

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.

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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, *mittelbare Täterschaft*). Subparagraph (b) contains different forms of participation: on the one hand, ordering an (attempted) crime, on the other soliciting or inducing its (attempted) commission. Subparagraph (c) establishes criminal responsibility for "aiding and abetting" as the subsidiary form of participation. Thus, in contrast to the ILC Draft Codes of Crimes against the Peace and Security of Mankind⁵, the Statutes of the *ad hoc* Tribunals and the so-called mixed tribunals (Special

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".

² *Prosecutor v. Tadic*, Case No. IT-94-1-AR 72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 Oct. 1995, paras. 128–137 (134): "All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife". For an analysis on the case law since Nuremberg see K. Ambos, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS. ANSÄTZE EINER DOGMATISIERUNG 78 *et seq.* (2nd ed., 2004); *id.*, *Individual Criminal Responsibility in International Criminal Law*, in: G. K. McDonald/O. Swaak Goldman (eds.), SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, Vol. I: COMMENTARY 7 *et seq.* (2000) See also O. Triffterer, *Bestandsaufnahme zum Völkerstrafrecht*, in: G. Hankel/G. Stuby (eds.) STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN 211 – 213 (1995); M. Ch. Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 12, 47, 59, 64 *et seq.* (2003). For an analysis of the ICTR's case law see R. Boed, *Individual criminal responsibility for violations of Art. 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II thereto in the case law of the ICTR*, 13 CRIM. L.F. 293 (296 *et seq.*) (2002).

³ C. f. K. Ambos, INTERNATIONALES STRAFRECHT, § 6, margin No. 40 (2006); M. Cherif Bassiouni, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, Vol. I, 3–40 (2005); W.A. Schabas, *General Principles of Criminal Law*, 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. (1998).

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

⁵ 1954 ILC Draft Code, article 2 para. 13; 1991 ILC Draft Code, article 3; 1996 ILC Draft Code, article 2.

Court for Sierra Leone and the Cambodian Extraordinary Chambers)⁶, paragraph 3 distinguishes between perpetration (subparagraph (a)) and other forms of participation (subparagraphs (b) and (c)), with the latter establishing different degrees of responsibility⁷. This approach confirms the general tendency in comparative criminal law to reject a pure unitarian concept of perpetration (*Einheitstätermmodell*) and to distinguish, at least on the sentencing level, between different forms of participation⁸. The approach is also followed, albeit less elaborate, by the internationalized panels for East Timor⁹; for example the act of providing the *means* for the commission of a crime is not made explicitly punishable¹⁰. 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 Einheitstäterschaft*) as known, for example, in Austrian and Swedish law¹¹.

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 apparent¹².

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 ...". 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. Othman (eds.), NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (2003).

⁷ Conc. A. Eser, *Individual Criminal Responsibility* (Art. 25), in: A. Cassese *et al.* (eds.), THE ROME STATUTE OF THE ICC: A COMMENTARY 788 with fn. 86 (2002).

⁸ C. f. *supra* note 2, O. Triffterer, *Bestandsaufnahme* 226; J. Pradel, DROIT PENAL COMPARE 312 *et seq.* (2002); G. Fletcher, BASIC CONCEPTS OF CRIMINAL LAW 188 *et seq.* (1998). In a similar vein also F. Mantovani, *The General Principles of International Criminal Law: The viewpoint of a national criminal lawyer*, 1 J. INT'L CRIM. JUST. 34 (2003).

⁹ Section 14 of UNTAET Regulation 2000/15 (On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences) of 6 June 2000 in K. Ambos/S. Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1-90 (2002).

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

¹¹ C. f. K. Hamdorf, BETEILIGUNGSMODELLE IM STRAFRECHT. EIN VERGLEICH VON TEILNAHME- UND EINHEITSTÄTERSYSTEMEN IN SKANDINAVIEN, ÖSTERREICH UND DEUTSCHLAND 43 *et seq.*, 75 *et seq.*, 104 *et seq.* (2002); *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 543 *et seq.* with further comparative law references. For the unitarian concept C. Kreß, *Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts: Die Allgemeinen Prinzipien des Strafrechts im Statut des Internationalen Strafgerichtshofs*, 12 HUMANITÄRES VÖLKERRECHT 9 (1999).

¹² See – for a first attempt to develop a theory of attribution in international criminal law – K. Marxen, *Beteiligung an schwerem systematischem Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre*, in: K. Lüderssen (ed.), AUFGEKLÄRTE KRIMINALPOLITIK ODER KAMPF GEGEN DAS BÖSE? BAND III: MAKRODELINQUENZ 226 *et seq.* (1998). On the peculiarities on attribution in international criminal law see also *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL, 539 *et seq.* and *passim*; *id.*, *Remarks on the General Part of International Criminal Law*, 4 J. INT'L CRIM. JUST. 663 (2006); *supra* note 328, *id.*, § 7, margin No. 10.

B. Analysis and interpretation of elements

I. Paragraph 1

As far as the jurisdiction over natural persons is concerned, paragraph 1 states the obvious. 4
 Already the International Military Tribunal found that international crimes are "committed by men not by abstract entities"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 victims¹⁴. The final proposal presented to the Working Group was limited to private corporations, excluding States and other public and non-profit organizations¹⁵. 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 systems¹⁶. Consequently, the absence of corporate criminal liability in many States would render the principle of complementary (article 17)¹⁷ unworkable.

II. Paragraph 2

The provision repeats the principle of individual criminal responsibility. 5

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 Aggression¹⁸, established within the Preparatory Commission, has not arrived at a commonly agreed upon definition¹⁹. Moreover there has not been any agreement on what role the UN Security Council would have to play. Its permanent members (USA, France,

¹³ See already *supra* note 326.

¹⁴ U.N. Doc. A/CONF.183/C.1/L.3 (1998), article 23 paras. 5 and 6. See also E. Wise, *General Principles of Criminal Law*, in: L. Sadat Wexler (ed.), MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE'S TEXT TO THE DIPLOMATIC CONFERENCE 42 (1998); A. Sereni, *Individual criminal responsibility*, in: F. Lattanzi (ed.), THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 145–6 (1998); *supra* note 3, W.A. Schabas, *Principles*.

¹⁵ U.N. Doc. A/CONF.183/C.1/WGGP/L.5 (1998) and *supra* note 3.

¹⁶ *C.f.* A. Eser/B. Huber/K. Cornils (eds.), EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT. EUROPEAN COLLOQUIUM ON INDIVIDUAL, PARTICIPATORY AND COLLECTIVE RESPONSIBILITY IN CRIMINAL LAW (1998); *supra* note 8, J. Pradel, 351 *et seq.*

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

¹⁸ *C.f.* D. Ntanda Nsereko, *Aggression under the Rome Statute of the International Criminal Court*, 4 NORDIC J. INT'L L. 497 (2002).

