contribution need neither "always" be "tangible"124 nor


119 Supra note 113, *Prosecutor v. Aleksovski*, paras. 63 et seq. (65); similarly supra note 24, *Prosecutor v. Krnojelac*, para. 89; "significant legitimising or encouraging effect"; also supra note 24, *Prosecutor v. Vasiljevic*, para. 70; supra note 24, *Prosecutor v. Blagojevic & Jokic*, para. 726, ln. 2177; "More presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender".


121 Supra note 89, *Prosecutor v. Akayesu*, para. 484. For an analysis of the ICTR’s complicity concept with regard to genocide see A. Obote-Odora, *Complicity in genocide as understood through the ICTR experience*, 2 INT’L CRIM. L. REV. 375 (2002), in particular on the distinction between aiding and abetting pp. 391–2, 400.

122 Similarly already supra note 2, O. Triffterer, *Bestandsaufnahme* 229.


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need it be indispensable (in the sense of a *conditio sine qua non*). Although it is not necessary that the aider or abettor be present during the commission, presence may indicate moral support, especially if the accused possesses a degree of authority entails "a clear signal of official tolerance." Aiding and abetting may also consist in an omission; in such cases it may be interpreted as moral support by encouraging.

Summing up this case law, aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Thus, the only limiting element is the "substantial effect" requirement. Obviously, this requirement is far from precise, and the case law has not contributed to its clarification, instead leaving the decision to each individual case. If one takes the principle of legality seriously, the case law has not contributed to its clarification, instead leaving the decision to each individual case. If one takes the principle of legality seriously, it must be a forbidden risk.

It must not be overlooked, however, that an abstract determination of aiding and abetting may be a mere academic exercise if one considers that the subsidiary mode of complicity of "assist otherwise" introduces an even lower threshold for accomplice liability than aiding and abetting. Although this concept is already included in the aiding and abetting formula as "assist otherwise," it may be interpreted as moral support by encouraging.


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125 Supra note 124, Prosecutor v. Kayishema & Ruzindana, para. 201; supra note 91, Prosecutor v. Bagilishema, para. 33; supra note 123, Prosecutor v. Bisengimana, para. 34.


128 Supra note 89, Prosecutor v. Akayesu, para. 548: "... may consist in failing to act or refraining from action" (unlike complicity in genocide); see also supra note 123, Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, para. 597: "The act of assistance may consist of an act or an omission"; supra note 123, Prosecutor v. Bisengimana, para 34; supra note 91, Prosecutor v. Mpambara, para. 22; supra note 24, Prosecutor v. Muvungi, para. 470.

129 Supra note 124, Prosecutor v. Kayishema & Ruzindana, para. 200 referring to Furundzija (supra note 106); supra note 123, Prosecutor v. Bisengimana, para 34.


132 For a detailed discussion see supra note 2, K. Ambos, *DER ALLGEMEINE TEIL* 619 et seq., 663–4.
(β) "For the purpose of facilitating"

23 This concept introduces a subjective threshold which goes beyond the ordinary \textit{mens rea} requirement within the meaning of article 30\textsuperscript{133}. The expression "for the purpose of facilitating" is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge\textsuperscript{134}. The formula, therefore, ignores the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence\textsuperscript{135}. Additionally, knowledge may be inferred from all relevant circumstances\textsuperscript{136}, i.e., it may be proven by circumstantial evidence\textsuperscript{137}. On the other hand, the word "facilitating" confirms that a direct and substantial assistance is not necessary and that the act of assistance need not be a \textit{conditio sine qua non} of the crime\textsuperscript{138}.

In conclusion, the formulation confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary \textit{mens rea} requirement according to article 30)\textsuperscript{139}.

(d) "In any other way contributes" to the (attempted) commission ... "by a group ... acting with a common purpose"

24 The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention\textsuperscript{140} and presents a compromise with earlier "conspiracy" provisions\textsuperscript{141}, which since Nuremberg have been controversial\textsuperscript{142}. The 1991 ILC Draft Code held punishable an individual who "conspires

\begin{footnotesize}

\textsuperscript{134} Supra note 22, Model Penal Code, § 2.06. Conc. supra note 7, A. Eser, \textit{Responsibility} 801.


\textsuperscript{137} C. f. supra note 99, Prosecutor v. Tadic, para. 689: "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ..."; supra note 90, Prosecutor v. Delalic et al., para. 386 with regard to command responsibility: "... such knowledge cannot be presumed but must be established by way of circumstantial evidence".

\textsuperscript{138} supra note 106, Prosecutor v. Furundzića, para. 231.

\textsuperscript{139} Conc. supra note 7, A. Eser, \textit{Responsibility} 801 with fn. 145.


\textsuperscript{141} For example: Preparatory Committee Draft, article 23 para. 7 (e) (ii).


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PURL: https://www.legal-tools.org/doc/e8ad48/
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in the commission of a crime, thereby converting conspiracy into a form of "participation in a common plan for the commission of a crime against the peace and security of mankind".143 The 1996 Draft Code extends to a person who "directly participates in planning or conspiring to commit such a crime which in fact occurs".144 Thus, it restricts liability compared to the traditional conspiracy provisions in that it requires a direct participation – already discussed above – and an effective commission of the crime. Subparagraph (d) takes this more restrictive approach even further, eliminating the term conspiracy altogether and requiring at least a contribution to a collective attempt of a crime.

Subparagraph (d) establishes, on the one hand, the lowest objective threshold for participation according to article 25 since it criminalizes "any other way" that contributes to a crime. This seems to imply a kind of subsidiary liability if subparagraph (c) is not applicable. On the other hand, however, subparagraph (d) only refers to "a crime by a group of persons acting with a common purpose", i.e., provides for objective – group crime – and subjective – common purpose – limitations of attribution which – at first glance – seem to delimitate subparagraph (d) from (c). Indeed, in Furundzija, the ICTY held that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as "two separate categories of liability for criminal participation ... – co-perpetrators who participate in a jce, on the one hand, and aiders and abettors, on the other".145 Or the issue of delimitation, see also margin No. 45.