¹⁹ *C. f.* "Discussion paper proposed by the Coordinator", in: Report of the Preparatory Commission, 24 July 2002 (Addendum. Part II. Proposals for a provision on the crime of aggression, UN-Doc. PCNICC/2002/2/Add.2) and <<http://untreaty.un.org/cod/icc/index.html>> (last visited 30 June 2008); for a critical assessment see also R. S. Clark, *Rethinking aggression as a crime and formulating its elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT'L L. 859 (2002).

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 Council²⁰.

The possible "punishment" follows from article 77: imprisonment up to a maximum of 30 years or life imprisonment, additionally a fine and forfeiture of proceeds²¹.

III. Paragraph 3

- 6 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

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

- 7 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 person²². 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 perpetration²³. 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 *Celebici* it was stated that "commission" constitutes primary or direct responsibility²⁵. 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 respectively²⁶. 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.iccnw.org/?mod=aggression> (last visited 30 June 2008).

²¹ See also rules 145–148 of the Rules of Procedure and Evidence as finally adopted by the Preparatory Commission, PCNICC/2000/1/Add.1, 2 Nov. 2000. For a recent study on sentencing in international criminal law see J.C. Nemitz, *STRAFZUMESSUNG IM VÖLKERSTRAFRECHT* (2002).

²² See Model Penal Code (American Law Institute, 1985), § 2.06 (1): "committed by his own conduct", available at <www.ali.org> (last visited 30 June 2008); good Introduction by M. D. Dubber, *Criminal Law: Model Penal Code 1 et seq.* (NY:Foundation Press, 2002), Spanish Penal Code (Código Penal, Ley Orgánica 10/1995, de 23 Nov. 1995), article 28: "por sí solo"; German Penal Code (trans. by J. Darby, THE AMERICAN SERIES OF FOREIGN PENAL CODES (Vol. 28, 1987), <<http://wings.buffalo.edu/law/bclc>>, last visited 1 July 2008), § 25 (1): "selbst ... begeht" ("acting himself").

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

²⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 188. Conc. *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, 26 Feb. 2001, para. 376: "direct personal or physical participation"; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, Trial Chamber, 15 Mar. 2002, para. 73; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, Trial Chamber, 29 Nov. 2002, para. 62; *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 Mar. 2003, para. 62. See recently *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-T, Judgment, Trial Chamber, 17 Jan. 2005, para. 694; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment, Trial Chamber, 12 Sep. 2006, para. 463.

²⁵ *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 Feb. 2001, paras. 342 *et seq.* (346).

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 perpetration²⁷. 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 fulfils 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 crime²⁸.

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"²⁹. 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"³⁰; *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 ("common purpose")³¹; *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 plan³². 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 follows³³: 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 realization³⁴. Subsequent decisions have taken up these considerations and refined this so called *joint criminal enterprise* (jce) liability³⁵,

indirectly". The Appeal chamber of *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, recently clarified, that "committing is not limited to direct and physical perpetration"(para 161). The correct legal standard has to ask if the actions done were as much "an integral part" of the crime as the direct and physical actions (para 206), citing *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement, Appeal Chamber, 7 July 2006, para 60.

²⁷ Conc. H. Vest, GENOZID DURCH ORGANISATORISCHE MACHTAPPARATE. AN DER GRENZE VON INDIVIDUELLER UND KOLLEKTIVER VERANTWORTLICHKEIT 185 (2002), E. van Sliedregt, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 71 *et seq.* (2003)

²⁸ For a similar definition invoking Claus Roxins *opus* TÄTERSCHAFT UND TÄTHERRSCHAFT see now *supra* note 26, *Prosecutor v. Stakic*, para. 440. See also *supra* note 7, A. Eser, *Responsibility* 789 *et seq.*; G. Werle, VÖLKERSTRAFRECHT, margin Nos. 426 *et seq.* (2nd ed 2007); *id.*, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 958 (2007).

²⁹ *Supra* note 24, *Prosecutor v. Tadic*, para. 191. In a similar vein most recently *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, Trial Chamber, 27 Sep. 2006, para. 876: "JCE is well suited to cases such as the present one, in which numerous persons are all said to be concerned with the commission of a large number of crimes". *C. f. A. Zahar/G. Sluiter*, INTERNATIONAL CRIMINAL LAW. A CRITICAL INTRODUCTION 255-257 (2008).

³⁰ *Supra* note 24, *Prosecutor v. Tadic*, *supra* note 344, paras. 196–201.

³¹ *Ibid.*, paras. 202–3.

³² *Ibid.*, paras. 204–19; *Prosecutor v. Haradinaj, Balaj & Brahimaj*, Case No. IT-04-84-T, Judgment, Trial Chamber 3 Apr. 2008, para 138; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement Trial Chamber, 12 June 2007, para 439. *Crit. supra* note 7, A. Eser, *Responsibility* 792 with fn. 104; conc. A. Cassese, INTERNATIONAL CRIMINAL LAW 199–209 (2nd ed. 2008). In *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, Appeals Chamber, 28 Feb. 2005, para. 86, the Appeals Chamber affirmed that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise (*i.e.* the second category of cases), if they were a natural and foreseeable consequence thereof.

³³ *Supra* note 24, *Prosecutor v. Tadic*, para. 227.

³⁴ Similarly *supra* note 32, A. Cassese, 190 without, however, explicitly mentioning the common plan.

³⁵ For my view on jce see K. Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM.

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 *Tadic*⁴¹. 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 any case, participation "of an extremely significant nature and at the leadership level" gives rise to responsibility as a co-perpetrator and not as a mere accomplice⁴⁶. In *Kvočka 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 category⁴⁷. The *Krnjelac* Trial Chamber followed *Tadic*⁴⁸ 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

JUST.159-183 (2007) and *supra* note 3, *id.*, § 7, margin No. 19 *et seq.* According to A. M. Danner/J.S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIFORNIA L. REV. 107 (2005), 64% of the indictments submitted in the ICTY between 25 June 2001 and 1 January 2004 relied on this doctrine. On the importance of JCE, also see N. Piacente, *Importance of the JCE Doctrine for the ICTY Prosecutorial Policy*, 2 J. INT'L CRIM. JUST. 448 (2004) 448; M. Osiel, *The Banality of the Good: Aligning Incentives against Mass Atrocity*, 105 COLUMBIA L. REV. 1783 (2005). As well as V. Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT'L C. L. REV. 167-201 (2005). See also R. Cryer *et al.*, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 304 *et seq.* (2007).