The distinction gains particular importance on the subjective level. While aiding and abetting generally only requires the knowledge that the assistance contributes to the main crime146 and subparagraph (c) adds to this the "purpose of facilitating" (margin No. 23), participation in a group crime within the meaning of subparagraph (d) requires, on the one hand, a "common purpose" of the group and, on the other, an "intentional" contribution of the participant, complemented by alternative additional requirements ((i) and (ii)) to be discussed below (margin Nos. 29 and 30).

Furthermore, it is not absolutely clear what is meant by "intentional". Does it refer to the traditional use of "intent" – as dolus (Vorsatz) including knowledge (Wissen) and intention or purpose (Wollen) or is it limited to the latter, i.e., the first degree dolus directus? This view seems to be supported by the Spanish version ("intencional") since Spanish doctrine, based on German thinking, starts from the general concept of dolus (see article 10 of the 1995 Codigo Penal: "dolosas") and reserves the notion of "intención" or "intencional" for the "delitos de intención" or the first degree dolus directus. The French version ("intentionelle"), however, does not support this restrictive interpretation since in French thinking "l'intention" consists of two elements: the foreseeability (element of knowledge) and the wish (element of will) of the criminal act. Thus, although the "faute intentionelle" is characterised by the "volonté orientée vers l'accomplissement d'un acte interdit", i.e., rather by will than knowledge, the latter is also contained in the concept of "intention"; thus, "intentionelle" in this general context is to be

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144 1996 ILC Draft Code, article 2 para. 3 (e).
145 Supra note 106, Prosecutor v. Furundzija, para. 216; see also para. 249.
146 Ibid., para. 246.
147 W.R. LaFave/A.W. Scott, SUBSTANTIVE CRIMINAL LAW Vol. 1, § 3.5., 302–3 (1986).
148 C. f. supra note 8, G. Fletcher, CONCEPTS, supra note 332, 112.
149 To avoid confusion this author uses "intent" in the sense of dolus in general and "intention" in the sense of first degree dolus.
150 Most explicitly J.M. Rodriguez Devesa/A. Serrano Gomez, DERECHO PENAL ESPAÑOL. PARTE GENERAL 459 et seq., 466 (18th ed. 1995): "El dolo directo comprende aquellos casos en que el resultado ha sido perseguido intencionalmente ... Se habla entonces de un dolo directo de primer grado ...". See also M. Cobo de Rosal/T.S. Vives Anton, DERECHO PENAL. PARTE GENERAL 371, 621 et seq., 625 (5th ed. 1999).
understood broadly in the sense of dolus. Also the official German translation of this subparagraph reads "vorsätzlich", i.e., refers to dolus in its general sense. Further, the ICTY considers that the mens rea of participation in a jce is "intent to participate", i.e., apparently understands intent in the traditional sense.

The correct understanding of "intentional" depends on the context in which the notion is used. If it is used as an expression of the general mental element it has to be understood also in a general sense as dolus; if it is used in a specific context to express a specific intention, aim or purpose of the perpetrator it has to be understood as first degree dolus directus. Thus, article 6 of the Statute, referring to genocide, speaks of "intent to destroy" and means first degree dolus directus, at least if one follows the still prevailing view that genocide requires a dolus specialis (specific intention). Consequently, the French version speaks of "l’intention de détruire", the Spanish one of "intención de destruir" and the official German translation of "absichtlich". On the other hand, the general mens rea provision (article 30) is based on the distinction between "intent" and "knowledge" defining the former – in relation to a consequence – as "means to cause that consequence" or as being "aware" that it will occur; thus, it understands intent in the traditional sense including knowledge. The word "intentional" in the subparagraph under examination is used in the same general sense. This also follows from the fact that subparagraphs (i) and (ii) contain additional specific subjective requirements which put the general notion of "intentional" in more concrete terms.

The foregoing discussion demonstrates that a provision drafted without regard to basic dogmatic categories will create difficult problems of interpretation for the future ICC.

(i) "with the aim of furthering the criminal activity or criminal purpose of the group ..."

A contribution to a (attempted) group crime has – first possibility – to be made "with the aim of furthering the criminal activity or criminal purpose of the group" provided that this "activity or purpose involves the commission of a crime within the jurisdiction of the Court". The last part of the phrase does not require further examination since it only states the obvious; namely, that contribution to group crimes may only give rise to individual responsibility if these crimes belong to the subject matter jurisdiction of the Court (articles 5–8).

According to the first part of the phrase the participant must pursue the "aim" to further the criminal "activity" or "purpose" of the group. Thus, he or she must act with a specific dolus, i.e., with the specific intention to promote the practical acts and ideological objectives of the group.

(ii) "in the knowledge of the intention of the group"

Alternatively ("or"), the participant must know the intention of the group to commit the crime, i.e., he or she must know that the group plans and wants to commit the crime.

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153 See supra note 106, Prosecutor v. Furundzija, para. 249.
154 This view, however, has been challenged recently by different authors, see A. Gil Gil, DERECHO PENAL INTERNACIONAL 231 et seq. (1999); A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation, 99 COLUMBIA L. REV. 2259, at 2265 et seq. (1999); O. Triffterer, Kriminalpolitische und dogmatische Überlegungen zum Entwurf gleichlautender "Elements of Crimes" für alle Tatbestände des Völkermords, in: B. Schünemann et al. (eds.), FESTSCHRIFT FÜR CLAUS ROXIN 1438 et seq. (2001); id., Genocide, its particular intent to destroy in whole or in part the group as such, 14 LEIDEN J. INT’L L. 399, 403 et seq. (2001); supra note 27, H. Vest, GENOZID 101 et seq.; id., Humanitätsverbrechen – Herausforderung für das Individualstrafrecht? 113 ZSW 480 et seq. (2001); for a discussion of these views see supra note 2, K. Ambos, DER ALLGEMEINE TEIL 790 et seq.; supra note 133, id., Preliminary Reflections 19 et seq. More recently also for a broader understanding of the specific intent (Absicht) C. Kreß, The Darfur Report and Genocidal Intent, 3 J. INT’L CRIM. JUST. 562 et seq. (2005).
155 Supra note 152.
156 Conc. supra note 7, A. Eser, Responsibility 803 with fn. 155.
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question is whether positive knowledge with regard to the specific crime is required or whether it is sufficient that the participant is aware that a crime will probably be committed. The latter requirement was considered sufficient with regard to aiding and abetting by a Trial Chamber of the ICTY157 but this precedent is only applicable to subparagraph (c) not to (d) (ii). The subparagraph under examination clearly requires "knowledge of the intention ... to commit the crime", i.e., the participant must be aware of the specific crime intended by the group.

(e) "directly and publicly incites ... to commit genocide"

The provision criminalizes direct and public incitement but only with regard to genocide. Identical to article III (c) of the 1948 Genocide Convention158 the provision provokes the same criticism. Some delegations felt that incitement as a specific form of complicity in genocide should not be included in the "General Part" of the Statute but only in the specific provision on the crime of genocide (article 6) in order to make it clear that incitement is not recognized for other crimes159. This argument is questionable since incitement is covered by other forms of complicity, in particular – in the case of the Rome Statute – by soliciting and inducing as defined above160. Normally, the difference between an ordinary form of complicity, e.g., instigation, and incitement lies in the fact that the former is more specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general161. The ILC rightly referred to the use of the mass media to promote the commission of genocide in Rwanda to justify the inclusion of direct and public incitement as subparagraph (f) of article 2 para. 3 of the 1996 Draft Code162. The ICTR first confirmed the importance of incitement in relation to genocide in Kambanda163 and Akayesu164; subsequent judgments have basically followed Akayesu165. The Akayesu Appeals Chamber, however, distinguished between incitement as a general form of participation within the meaning of article 6 para. 1 ICTR Statute and the specific form of incitement to genocide within the meaning of article 2 para. 3 (c) ICTR Statute166. Only the latter must be committed publicly and directly while the former does not necessarily require these additional elements167.

To incite "publicly" means that the call for criminal action is communicated to a number of persons in a public place or to members of the general public at large, in particular by using

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157 Supra note 106, Prosecutor v. Furundzija, para. 246.
159 Similarly supra note 7, A. Eser, Responsibility 804.
160 See margin No. 15.
161 C. f. supra note 2, K. Ambos, DER ALLGEMEINE TEIL 651, 653–4. The ICTR, however, considers that instigation under article 6 para. 1 ICTR Statute includes the direct and public elements of incitement under article 2 para. 3 (c) ICTR Statute (supra note 89, Prosecutor v. Akayesu, para. 481).
164 Supra note 89, Prosecutor v. Akayesu, paras. 672–5.
technical means of mass communication such as radio and television\textsuperscript{168}. The ICTR considers the place where the incitement occurred and the scope of the assistance as particularly important\textsuperscript{169}. To incite "directly" means that another person is concretely urged or specifically provoked to take immediate criminal action; a vague suggestion is not sufficient\textsuperscript{170}. There must be a specific causal link between the act of incitement and the main offence\textsuperscript{171}. The fulfilment of these requirements may also depend on the "cultural and linguistic" context\textsuperscript{172}. What, for example, a Rwandan national understands as a "direct" call to commit a crime might not be understood as such by a German and vice versa. The qualifier "direct" brings the concept of incitement even closer to ordinary forms of complicity, such as instigation, solicitation or inducement. Thereby, the concept loses its original purpose\textsuperscript{173}, which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes\textsuperscript{174}. For if an individual urges another individual known to him to take criminal action he or she has the same control over the actual perpetrator as an instigator or any other accomplice causing a crime.

One important difference still remains between subparagraph (e) and the forms of complicity found in subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, i.e., genocide. It only requires the incitement "to commit genocide" without the additional requirement that it "in fact occurs or is attempted" (as, for example, is required in a general manner by subparagraph (b)). Thus, subparagraph (e) breaks with the dependence of the act of complicity on the actual crime, abandoning the accessory principle (Akzessoriätätsgrundsatz) which governs – at least in the sense of factual dependence of the complicity on the main act\textsuperscript{175} – subparagraphs (b) to (d). A person who directly and publicly incites the commission of genocide is punishable for the incitement even if the crime of genocide per se is never actually committed\textsuperscript{176}. This has been confirmed by the ICTR in \textit{Prosecutor v. Akayesu}, where it was stated that incitement to commit genocide "must be punished as such, even where such incitement failed to produce the result expected by the perpetrator"\textsuperscript{177}. This view is convincing since the act of incitement is as such sufficiently dangerous and blameworthy to be punished\textsuperscript{178}. On the subjective level, the incitement must be accompanied by the intention (purpose) "to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging"\textsuperscript{179}. In other words, the person who incites must


\textsuperscript{169} \textit{Supra} note 89, \textit{Prosecutor v. Akayesu}, para. 556.


\textsuperscript{171} \textit{Supra} note 89, \textit{Prosecutor v. Akayesu}, para. 557.


\textsuperscript{173} Conc. supra note 7, A. Eser, \textit{Responsible 805 with fn. 168}.

\textsuperscript{174} The specific danger or risk implicit in the act of incitement lies in the possibility to trigger a certain course of events. It has been most convincingly described by E. Dreher who compares the inciter to a person who throws a torch and does not know if it will catch fire or not (\textit{Der Paragraph mit dem Januskopf}, in: K. Lackner et al. (eds.), \textit{Festschrift für Wilhelm Gallas zum 70. Geburtstag} 307, 312 (1973)).

\textsuperscript{175} See on the accessory principle in a factual, quantitative and qualitative sense \textit{supra} note 11, K. Hamdorf, \textit{Beteiligungsmodelle 17 et seq.}; \textit{supra} note 2, K. Ambos, \textit{Der allgemeine Teil 617–8}.


\textsuperscript{177} \textit{Supra} note 89, \textit{Prosecutor v. Akayesu}, paras. 561–2 (562). In the same vein \textit{supra} note 113, \textit{Prosecutor v. Nahimana, Barayagwiza, Ngeze}, para 678, explicitly emphasizing that "the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide".


\textsuperscript{179} \textit{Ibid.}, para. 560.