- ³⁶ *C. f. Prosecutor v. Kondewa*, Case No. SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 Nov. 2003, para. 9; *Prosecutor v. Kamara*, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 1 Apr. 2004, para. 49. As to the indictments before the SLSC invoking JCE III see *supra* note 35, M. Danner/J.S. Martinez, 155 *et seq.*
- ³⁷ See *Prosecutor v. Pereira*, Case No. 34/2003, Judgment, Special Panel for Serious Crimes, 27 Apr. 2005, 19-20, <www.jsmp.minihub.org/Court%20Monitoring/SPSC/Documents/2003> (last visited 30 June 2008). Concurring also *ibid.*, Separate Opinion of Judge Phillip Rapoza, pp. 4-5, paras. 17-18, 25. See also *Prosecutor v. de Deus*, Case No. 2a/2004, Judgment, Special Panel for Serious Crimes, 12 Apr. 2005, p. 13, see: <www.jsmp.minihub.org/Court%20Monitoring/SPSC/Documents/2004> (last visited 30 June 2008); *Prosecutor v. Cardoso*, (known as Lolotoe Case), Case No. 04c/2001, Judgment, Special Panel, 5 Apr. 2003, pp. 18 *et seq.*, <www.jsmp.minihub.org/Court%20Monitoring/SPSC/Documents/2001> (last visited 30 June 2008).
- ³⁸ *Prosecutor v. Furundzija*, Case No. IT-95-17/1 A, Judgment, Appeals Chamber, 21 July 2000, paras. 117 *et seq.*
- ³⁹ *Ibid.*, para. 120.
- ⁴⁰ *Supra* note 25, *Prosecutor v. Delalic et al.*, para. 366.
- ⁴¹ *Supra* note 24, *Prosecutor v. Kordic & Cerkez*, paras. 395 *et seq.*
- ⁴² *Prosecutor v. Krstic*, Case No. IT-98-33/T, Judgment, Trial Chamber, 2 Aug. 2001, para. 611.
- ⁴³ *Ibid.*, paras. 608, 610, 612, 653.
- ⁴⁴ *Ibid.*, paras. 621 *et seq.* (633), 636.
- ⁴⁵ *Ibid.*, para. 635. Also *cf* on foreseeability issue *supra* note 35, K. Ambos, *Joint Criminal Enterprise* 16.
- ⁴⁶ *Ibid.*, para. 642. See *supra* note 29, A. Zahar/G. Sluiter, 236 *et seq.*, for a crit. analysis of the judgement.
- ⁴⁷ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, Trial Chamber, 2 Nov. 2001, paras. 265 *et seq.*; recently *supra* note 32, *Prosecutor v. Kvočka et al.*, para. 77 *et seq.*
- ⁴⁸ *Supra* note 24, *Prosecutor v. Krnjelac*, para. 78.

system and intent to further it⁴⁹. 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*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)⁵¹. The *Stakic* Trial Chamber adopted the three forms of participation in a joint enterprise as developed by *Krnjelac*⁵². It further considered that the term "commission" in article 7 para. 1 ICTY Statute includes other forms of co-perpetration than jce⁵³ and employs a concept of co-perpetration based on the German doctrine of participation and similar to the definition set out above⁵⁴. 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"⁵⁵. Recently, in *Brdanin*, 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 only⁵⁶. 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-Herzegovina⁵⁷. 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 risk⁵⁸. 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 group⁵⁹.

⁴⁹ *Ibid.*, para. 81.

⁵⁰ *Supra* note 24, *Prosecutor v. Vasiljevic*, paras. 63 *et seq.* (67).

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.

⁵² *Supra* note 26, *Prosecutor v. Stakic*, para. 435.

⁵³ *Ibid.*, para. 438.

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.

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".

⁵⁶ *Prosecutor v. Brdanin*, 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).

⁵⁷ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 144 *et seq.* See K. Ambos, *Zwischenbilanz im Milosevic-Verfahren*, 59 JZ 966 (2004).

⁵⁸ See *supra* note 55, *Prosecutor v. Ntakirutimana & Ntakirutimana*, para. 467 with further references; also *Prosecutor v. Mrksic, Radic & Sljivancanin*, Case No. IT-95-13/1-T, Judgment Trial Chamber, 27 Sep. 2007, para 542. Crit. as to the negligence standard, *supra* note 35, R. Cryer *et al.*, 307.

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, Tatmittler*) can be used as an instrument or tool (*Werkzeug*) by the indirect perpetrator (*auteur médiat*) 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

be committed and that it would be committed with genocidal intent". Crit., but not clear the separate opinion of Judge Shahabuddeen, who, on the one hand, takes the view that "specific intent always has to be shown" (para. 4), but, on the other hand, states "that intent is shown by the particular circumstances of the third category of joint criminal enterprise" (para. 5 a. E.). *Supra* note 57, *Prosecutor v. Milosevic*, para. 219 adopts without more the majority opinion of *Brdjanin*. Crit. G. Mettraux, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 215, 264-5, 289 (2005).

⁶⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges, PTC I, 29 Jan. 2007, paras. 326 *et seq.*

⁶¹ *Ibid.*, para 341 "joint control". See also C. Roxin, STRAFRECHT, ALLGEMEINER TEIL VOL. II: BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT, § 25 .margin Nos. 188 *et seq.*, H. Satzger, INTERNATIONALES UND EUROPÄISCHES STRAFRECHT, § 14 margin Nos. 42 (2nd 2008); Separate Opinion of Judge Schomburg, *supra* note 26, *Prosecutor v. Gacumbitsi*, para 17.

⁶² *Supra* note 60, *Prosecutor v. Lubanga*, para 342 quoting *supra* note 26, *Prosecutor v. Stakic*, para 440.

⁶³ *Supra* note 60, *Prosecutor v. Lubanga*, para 343- 345.

⁶⁴ *Ibid.*, paras 346-348.

⁶⁵ *Ibid.*, paras 349-360.

⁶⁶ *Ibid.*, paras 361-365.

⁶⁷ *Ibid.*, paras 366-367.

⁶⁸ The translation of the German "Hintermann" as "master-mind" (by E. Silverman, in: C. Roxin, *The Dogmatic Structure of Criminal Liability in the General Part of the Draft Israeli Penal Code*, 30 ISRAEL L. REV. 71 (1996)) may omit cases in which the dominance of the "Hintermann" is physical (*e.g.*, by coercion) rather than intellectual. Michael Bohlander employs in his recent translation of the German Criminal Code (THE GERMAN CRIMINAL CODE – A MODERN ENGLISH TRANSLATION, Hart, Oxford/Portland, 2008, § 84) the term "hinterman" referring to other words borrowed from German into English terminology, such as "hinterland", which suggest that English native-speakers will be familiar with the connotations of the prefix "hinter-" and be able to adapt it to new combinations.