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have the specific intention (dolus specialis) to destroy, in whole or in part, a protected group him- or herself, i.e., he or she must posses the same state of mind as the main perpetrator.

According to the ICTR, this requirement also applies to other forms of participation in genocide but not to complicity under article 2 para. 3 (e) ICTR Statute. This differentiation is not convincing. Indeed, it was not followed by the Musema Trial Chamber, which held that complicity in genocide – independent of its legal basis and form – requires only knowledge of the genocidal intent; for aiding and abetting, even possible knowledge, i.e., culpable ignorance ("had reason to know"), shall be sufficient. This is correct in that it limits the accomplices’ mens rea to positive knowledge; yet it goes too far in admitting the "had reason to know"- standard for the aider and abettor since this standard introduces a negligence threshold and thereby violates the principle of culpability. Thus, in general, positive knowledge of the accomplice with regard to the genocidal intent of the (main) perpetrator(s) must be considered necessary but it is also sufficient. A higher threshold, i.e., specific genocidal intent, should only be required for those forms of commission which are similar to direct perpetration, i.e., the other forms of perpetration (co-perpetration, perpetration by means) and the specific forms of complicity (incitement and conspiracy), since they create a specific and autonomous risk for the protected groups.

(f) attempt

α) "by taking action that commences its execution by means of a substantial step ..."

Although attempt liability was not explicitly and autonomously recognized in Nuremberg or Tokyo or in the Statutes of the ICTY and ICTR it was always implicit in the criminalization of the "preparation" and "planning" of a war, especially of a war of aggression. With this form of criminalization even conduct still in the attempt stage was made punishable as a complete offence. Thus, it is not surprising that all ILC Draft Codes contain an attempt provision. The Rome Statute correctly follows this view; yet, it does not limit attempt to certain crimes – as proposed by the ILC – but refers to "such a crime", i.e., to any crime within the jurisdiction of

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180 Explicitly supra note 165, Prosecutor v. Ruggiu, para. 14: "... must himself have the specific intent to commit genocide ...".
183 Supra note 123, Prosecutor v. Musema, para. 183.
185 See for a detailed discussion supra note 2, K. Ambos, DER ALLGEMEINE TEIL 793 et seq.; supra note 133, id., Preliminary Reflections 21 et seq. (23–4); id., Immer mehr Fragen im internationalen Strafrecht, 21 NIZ, 628, 632–2 (2001). This view is also shared by supra note 27, H. Vest, GENOZID 243 (with fn. 33), 248, 265 and 385; supra note 28, G. Werle, VOLKERSTRAFRECHT, margin Nos. 438 et 441; supra note 28, id., Individual Criminal Responsibility 970 and R. Kolb, Droit international pénal, in: id. (ed.), DROIT INTERNATIONAL PENAL 1, 180 (2008) (both with regard to the aider and abettor); J. Jones, Whose intent is it anyway?, in: L.C. Vohrah et al. (eds.), MAN’S INHUMANITY TO MAN – ESSAYS IN HONOUR OF A. CASSESE 467, 479 (2003) arguing for an analogy with the mens rea requirement of crimes against humanity. supra note 7; A. Eser, Responsibility 806 only that the inciter "must merely know and want the incited persons to commit the crime", but need not herself posses the genocidal intent. It is difficult to see, however, how this position may be reconciled with his – convincing – conclusion that the link between incitement and genocide is "a subjective 'volitional' one in terms of being directed at the genocidal aim of the inciting act". (ibid.; 805).
187 1954 ILC Draft Code, article 2 para. 13 (iv); 1991 ILC Draft Code, article 3 para. 3; 1996 ILC Draft Code, article 2 para. 3 (g).
188 The ILC could not reach consensus on a list of crimes which can be attempted yet many members and some governments considered an attempt only possible in case of war crimes or crimes against humanity (2
the Court (articles 5–8). This is convincing since the Statute only includes the core crimes which are all equally serious so that it would not be justified to admit attempt liability only for some, but not for others.

37 Attempt is defined as the commencement of execution (of "such a crime") by means of a substantial step. This definition is a combination of French and American Law and was already used in the 1991 Draft Code (article 3 para. 3) and the 1996 Draft Code (article 2 para. 3 (g)). The crucial question was and still is when, according to this definition, an attempt actually begins. It is clear that preparatory acts are not included since they do not represent a "commencement of execution". In fact, this was the only issue which was not controversial within the ILC when discussing attempt. It is not clear, however, whether the German concept of the commencement of attempt by "immediately proceeding to the accomplishment of the elements of the offence" (unmittelbares Ansetzen zur Tatbestandsverwirklichung) falls within the terms of this subparagraph. At first glance, the German concept seems to differ from the "commencement of execution" since in the case of an "immediately proceeding" the perpetrator must only be very close to the actual execution of a crime but have not partly executed it as apparently required in the case of the "commencement of execution". However, this is only an apparent difference, not a real one. The ILC commentary explained that "commencement of execution" indicates that "the individual has performed an act which constitutes a significant step towards the completion of the crime". Consequently, there is no requirement that the crime in question be partly executed, i.e., the person need not have realized one or more elements of the crime. The French version of the Statute also speaks of "un commencement d'exécution", employing the wording of article 121–5 of the Code Pénal. French legal scholarship has always understood the concept in a broad sense, covering "tout acte qui tend directement au délit". The Spanish version does not even speak of "commencement of execution" but requires "actos que supongan un paso importante para su ejecución". Thus, in practical terms, there is no difference between "commencement of execution" and "immediately proceeding to the accomplishment of the elements of the offence". Still, the latter definition is more precise and gives attempt liability by its wording much more weight since it is – at least theoretically – clearly distinguishable from liability for a complete crime.


More detailed on the essential elements of attempt (incompleteness of the crime, subjective intention and objective commencement of execution) see supra note 7, A. Eser, Responsibility 809 et seq.

See, on the one hand, the classical French formulation ("commencement d’exécution") already in § 2 of the Code Penal of 1810 and now in article 121–5 Code Penal; on the other hand, supra note 22, Model Penal Code, § 5.01 (1) (c), "substantial step". C.f. supra note 14, E. Wise, Principles 44; supra note 8, G. Fletcher, CONCEPTS, 171–2; crit. supra note 28, G. Werle, Volkerstrafrecht, margin Nos. 591 et seq.


See § 22 German Penal Code; more precisely expressed in § 15 section 2 of the Austrian Penal Code by the formula "eine der Ausführung unmittelbar vorangehende Handlung" (an act that immediately precedes the execution of the crime). For the Austrian solution see O. Triffterer, Österreichisches Strafrecht, ALLGEMEINER TEIL, chapter 15, margin Nos. 7 et seq. (2nd ed. 1994).

1996 ILC Draft Code, p. 27 (para. 17).


Conc. supra note 7, A. Eser, Responsibility 812–3 with fn. 204.

See also article 3 para. 6 of the Alternative General Part, prepared by A. Eser/O. Lagodny/O. Triffterer.

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At first glance it is difficult to understand the meaning of the last part of the first sentence of article 25 para. 3 (D)\(^{198}\). That "the crime does not occur" seems already to follow from the concept of attempt as a non-completed (inchoate) offence. Further, the non-completion seems to be logically "independent of the person’s intentions" since he or she intends (wants, desires) to commit the offence. In other words, the perpetrator has the normal \textit{mens rea} (as in the case of a completed offence), what is lacking in the case of attempt is a complete \textit{actus reus}, since "the harm is absent"\(^{199}\). In fact, however, the complicated wording goes back to the French law which conceives of abandonment as a negative element of the attempt definition\(^{200}\). Accordingly, attempt implies the non-occurrence of the crime \textit{independent} of circumstances intended by the perpetrator; \textit{e contrario} this means that the perpetrator is not punishable if the crime does not occur because of circumstances \textit{intended} by him or her. Thus, what this formulation does is to recognise the possibility of voluntary abandonment using a negative-implicit approach\(^{201}\).

\(\beta\) "a person ... shall not be liable ... for the attempt ... if that person completely and voluntarily gave up the criminal purpose"

The possibility of abandonment was not provided for in the ILC Draft Codes of Crimes but was considered in the Preparatory Committee\(^{202}\). It is recognized in all modern legal systems and can, therefore, be truly considered a general principle of international law\(^{203}\). In theory, it creates an incentive for the perpetrator to withdraw from the commission\(^{204}\). In light of the first clause (margin No. 38), however, it is doubtful whether this second clause is indeed necessary. While the first clause provides for an \textit{implicit} formulation, the second one opts for a \textit{positive} and \textit{explicit} approach. It was included in the \textit{Rome Statute} in the last minute, based upon a Japanese proposal and supported by Germany, Argentina and other like-minded States after informal consultations. In the heat of the negotiations, the drafters, including this author, overlooked the fact that the first clause already contained a rule on abandonment, albeit only an implicit one.

The formulation is based on the General Part of the updated Siracusa Draft\(^{205}\) and the US-Model Penal Code\(^{206}\). It is, however, less stringent than these provisions. In essence, omitting the redundant, the provision rewards the person if he or she – in objective terms – abandons the effort to commit the crime or otherwise prevents its commission and – in subjective terms – completely and voluntarily gives up the criminal purpose. The reference to the criminal purpose is not indispensable since the \textit{raison d’être} of an exemption from punishment in case of abandonment is that the perpetrator completely and voluntarily abandons the further execution or prevents the completion of the act. This presupposes that he or she has given up the criminal purpose.

\(^{198}\) Crit. also supra note 28, G. Werle, \textit{VÖLKERSTRAFRECHT}, margin No. 594.

\(^{199}\) Supra note 8, G. Fletcher, \textit{CONCEPTS}, 171.

\(^{200}\) Article 121–5 of the French \textit{Code Pénal} reads: "La tentative ... n’a été suspendue ou n’a manqué son effet qu’en raison de circonstances indépendantes de la volonté de son auteur". The French wording of the Statute is almost identical: "... en raison de circonstances indépendantes de sa volonté". See also supra note 8, J. Pradel, 286. For the Spanish law see article 16 para. 1 \textit{Código Penal} and Mir Puig, \textit{DERECHO PENAL} 349-50 (2002).

\(^{201}\) For a more profound discussion see supra note 2, K. Ambos, \textit{DER ALLGEMEINE TEIL} 709 et seq.


\(^{203}\) C. J. G. Fletcher, \textit{RETHINKING CRIMINAL LAW} 185 (1978); \textit{id.}, \textit{CONCEPTS}, supra note 332, 181; supra note 8, J. Pradel, 280. On its basic elements see supra note 7, A. Eser, \textit{Responsibility} 815 et seq.

\(^{204}\) See for the different theoretical justifications of abandonment: supra note 203, G. Fletcher, \textit{RETHINKING}, 186 et seq.; supra note 69, H.-H. Jescheck/T. Weigend, 538 et seq.

\(^{205}\) Siracusa Draft, articles 33–8. See also supra note 197, article 3 para. 6 of the \textit{Alternative General Part}. Both rules are based on German law, \textit{c. f.} sect. 24 \textit{Strafgesetzbuch}.

\(^{206}\) Supra note 22, Model Penal Code, § 5.01 (4).
The provision does not address the difficult problems related to abandonment, *e.g.*, at what stage of the commission abandonment is still possible, what counter-activity the perpetrator must engage in so as to deserve an exemption from punishment or what the circumstances must be for the abandonment to be deemed engaged in "voluntarily". Further, the provision does not distinguish between abandonment in case of one or more than one participants; in the latter case, difficult questions of attribution regarding the act of abandonment of one participant *vis à vis* the other(s) arise. These and other problems are left to the Court. Given the short time at the Rome Conference and the difficulty in reaching consensus about less complicated issues this was certainly a wise or, at least, practical solution.

### IV. Paragraph 4

This paragraph repeats a formulation as old as the codification history of international criminal law. It affirms the parallel validity of the rules of State responsibility, *i.e.*, in particular the rules as embodied in the ILC Draft articles on State Responsibility.