⁶⁹ See generally for perpetration by means *supra* note 8, G. Fletcher, 197–200; H.-H. Jescheck/T. Weigend, STRAFRECHT. ALLGEMEINER TEIL § 62, 662 *et seq.* (5th ed. 1996). In *French* criminal law the "auteur médiat" is not codified, but exceptionally recognized if the direct perpetrator is used as a "simple instrument" (*c. f.* A.-K. Czepluch, TÄTERSCHAFT UND TEILNAHME IM FRANZÖSISCHEN STRAFRECHT 30–33 (1994)). With regard to article 25 see also (conc.) *supra* note 7, A. Eser, *Responsibility* 793 *et seq.*, *supra* note 27, E. van Sliedregt, 71.

⁷⁰ See comment to *supra* note 22, Model Penal Code, § 2.06.

State⁷¹, 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*"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"⁷³, *i.e.*, because of their commission of crimes by way of a hierarchical organizational structure⁷⁴. 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*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"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 guards⁷⁷. 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 doctrine⁷⁸. Most

⁷¹ See H. Jäger, MAKROKRIMINALITÄT. STUDIEN ZUR KRIMINOLOGIE KOLLEKTIVER GEWALT (1989).

⁷² See the fundamental work of C. Roxin, TÄTERSCHAFT UND TÄTHERRSCHAFT 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 VStGB, 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 NStZ 13 *et seq.* (2005). With references on this discussion *c. f.* C. Kreß, *Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht*, 153 GOLTDDAMMER'S ARCHIV 304 *et seq.* (2006); also H. Radtke, *Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und Internationalen Strafrecht*, 153 GOLTDDAMMER'S ARCHIV 350 *et seq.* (2006). For a recent reply C. Roxin, *Organisationsherrschaft als eigenständige Form mittelbarer Täterschaft*, 125 Schweizerische ZStR 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).

⁷³ Judgment, *U.S. v. Altstötter et al.*, (Justice Trial), US Military Tribunal sitting at Nuremberg, 4 December 1947, in: TRWC (US-GPO, 1947), para. 985: "conscious participation in a nationwide government-organized system of cruelty and injustice" (emphasis added).

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

⁷⁵ Judgment 12 Dec. 1961, 36 I.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.

⁷⁶ *Cámara Nacional de Apelaciones etc.*, Sentencia 9 Dec. 1985, in: Fallos CSJ Vol. 309-I/II 33, at 1597-98, 1601-02 (emphasis added; own translation from Spanish). For a more detailed analysis see *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 234 *et seq.*; *supra* note 2, *id.*, *Individual Criminal Responsibility* 18-9.

⁷⁷ 40 Bundesgerichtshof-Entscheidungen in Strafsachen, 218, 237-38 (1994). For a more detailed analysis see *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 243 *et seq.*; *supra* note 2, *id.*, *Individual Criminal Responsibility* 20-1.

⁷⁸ *C. f.* K. Ambos/Ch. Grammer, *Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen*

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.a.*, 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.

- 11 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 Gesamttat*)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,

Militärführung für den Tod von Elisabeth Käsemann, in: JAHRBUCH FÜR JURISTISCHE ZEITGESCHICHTE 531 (2003); in Spanish: *Dominio del hecho por organización. La responsabilidad de la conducción militar argentina por la muerte de Elisabeth Käsemann*. 16 Cuadernos DE DOCTRINA Y JURISPRUDENCIA PENAL (Argentina) 163 (2003) = 12 REVISTA PENAL (Spain) 27 (July 2003).

⁷⁹ See *supra* note 60, *Prosecutor v. Lubanga*, para. 332.

⁸⁰ Conc. *supra* note 7, A. Eser, *Responsibility* 795 with fn. 111; *supra* note 28, G. Werle, *Individual Criminal Responsibility* 964. On the proximity between command responsibility and *Organisationsherrschaft* see also *supra* note 27, H. Vest, GENOZID 300.

⁸¹ C. f. *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 594 *et seq.* (597–8), 614 with further references.

⁸² *Ibid.*, 602 *et seq.*, 614.

⁸³ C. f. *supra* note 27, H. Vest, GENOZID 220, 249.

⁸⁴ On this new concept of attribution for collective criminality see the fundamental work of F. Dencker, KAUSALITÄT UND GESAMTTAT 125 *et seq.*, 152 *et seq.*, 229, 253 *et seq.* and *passim* (1996); *id.*, *Beteiligung ohne Täter*, in: C. Prittwitz *et al.* (eds.), FESTSCHRIFT LÜDERSEN 525, at 534 *et seq.* (2002). The concept was further elaborated by *supra* note 27, H. Vest, GENOZID 214 *et seq.*, 236 *et seq.*, 303, 304 *et seq.*, 359 *et seq.* referring in particular to the crime of genocide.

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")

⁸⁵ See already K. Ambos, *Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate*, 145 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 226, at 237–8 (1998); also available in Spanish: DOMINIO DEL HECHO POR DOMINIO DE VOLUNTAD EN VIRTUD DE APARATOS ORGANIZADOS DE PODER 37–38 (Bogotá 1998, Universidad Externado) = 3 REVISTA DE DERECHO PENAL Y CRIMINOLOGIA (Universidad Nacional de Educación a Distancia, Facultad de Derecho, Spain) 133 (Jan. 1999, 2nda Epoca) = 9 CUADERNOS DE DOCTRINA Y JURISPRUDENCIA PENAL (Argentina) 367 (1999). Conc. *supra* note 27, H. Vest, GENOZID, 239.

⁸⁶ C. f. *supra* note 27, H. Vest, GENOZID 29–30, 240 *et seq.*, 302.

⁸⁷ Conc. *supra* note 27, E. van Sliedregt, 71.

⁸⁸ 1996 ILC Draft Code, p. 25 (para. 14).

⁸⁹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber, 2 Sep. 1998, para. 483. In the same vein *supra* note 42, *Prosecutor v. Krstic*, para. 601; *supra* note 26, *Prosecutor v. Stakic*, para. 445; also the ICTY *supra* note 58, *Prosecutor v. Mrksic, Radic & Sljivancanin*, para 550; *supra* note 32, *Prosecutor v. Martić*, para 441.

⁹⁰ *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 Nov. 1998, paras. 348 *et seq.* C.f. *supra* note 29, A. Zahar/G. Sluiter, 261 *et seq.*

⁹¹ C. f. *supra* note 24, *Prosecutor v. Naletilic & Martinovic*, paras. 64 *et seq.*; *supra* note 26, *Prosecutor v. Stakic*, paras. 447 *et seq.*; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, Trial Chamber, 7

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.

- 15 *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 "sollicite ou encourage", thereby using a form of sollicitation 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 compulsiva*⁹⁶. 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.

(c) "For the purpose of facilitating aids, abets or otherwise assists ..."

- 16 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).

α) "aids, abets or otherwise assists ... including providing the means"

- 17 "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

June 2001, paras. 37 *et seq.* and recently *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber, 31 Jan. 2005, paras. 357 *et seq.*; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, Trial Chamber, 11 Sept. 2006, para. 19; *supra* note 24, *Prosecutor v. Muvunyi*, para. 467; *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment Trial Chamber, 7 Dec. 2007, para 537; *supra* note 26, *Prosecutor v. Gacumbitsi*, para 143; *Prosecutor v. D. Milosevic*, Case No. IT-98-29/1-T, Judgement Trial Chamber, 12 Dec. 2007, para 957; *supra* note 32, *Prosecutor v. Martić*, para 441. For a summary of the case law see K. Ambos, *Superior Responsibility (Art. 28)*, in: A. Cassese *et al.* (eds.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 815 *et seq.* (2002) and *supra* note 35, R. Cryer *et al.*, 313.

⁹² 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.

⁹³ BLACK'S LAW DICTIONARY 1398 (7th ed. 1999); *supra* note 22, Model Penal Code, § 5.02 (1).

⁹⁴ *Supra* note 93, BLACK'S LAW DICTIONARY, 779.

⁹⁵ *C. f. supra* note 2, K. Ambos, *DER ALLGEMEINE TEIL* 481 *et seq.* I do not longer take the view, as in the First Edition, that a meaningful terminological distinction between both terms can be made. For an "umbrella" function of soliciting also *supra* note 7, A. Eser, *Responsibility* 797 with fn. 117. Differently V. Militello, *The personal nature of individual criminal responsibility and the ICC Statute*, 5 J. INT'L CRIM. JUST 947 (2007).

⁹⁶ 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).

⁹⁷ *C. f. supra* note 27, H. Vest, *GENOZID* 203 *et seq.*, 238.

⁹⁸ 1996 ILC Draft Code, p. 24 (para. 10).

⁹⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber, 7 May 1997, paras. 674, 688–692.

relationship with the result¹⁰⁰. However, this does not necessarily require physical presence at the scene of the crime. In *Tadic*, Trial Chamber II followed a broad concept of complicity based on the English "concerned in the killing" theory¹⁰¹. 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"¹⁰². This position was confirmed by a Trial Chamber in "*Celebici*"¹⁰³ and, more recently, in *Naletilic & Martinovic*¹⁰⁴. The Appeals Chamber stressed that the aiding and abetting must have a substantial effect on the main act¹⁰⁵.

In *Furundzija* the ICTY took a more sophisticated view¹⁰⁶. The Trial Chamber distinguished 18 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"¹⁰⁷. 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 person¹⁰⁸. The "significant"-requirement, however, implies that it would not be sufficient if the accomplice has only "a role in a system without influence"¹⁰⁹. 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"¹¹⁰. In sum, aiding and abetting requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"¹¹¹. The Appeals Chamber endorsed this view¹¹².

The subsequent case law of the ICTY has confirmed the broad concept of aiding and 19 abetting developed in *Tadic*, *Celibici* and *Furundzija*¹¹³. The *Aleksovski* Trial Chamber required

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. Tadic*, 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).

¹⁰⁶ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, 10 Dec. 1998, paras. 190–249.

¹⁰⁷ *Ibid.*, paras. 199, 232.

¹⁰⁸ *Ibid.*, para. 273–4; confirmed by the Appeals Chamber in *supra* note 38, *Prosecutor v. Furundzija*, para. 126 and *supra* note 24, *Prosecutor v. Naletilic & Martinovic*, *supra* note 344, para. 63.

¹⁰⁹ *Supra* note 24, *Prosecutor v. Furundzija*, paras. 217, 233–4.

¹¹⁰ *Ibid.*, para. 231.

¹¹¹ *Ibid.*, paras. 235, 249.

¹¹² *Supra* note 38, *Prosecutor v. Furundzija*, paras. 117 *et seq.*

¹¹³ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, paras. 60 *et seq.*; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 Mar. 2000, para. 245; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb. 2001, paras. 391–3; *supra* note 24, *Prosecutor v. Kordic & Cerkez*, paras. 395 *et seq.*; *supra* note 24, *Prosecutor v. Krnojelac*, paras. 88 *et seq.*; *Prosecutor v. Limja, Bala & Musliu*, Case No. IT-03-66-T, Judgment, Trial

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.

- 20 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

Chamber, 30 Nov. 2005, para. 516; confirmed by Appeals Chamber Judgment 27 Sep. 2007, para. 90 *et seq.*, *supra* note 58, *Prosecutor v. Mrksic, Radic & Sljivancanin*, para. 551 *et seq.*; *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No. ICTR-99-52-A, Judgment, Appeals Chamber, 28 Nov. 2007, para. 482; *supra* note 32, *Prosecutor v. Haradinaj, Balaj & Brahimaj*, para. 145.

¹¹⁴ *Supra* note 113, *Prosecutor v. Aleksovski*, paras. 60–1.

¹¹⁵ *Ibid.*, para. 62. See also *supra* note 113, *Prosecutor v. Blaskic*, para. 284.

¹¹⁶ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber, 31 January 2005.

¹¹⁷ C.f. S. Hinek, *The Judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Pavle Strugar*, 19 LEIDEN J. INT'L L. 477 (2006).

¹¹⁸ *Supra* note 113, *Prosecutor v. Aleksovski*, para. 61; *supra* note 113, *Prosecutor v. Blaskic*, para. 284; *supra* note 24, *Prosecutor v. Krnojelac*, *supra* note 344, para. 88; *supra* note 24, *Prosecutor v. Naletilic & Martinovic*, para. 63; *supra* note 24, *Prosecutor v. Vasiljevic*, para. 70; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 48; *supra* note 24, *Prosecutor v. Blagojevic & Jokic*, para. 726.

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, fn. 2177: "'Mere 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".

¹²⁰ *Supra* note 113, *Prosecutor v. Blaskic*, para. 284; conc. *supra* note 24, *Prosecutor v. Naletilic & Martinovic*, para. 63. In *supra* note 118, *Prosecutor v. Blaskic*, the Appeals Chamber explicitly left open the possibility that "in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting (para. 47)".

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.