### C. Special Remarks

#### 1. Issues of delimitation

The analysis of paragraph 3, subparagraphs (b) and (c), shows that it is hardly possible to delimitate the different forms of complicity mentioned in these subparagraphs. Thus, it may be sufficient and more reasonable to draft a rule limiting complicity to inducement/instigation and aiding and abetting. It is submitted that these forms of complicity cover any conduct which should entail criminal responsibility. "Ordering" a crime should be dealt with under subparagraph (a), *i.e.*, acting through another.

As to the delimitation of co-perpetration and aiding and abetting, the case law has developed some criteria. With regard to participation in torture, the *Furundzija* Trial Chamber held that it constitutes co-perpetration if the accused takes part in an "integral part of the torture and partake(s) of the purpose"; if he or she "only" assists "in some way" in the torture and knows of its existence, the accused is liable as an aider and abettor. According to the *Tadic* Appeals Chamber, the main difference between co-perpetration and aiding and abetting lies in the existence of a common plan in case of the former and the absence of such a plan in the latter. If such a plan exists, any contribution to its realisation constitutes co-perpetration. In *Krstic*, Trial Chamber I held that co-perpetration requires participation "of an extremely significant nature and at the leadership level". In *Kvocka*, the same Chamber made the delimitation using subjective criteria: while co-perpetrator shares the intent of the jce, the aider and abettor merely has knowledge of the principal offender’s intent. However, in *Krnajelac*, Trial Chamber II explicitly rejected this view and instead followed the more simplistic *Tadic* approach, which considers any participant in a criminal enterprise who is not a principal offender an accomplice.

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207 Thereto *supra* note 35, R. Cryer *et al.*, 317, emphasizing that liability for aiding and abetting or participating in a joint criminal enterprise might arise.

208 See the 1954 ILC Draft Code, article 1; 1991 ILC Draft Code, article 3 para. 1; 1996 ILC Draft Code, article 2 paras. 1 and 4. See also T. Weigend, *supra* note 481, Article 3, 113; *supra* note 98, V. Militello, *personal nature*, 951.


210 *Supra* note 106, *Prosecutor v. Furundzija*, para. 257; see also *supra* note 108 and corresponding text.


212 See already margin No. 9 with *supra* note 42.

but refers to him or her, oddly enough, as a co-perpetrator (sic!)\textsuperscript{214}. In substance, however, this Chamber pursued the same subjective approach as Trial Chamber I in \textit{Kvocka}\textsuperscript{215}. In the \textit{Vasiljevic} Appeal Judgment, the Appeals Chamber draws the following distinction between co-perpetration by means of a jce and aiding and abetting:

\begin{itemize}
\item [(i)] The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts in that in some way are directed to the furtherance of the common design.
\item [(ii)] In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite \textit{mens rea} is intent to pursue a common purpose\textsuperscript{216}.
\end{itemize}

This latter approach was recently confirmed by the Appeals Chamber in the \textit{Kvocka} Appeal Judgment\textsuperscript{217}. In sum, however, the case law is still developing and far from uniform.

It is also questionable if – in practical terms – subparagraph (d) is really indispensable given the wide scope of liability for an aider and abettor according to subparagraph (c)\textsuperscript{218}. On the objective level, subparagraphs (c) and (d) are quite similar, the only difference being that (c) is concerned with individual responsibility and (d) with group responsibility. A person who contributes to a group crime or its attempt will always be liable as an aider and abettor to an individual crime in the sense of subparagraph (c). In other words, the group requirement of subparagraph (d) excludes liability for participation in individual crimes according to subparagraphs (a) to (e) but not vice versa. Thus, the significant difference between subparagraphs (c) and (d) lies, if at all, on the subjective level. As pointed out above (margin Nos. 29–30), a participant in a group crime must either aim at furthering the criminal activity or purpose of the group (subparagraph (d) (i)) or must know of its criminal intention (subparagraph (d) (ii))\textsuperscript{219}. Thus, a person acting without the specific intent of facilitating the commission within the meaning of subparagraph (c) may still be liable under subparagraph (d) (ii). In fact, the Rome Statute provides, on the one hand, for a subjective limitation of aiding and abetting by the requirement of facilitating – in contrast, the case law of the \textit{ad hoc} Tribunals only requires knowledge that the assistance contributes to the commission of crimes\textsuperscript{220}; but, on the other hand, it takes this limitation away by the low knowledge threshold in subparagraph (d) (ii)\textsuperscript{221}.

\section*{2. Complicity after commission}

Article 25 does not refer to acts of complicity after the commission of the crime. The ILC only wanted to include such acts within the concept of complicity if they were based on a commonly agreed plan; in the absence of such a plan the person would only be liable pursuant to


\textsuperscript{215} \textit{Ibid.}, para. 87 requiring that the accused – as a co-perpetrator – shares the state of mind necessary for the crimes committed as part of the criminal enterprise.


\textsuperscript{217} \textit{Supra} note 32, \textit{Prosecutor v. Kvocka et al.}, para. 89. See further para. 92, where the Appeals Chamber notes that "the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise <www.un.org/icry/kvocka/appeal/judgement/foot.htm - 204>".

\textsuperscript{218} According to \textit{supra} note 8, F. Mantovani, \textit{Principles} 35 it is "superfluous".

\textsuperscript{219} I thereby modify the view presented in the first edition (margin No. 39).

\textsuperscript{220} See \textit{supra} margin No. 23 with \textit{supra} note135.

\textsuperscript{221} For a more detailed discussion see \textit{supra} note 2, K. Ambos, \textit{DER ALLGEMEINE TEIL} 641 et seq. drawing an analogy to \textit{Tadić}.

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a distinct offence ("harbouring a criminal")\textsuperscript{222}. This is the correct view since a prerequisite of accomplice liability is an "attributory" nexus (Zurechnungszusammenhang) between the main offence and the act of assistance. Thus, assistance that occurs after the commission of the main offence may only entail criminal responsibility if there is a link to the accomplice’s conduct before commission of the main offence, or more exactly, before its completion. In most cases such a link will consist in a prior common agreement which extends beyond the completion of the main offence.

This reasoning also follows from the guilt principle. Accordingly, a participant in a crime can only be liable for his or her own contribution to the crime, regardless of the liability of other participants. This implies that the responsibility of each participant has to be determined individually on the basis of his or her factual contribution to the crime in question. A form of vicarious liability of the accomplice for the principal is excluded\textsuperscript{223}. If the accomplice, on the contrary, is liable only for his or her own contribution, this contribution determines the scope of attribution and guilt\textsuperscript{224}.

3. Individual criminal responsibility and omission, in particular command responsibility

The wide range of liability established in article 25 para. 3 is complemented by a specific rule on command and superior responsibility (article 28)\textsuperscript{225}. This provision constitutes the classical rule expanding attribution – apart from conspiracy (only included in a modified version in subparagraph (d), see supra) and attempt (subparagraph (f)). Article 28 establishes a – in international criminal law unique – responsibility for omission\textsuperscript{226}: the superior is punished for failing to prevent his or her subordinates from committing crimes or for failing to punish them for these crimes\textsuperscript{227}. Thus, this provision establishes a very broad liability of the superior as a direct perpetrator (principal) for the acts of third persons (the subordinates), thereby creating a kind of vicarious liability (responsabilité du fait d’autrui) that comes very close to strict liability if one lowers the subjective threshold to a standard of mere negligence (‘should have known’) and infers the potential knowledge not from objective facts but mere presumptions (‘constructive knowledge’ in its worst form). It further puts liability for the failure to intervene


\textsuperscript{223} In American law, however, the doctrine of vicarious liability serves as the basis for the formal equivalence of perpetrators and accomplices (c. f. supra note 8, G. Fletcher, CONCEPTS, 190 et seq.).

\textsuperscript{224} C. f. supra note 14, E. Wise, Principles 42–3; supra note 14, A. Sereni, Responsibility 139. See also: Preparatory Committee Draft, supra note 446, article 23 para. 3: "Criminal responsibility is individual and cannot go beyond the person and the person’s possessions".

\textsuperscript{225} C.f. supra note 35, K. Ambos, Joint Criminal Enterprise 163 et seq.

\textsuperscript{226} For a more detailed analysis with regard to liability for omission in international criminal law K. Weltz, DIE UNTERLASSUNGSFAHIGKEIT IM VÖLKERSTRAFRECHT AUS DEM BLICKWINKEL DES FRANZÖSISCHEN, US-AMERIKANISCHEN UND DEUTSCHEN RECHT passim (2003).

in the commission of crimes on an equal footing with (accomplice) liability for not adequately supervising the subordinates and not reporting their crimes. Finally, the provision fails to distinguish between preventive (supervision, timely intervention) and repressive (reporting the crimes) countermeasures on the superior’s part. In fact, liability is so broad that some kind of limitation must be imposed in order to avoid violating the principle of culpability. In the case of Prosecutor v. Oric\textsuperscript{228} the Trial Chamber’s application of the ‘reason to know’ standard of superior responsibility for the crimes of the subordinates pushed the boundaries of culpability to its farthest limits in the jurisprudence of the Tribunal\textsuperscript{229}. To adress the culpability problem, the German International Criminal Law Code (\textit{Völkerstrafgesetzbuch}) distinguishes between liability as a perpetrator (principal) for the failure to prevent subordinates from committing crimes (Sect. 4), on the one hand, and accomplice liability for the (intentional or negligent) failure to properly supervise the subordinates (Sect. 13) and the failure to report crimes (Sect. 14), on the other\textsuperscript{230}.

Moreover, although it is conceptually possible to make a clear distinction between liability for ordering (an affirmative or direct act) and for superior responsibility (an omission), these forms of responsibility are not clearly delimited in the case law of the ad hoc Tribunals. In fact, there is a tendency to use the superior responsibility doctrine (Articles 7 para. 3 and 6 para. 3 ICTY and ICTR Statutes respectively) as a kind of default liability for cases in which an affirmative or direct act (Articles 7 para. 1 and 6 para. 1) cannot be proven\textsuperscript{231}. The issue was implicitly addressed for the first time in Kayishema & Ruzindana, where a Trial Chamber held that article 7 para. 3 only becomes relevant if the accused did not order the alleged crimes\textsuperscript{232}. It was also addressed in Blaskic, which held that "l’omission de punir des crimes passés … peut … engager la responsabilité du commandant au titre de l’article 7 (1) …"\textsuperscript{233}. Only recently, however, was the issue addressed explicitly. In Kordic & Cerkez, responsibility under article 7 para. 1 was characterized as “direct” as compared to the rather “indirect” responsibility under article 7 para. 3\textsuperscript{234}. As a consequence, article 7 para. 1 constitutes a \textit{lex specialis} that excludes simultaneous conviction on the basis of article 7 para. 3\textsuperscript{235}. Similarly, the Krstic Trial Chamber held that "any responsibility under article 7 (3) is subsumed under article 7 (1), i.e., superior responsibility is only of subsidiary nature\textsuperscript{236}. Last but not least, the Krnojelac Trial Chamber considers that, if responsibility under article 7 para. 1 can be established, conviction should only be entered under this provision and the accused’s position as a superior taken into account as an aggravating factor\textsuperscript{237}. The Trial Chambers in Naletilic & Martinovic\textsuperscript{238} and in Stakic\textsuperscript{239} follow this approach, the latter obiter adding that it would be a waste of judicial resources to discuss article 7 para. 3 if the accused can be convicted on the basis of article 7 para. 1\textsuperscript{240}. In the meantime this position has been confirmed by the Appeals Chamber in various judgments\textsuperscript{241}.