¹²³ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, Trial Chamber, 6 Dec. 1999, para. 43; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, Trial Chamber, 27 Jan. 2000, paras. 125–6; *supra* note 91, *Prosecutor v. Bagilishema*, para. 33; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, Trial Chamber, 15 May 2003, para. 385; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, Trial Chamber, 22 Jan. 2004, para. 597; *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, Judgment, Trial Chamber, 13 Apr. 2006, paras. 32 *et seq.*; *supra* note 91, *Prosecutor v. Karera*, para. 548; *supra* note 91, *Prosecutor v. Mpambara*, para. 16; *supra* note 24, *Prosecutor v. Muvunyi*, para. 471; *supra* note 26, *Prosecutor v. Seromba*, para. 530.

¹²⁴ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment, Trial Chamber, 21 May 1995, para. 200.

need it be indispensable (in the sense of a *conditio sine qua non*)¹²⁵. Although it is not necessary that the aider or abettor be present during the commission¹²⁶, presence may indicate moral support, especially if the accused possesses a degree of authority entails "a clear signal of official tolerance"¹²⁷. Aiding and abetting may also consist in an omission¹²⁸; in such cases it may be interpreted as moral support by encouraging¹²⁹.

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, *i.e.*, the requirements of legal certainty and foreseeability (*nullum crimen sine lege*)¹³⁰, a general theory of imputation in international criminal law must be developed in order, *inter alia*, to determine, on an abstract level, when an effect is "substantial" and, thus, when aiding and abetting should entail criminal responsibility. From a theoretical perspective, this is ultimately a normative question which can best be answered by taking into account the modern theories of attribution¹³¹. Accordingly, to incur criminal responsibility the aider and abettor must, with her contribution, create and increase the risk that the crime be committed and thereby fundamental legal interests violated (*Risikoerhöhung*). The risk must be realized through the commission of the (main) crime (*Risikorealisation*) or, in other words, the risk-creation or increase must be causal for the commission of this crime (*kausale Risikosteigerung*). Finally, the risk created or increased must be disapproved by the legal order, *i.e.*, it must be a forbidden risk (*Risikomißbilligung*)¹³². – On the delimitation between co-perpetration and aiding and abetting see margin No. 44.

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 interpreted by the case law, it makes quite clear that there should be virtually no objective threshold for accomplice liability. Still, if one follows the case law and considers the substantial effect of the assistance on the main crime as an independent constituting element of accomplice liability, complicity as an "otherwise assist" would also require a substantial effect on the commission, and the risk-criteria developed above (margin No. 21) would apply.

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.

¹²⁶ *Supra* note 89, *Prosecutor v. Akayesu*, para. 484; *supra* note 123, *Prosecutor v. Musema*, para. 125; *supra* note 91, *Prosecutor v. Bagilishema*, para. 33; *supra* note 123, *Prosecutor v. Semanza*, para. 385; *supra* note 35, R. Cryer *et al.*, 311.

¹²⁷ *Supra* note 89, *Prosecutor v. Akayesu*, para. 484; *supra* note 91, *Prosecutor v. Bagilishema*, paras. 34–5; *supra* note 123, *Prosecutor v. Semanza*, para. 386; *supra* note 56, *Prosecutor v. Brdanin*, para 273;

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. Muvunyi*, 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.

¹³⁰ See for the interpretation of article 7 ECHR in this respect *Sunday Times v. UK*, Series A 30 Judgment of 26 Apr. 1979, para. 49; *S.W. v. UK*, Series A 335-b, 27 Oct. 1995, para. 36; *C.R. v. UK*, Series A 335-c, 27 Oct. 1995, para. 34 and most recently *Streletz, Kessler, Krenz v. Germany*, Judgment of 22 Mar. 2001, paras. 77 *et seq.* (105).

¹³¹ See, generally, C. Roxin, STRAFRECHT. ALLGEMEINER TEIL Vol. I, 287 *et seq.* (3rd ed. 1997); G. Jakobs, STRAFRECHT. ALLGEMEINER TEIL. DIE GRUNDLAGEN UND DIE ZURECHNUNGSLEHRE 185 *et seq.* (2nd ed. 1993). Conc. *supra* note 7, A. Eser, *Responsibility* 801 with fn. 141.

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 *mens rea* requirement within the meaning of article 30¹³³. 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 knowledge¹³⁴. 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 offence¹³⁵. Additionally, knowledge may be inferred from all relevant circumstances¹³⁶, *i.e.*, it may be proven by circumstantial evidence¹³⁷.

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 *conditio sine qua non* of the crime¹³⁸.

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 *mens rea* requirement according to article 30)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 convention¹⁴⁰ and presents a compromise with earlier "conspiracy" provisions¹⁴¹, which since Nuremberg have been controversial¹⁴². The 1991 ILC Draft Code held punishable an individual who "conspires

¹³³ See D.K. Piragoff/D. Robinson, article 30, margin Nos. 9 *et seq.* and 17 *et seq.* (in this volume); generally about the mental element in international criminal law, *c. f.* A. Eser, *Mental Elements – Mistake of Fact and Law*, in: A. Cassese *et al.* (eds.), *THE ROME STATUTE OF THE ICC: A COMMENTARY* 889 (2002); K. Ambos, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC-Statute and of the Elements of Crimes*, in: L.C. Vohrah *et al.* (eds.), *MAN'S INHUMANITY TO MAN – ESSAYS IN HONOUR OF A. CASSESE 12 et seq.* (2003); *supra* note 2, *id.*, *DER ALLGEMEINE TEIL 757 et seq.*; *supra* note 2, O. Triffterer, *Bestandsaufnahme* 221–4.

¹³⁴ *Supra* note 22, Model Penal Code, § 2.06. Conc. *supra* note 7, A. Eser, *Responsibility* 801.

¹³⁵ *Supra* note 99, *Prosecutor v. Tadic*, para. 692; *supra* note 90, *Prosecutor v. Delalic et al.*, paras. 326, 328; *supra* note 106, *Prosecutor v. Furundzija*, paras. 236–249 (236, 245–6, 249); *supra* note 24, *Prosecutor v. Krnojelac*, para. 90; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, Appeals Chamber, 25 Feb. 2004, para. 102; *Supra* note 118, *Prosecutor v. Blaskic*, para. 49; *supra* note 89 *Prosecutor v. Akayesu*, paras. 476–9; *supra* note 123, *Prosecutor v. Semanza*, para. 388; *supra* note 123, *Prosecutor v. Kamuhanda*, para. 599.

¹³⁶ *Supra* note 99, *Prosecutor v. Tadic*, para. 676; *supra* note 90, *Prosecutor v. Delalic et al.*, para. 328; *supra* note 89, *Prosecutor v. Akayesu*, para. 478; *supra* note 123, *Prosecutor v. Kamuhanda*, para. 600.

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".

¹³⁸ *Supra* note 106, *Prosecutor v. Furundzija*, para. 231.

¹³⁹ Conc. *supra* note 7, A. Eser, *Responsibility* 801 with fn. 145.

¹⁴⁰ International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), Annex (37 I.L.M. 249 (1998)), article 2 para. 3 (c).

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

¹⁴² See, for example, V. Pella, *Mémorandum*, 2 Y.B.I.L.C. 278–362, 357 (1950); J. Graven, *Les Crimes contre l'Humanité*, RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 433–605, 502–503 (1950); H.-H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, 66 ZStW 193–217, 213 (1954); R. Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 52 (1997); *supra* note 32, A. Cassese, 196 *et seq.* (2003), but now less critical in the 2nd ed *supra* note 352, 228. See also the statement of the German delegate O. Katholnigg at the Diplomatic Conference for the Adoption of the 1988 Drug Convention (United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988, Official Records, Vol. II, para. 52: "common law concept unknown in civil law systems"). The concept was, however, in principle recognized by the ILC Special Rapporteur D. Thiam (2 Y.B.I.L.C., Part 1, 16, para. 66 (1990)) and also exists today in civil law jurisdictions in a similar form (see, *e.g.*, § 30 para. 2 alt. 3 of the German *Strafgesetzbuch*).

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. – On 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"¹⁴⁷ – as *dolus (Vorsatz)*¹⁴⁸ – including knowledge (*Wissen*) and intention or purpose (*Wollen*) or is it limited to the latter, *i.e.*, the first degree *dolus directus*¹⁴⁹? 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 Código Penal: "dolosas") and reserves the notion of "intención" or "intencional" for the "delitos de intención" or the first degree *dolus directus*¹⁵⁰. The French version ("intentionelle"), however, does not support this restrictive interpretation since in French thinking¹⁵¹ "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

¹⁴³ 2 Y.B.I.L.C., Part 2, p. 99 (commentary to article 3) (1991).

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. Rodríguez 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).

¹⁵¹ See J. Larguier, *DROIT PENAL GENERAL* 49, 51 (18th ed. 2001); J.-C. Soyser, *MANUEL DROIT PENAL ET PROCEDURE PENAL* 99 (15th ed. 2000).

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 sense¹⁵². 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 sense¹⁵³.

- 28 The correct understanding of "intentional" depends in the final analysis 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)¹⁵⁴. Consequently, the French version speaks of "l'intention de détruire", the Spanish one of "intención de destruir" and the official German translation of "absichtlich"¹⁵⁵. 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 ..."

- 29 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 group¹⁵⁶.

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

- 30 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. The

¹⁵² Bundestag-Drucksache 14/2682 (14 Feb. 2000) = Bundesgesetzblatt p. 1394 (Vol. II 2000).

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 *ZSTW* 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.

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. 31
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 *Kambanda*¹⁶³ and *Akayesu*¹⁶⁴; subsequent judgments have basically followed *Akayesu*¹⁶⁵. 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 32
persons in a public place or to members of the general public at large, in particular by using

¹⁵⁷ *Supra* note 106, *Prosecutor v. Furundzija*, para. 246.

¹⁵⁸ 78 U.N.T.S. 277 (1951). See, e.g., R. Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145 (1947); J.L. Kunz, *The United Nations Convention on Genocide*, 43 AM. J. INT'L L. 732, 738 (1949); *supra* note 27, H. Vest, GENOZID 189 *et seq.*; *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 415 *et seq.*

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).

¹⁶² 1996 ILC Draft Code, pp. 26–7 (para. 16).

¹⁶³ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment, Trial Chamber, 4 Sep. 1998, para. 40 (count 3).

¹⁶⁴ *Supra* note 89, *Prosecutor v. Akayesu*, paras. 672–5.

¹⁶⁵ *Supra* note 123, *Prosecutor v. Rutaganda*, para. 38; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment, Trial Chamber, 1 June 2000, paras. 13 *et seq.*; *supra* note 91, *Prosecutor v. Bagilishema*, paras. 51 *et seq.* (55).

¹⁶⁶ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras. 474 *et seq.* also *supra* note 113, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, para 678.

¹⁶⁷ *Supra* note 166, *Prosecutor v. Akayesu*, paras. 478, 482; *supra* note 113, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, para 679.

technical means of mass communication such as radio and television¹⁶⁸. The ICTR considers the place where the incitement occurred and the scope of the assistance as particularly important¹⁶⁹.

- 33 To incite "directly" means that another person is concretely urged or specifically provoked to take immediate criminal action; a vague suggestion is not sufficient¹⁷⁰. There must be a specific causal link between the act of incitement and the main offence¹⁷¹. The fulfilment of these requirements may also depend on the "cultural and linguistic" context¹⁷². 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 purpose¹⁷³, which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes¹⁷⁴. 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.
- 34 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 (*Akzessorietätsgrundsatz*) which governs – at least in the sense of *factual* dependence of the complicity on the main act¹⁷⁵ – 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 committed¹⁷⁶. This has been confirmed by the ICTR in *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"¹⁷⁷. This view is convincing since the act of incitement is as such sufficiently dangerous and blameworthy to be punished¹⁷⁸.
- 35 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"¹⁷⁹. In other words, the person who incites must

¹⁶⁸ *C. f.* 1996 ILC Draft Code, p. 26; *supra* note 89, *Prosecutor v. Akayesu*, para. 556.

¹⁶⁹ *Supra* note 89, *Prosecutor v. Akayesu*, para. 556.

¹⁷⁰ *C. f.* 1996 ILC Draft Code, p. 26; *supra* note 89, *Prosecutor v. Akayesu*, para. 557; *supra* note 113, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, para 692.

¹⁷¹ *Supra* note 89, *Prosecutor v. Akayesu*, para. 557.

¹⁷² *Ibid.*, paras. 557–8. *supra* note 113, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, para 700.

¹⁷³ *Conc. supra* note 7, A. Eser, *Responsibility* 805 with fn. 168.

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 (*Der Paragraph mit dem Januskopf*, in: K. Lackner *et al.* (eds.), *FESTSCHRIFT FÜR WILHELM GALLAS ZUM 70. GEBURTSTAG* 307, 312 (1973)).

¹⁷⁵ See on the accessory principle in a factual, quantitative and qualitative sense *supra* note 11, K. Hamdorf, *BETEILIGUNGSMODELLE 17 et seq.*; *supra* note 2, K. Ambos, *DER ALLGEMEINE TEIL* 617–8.

¹⁷⁶ *C. f.* T. Weigend, *Article 3: Responsibility and Punishment*, in: M. Ch. Bassiouni (ed.), *COMMENTARIES ON THE ILC'S 1991 DRAFT CODE 115–116* (1993) (regarding the 1991 ILC Draft Code, article 2 para. 3) distinguishing between soliciting and aiding on the one hand, and inciting and conspiring on the other.