\footnotesize
\begin{itemize}
  \item \textsuperscript{228}Prosecutor v. Oric. Case No. IT-03-68-T, Judgment Trial Chamber, 30 June 2006
  \item \textsuperscript{230}Bundesgesetzblatt 2002 I 2254; for translations of the text and motives, see <http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/abgeschlossene Projekte Translation.html> (last visited 30 June 2008).
  \item \textsuperscript{231}C. f. supra note 2, K. Ambos, DER ALLGEMEINE TEIL 670 et seq. (esp. 672); supra note 91, id., Superior Responsibility, 835 et seq.
  \item \textsuperscript{232}Supra note 124, Prosecutor v. Kayishema & Ruzindana, para. 223.
  \item \textsuperscript{233}Supra note 113, Prosecutor v. Blaskic, para. 337.
  \item \textsuperscript{234}Supra note 24, Prosecutor v. Kordic & Cerkez, paras. 366 et seq. (367, 369).
  \item \textsuperscript{235}C. f. ibid., paras. 370–1.
  \item \textsuperscript{236}Supra note 42, Prosecutor v. Krstic, para. 605.
  \item \textsuperscript{237}Supra note 24, Prosecutor v. Krnojelac, para. 173, 496.
  \item \textsuperscript{238}Supra note 24, Prosecutor v. Naletilic & Martinovic, para. 81.
  \item \textsuperscript{239}Supra note 26, Prosecutor v. Stakic, para. 463 et seq.
  \item \textsuperscript{240}Ibid., para. 466.
  \item \textsuperscript{241}Supra note 25, Prosecutor v. Delalic et al., para. 745; Supra note 118, Prosecutor v. Blaskic, para. 90-2;
\end{itemize}

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\textsuperscript{49}
part 25

The applicability of the command responsibility doctrine in non-international armed conflicts raises another unresolved problem. While a commander’s responsibility in international conflicts may be based on customary law, starting with the post World War II case law, there is no conventional (written) or customary norm that can be invoked for such “indirect” responsibility in non-international conflicts. Thus, the question arises of whether prosecution and conviction in such cases would be barred by the principle of legality (margin No. 21). Although the Tadic Appeals Chamber extended individual criminal responsibility to non-international conflicts, mainly invoking common article 3 of the Four Geneva Conventions, it is difficult to apply this precedent to command responsibility since command responsibility is a special form of "indirect" responsibility for omission which is mentioned neither in common article 3 nor in any other norm of international humanitarian law; indeed, articles 86, 87 First Additional Protocol only apply to international conflicts. Notwithstanding, in Hadzihasanovic et al., the ICTY Appeals Chamber, confirming the Trial Chamber’s view, held that command responsibility for crimes committed in non-international conflicts is a logical consequence of the individual responsibility attached to these crimes by Tadic. In addition, it refers in agreement to the analysis of the sources presented by the Trial Chamber.

Still, if one assumes that this is the correct view, the principle of legality would ban a commander’s prosecution for crimes committed before the day of the Tadic judgment, i.e., 2 October 1995. The Hadzihasanovic Appeals Chamber seems to overlook this problem. There is another critical point: While stretching the principle of command responsibility quite far with regard to the commander’s responsibility in non-international conflicts, the Appeals Chamber opts for a more restrictive interpretation with regard to the second ground of appeal, i.e., the question whether command responsibility extends to crimes committed before the superior assumed the command. As to this point, the Chamber allows the appeal for the lack of state practice and opinio juris and on the basis of a strict interpretation of the relevant provisions.

Yet, while it is certainly true that "criminal liability must rest on a positive and solid foundation of a customary law principle," this applies to both grounds of appeal and does not justify the use of apparently different concepts of command responsibility with respect to the two issues. In fact, the right answer to the second issue lies in the correct understanding of the structure of the "concept" of superior responsibility: It establishes, as was analyzed in detail elsewhere, a separate and own responsibility of the superior for his or her omission to intervene. This obligation arises, so to speak, in its own...
right as soon as the commander assumes command with regard to all crimes which still may be prevented or punished. In other words and with regard to the latter obligation, the commander is under an obligation to punish all crimes which are or should be known to him or her, independently of the time of their commission by the subordinates252. Were it otherwise, it would be all too easy to strip the commander of his or her obligation to repress international crimes by changing regularly and quickly the command. Consequently, the deterrent effect of the command responsibility doctrine with a view to future crimes would be severely undermined. In any case, there is a temporal limitation – apart from the day of the Tadic judgment - to the argument of the Appeals Chamber with regard to the Rome Statute: if its prohibition on non-retroactivity (article 22 para. 1, article 24) is to be taken seriously acts committed in non-international conflicts can only trigger prosecution for superior responsibility if they were committed on or after 1 July 2002 (for the first 67 States Parties).

The Rome Conference missed the opportunity to propose a general rule on omission, although the final Draft Statute contained a general actus reus article253. This article was deleted254, basically, because it was not possible to reach a consensus on the definition of an omission255. Further, it was argued that liability for omission based on article 28 and on the crimes themselves may be sufficient256. However, if the Court takes the nullum crimen principle seriously it may have difficulties in basing liability for omission on provisions which do not clearly and explicitly provide for such liability257. The case law of the ad hoc Tribunals has generally accepted that liability under article 7 para. 1 ICTY Statute also encompasses commission by omission258; the Celibici Appeals Chamber, however, held that the non-release of a prisoner is not a punishable omission in terms of article 7 para. 1 ICTY Statute259. Further, omission may imply moral support and therefore qualify as aiding and abetting260.

252 In this sense also supra note 227, T. Weigend, Vorgesetztenverantwortlichkeit.
253 Preparatory Committee Draft, article 28.
255 But see, for example, articles 33–5 Siracusa Draft, article 2 para. 2. Supra note 197, Alternative General Part. For a general rule also supra note 14, E. Wise, Principles 48–50; see also supra note 8, F. Mantovani, Principles 32.
256 See supra note 3, W.A. Schabas, Principles.
257 Conc. supra note 7, A. Eser, Responsibility 819 with fn. 237.
259 Supra note 25. Prosecutor v. Delalic et al., paras. 342–3, 376. For further positive obligations derived from International Humanitarian Law see supra note 32; A. Cassese, 234–5; for a general liability for omission in international criminal law supra note 28, G. Werle, VÖLKERSTRAFRECHT, margin Nos. 599 et seq.; supra note 28, id., Individual Criminal Responsibility 964 et seq.; supra note 185, Prosecutor v. Hadzihasanovic et al., R. Kolb, Droit international pénal 1, 182.
260 See supra margin No. 20 with supra note 128.

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