¹⁷⁷ *Supra* note 89, *Prosecutor v. Akayesu*, paras. 561–2 (562). In the same vein *supra* note 113, *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".

¹⁷⁸ *Conc. supra* note 27, H. Vest, *GENOZID* 195. See *supra* note 113, *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, paras. 771 *et seq.* for examples of articles which constitute direct and public incitement to genocide.

¹⁷⁹ *Ibid.*, para. 560.

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 possess the same state of mind as the main perpetrator¹⁸⁰. 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 Statute¹⁸¹. This differentiation is not convincing¹⁸². 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 intent¹⁸³; for aiding and abetting, even possible knowledge, *i.e.*, culpable ignorance ("had reason to know"), shall be sufficient¹⁸⁴. 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 groups¹⁸⁵.

(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 crime, especially a war of aggression. With this form of criminalization even conduct still in the attempt stage was made punishable as a complete offence¹⁸⁶. Thus, it is not surprising that all ILC Draft Codes contain an attempt provision¹⁸⁷. The *Rome Statute* correctly follows this view; yet, it does not limit attempt to certain crimes – as proposed by the ILC¹⁸⁸ – but refers to "such a crime", *i.e.*, to any crime within the jurisdiction of

¹⁸⁰ Explicitly *supra* note 165, *Prosecutor v. Ruggiu*, para. 14: "... must himself have the specific intent to commit genocide ...".

¹⁸¹ *Supra* note 89, *Prosecutor v. Akayesu*, paras. 485, 540, 546–7.

¹⁸² For a critical view see also *supra* note 154, A. Greenawalt, 2282 *et seq.*; W.A. Schabas, *The Crime of Genocide in the Jurisprudence of the ICTY and ICTR*, in: H. Fischer/C. Kreß/S.R. Lüder (eds.), *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 469–70 (2001).

¹⁸³ *Supra* note 123, *Prosecutor v. Musema*, para. 183.

¹⁸⁴ *Ibid.*, para. 182. See also *Prosecutor v. Krstic*, Case No: IT-98-33-A, Judgment, Appeals Chamber, 19 Apr. 2004, paras. 140 *et seq.*

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 *NStZ* 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, *VÖLKERSTRAFRECHT*, margin Nos. 438 *et* 441; *supra* note 28, *id.*, *Individual Criminal Responsibility* 970 and R. Kolb, *Droit international pénal*, in: *id.* (ed.), *DROIT INTERNATIONAL PÉNAL* 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 requires that the inciter "must merely know and want the incited persons to commit the crime", but need not herself possess 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).

¹⁸⁶ *C. f. supra* note 2, O. Triffterer, *Bestandsaufnahme* 232–4. According to *supra* note 28, G. Werle, *VÖLKERSTRAFRECHT*, margin No. 586 attempt is part of customary law.

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 serious¹⁸⁹ 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 step¹⁹⁰. This definition is a combination of French and American Law¹⁹¹ 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 attempt¹⁹². 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*)¹⁹³ 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 not have 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"¹⁹⁴. 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"¹⁹⁵. 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"¹⁹⁶. 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 crime¹⁹⁷.

Y.B.I.L.C., Part 2, 49, para. 128 (1986); 1 Y.B.I.L.C. 6, 21, 70 (1990); 2 Y.B.I.L.C., Part 2, 16 (para. 71) (1990); 1 Y.B.I.L.C. 188 (1991); 2 Y.B.I.L.C., Part 2, 99 (1991); 2 Y.B.I.L.C., Part 2, 77, 85 (para. 196) (1994); 1 Y.B.I.L.C. 110, 121, 145 (para. 10) (1994).

¹⁸⁹ See also *supra* note 89, *Prosecutor v. Akayesu*, para. 470 considering that the ICTR Statute does not establish a hierarchy of norms, but rather puts all offences (genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of the Add. Prot. II) "on an equal footing". Conc. *Prosecutor v. Tadic*, Case No. IT-94-1-Abis, Judgment, Appeals Chamber, 26 Jan. 2000, para. 69. For a higher gravity of crimes against humanity *Prosecutor v. Erdemovic*, IT-96-22-A, Judgment, Appeals Chamber, 7 Oct. 1997, joint separate opinion G. Mc Donald/L.C. Vohrah, paras. 20 *et seq.*; conc. opinion N. Stephens para. 5; *supra* note 163, *Prosecutor v. Kambanda*, para. 14; *Prosecutor v. Tadic*, Case Nos. IT-94-1-S/Tbis-R 117, Judgment, Trial Chamber, 11 Nov. 1999, para. 28. *C.f. supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 748 with fn. 298 with further references.

¹⁹⁰ 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.*

¹⁹¹ See, on the one hand, the classical French formulation ("commencement d'exécution") already in § 2 of the Code Pénal of 1810 and now in article 121–5 Code Pénal; 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, *VÖLKERSTRAFRECHT*, margin Nos. 591 *et seq.*

¹⁹² 2 Y.B.I.L.C., p. 49 (para. 129) (1986).

¹⁹³ 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).

¹⁹⁴ 1996 ILC Draft Code, p. 27 (para. 17).

¹⁹⁵ *C.f.* H. Pelletier/J. Perfetti, *CODE PÉNAL 1997–1998*, 20 (10th ed. 1997).

¹⁹⁶ Conc. *supra* note 7, A. Eser, *Responsibility* 812–3 with fn. 204.

¹⁹⁷ See also article 3 para. 6 of the *Alternative General Part*, prepared by A. Eser/O. Lagodny/O. Triffterer,

At first glance it is difficult to understand the meaning of the last part of the first sentence of article 25 para. 3 (f)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 *mens rea* (as in the case of a completed offence), what is lacking in the case of attempt is a complete *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 definition²⁰⁰. Accordingly, attempt implies the non-occurrence of the crime *independent* of circumstances intended by the perpetrator; *e contrario* this means that the perpetrator is not punishable if the crime does not occur because of circumstances *intended* by him or her. Thus, what this formulation does is to recognise the possibility of voluntary abandonment using a negative-implicit approach²⁰¹. 38

β) "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 Committee²⁰². It is recognized in all modern legal systems and can, therefore, be truly considered a general principle of international law²⁰³. In theory, it creates an incentive for the perpetrator to withdraw from the commission²⁰⁴. 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 *implicit* formulation, the second one opts for a *positive* and *explicit* approach. It was included in the *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. 39

The formulation is based on the General Part of the updated Siracusa Draft²⁰⁵ and the US-Model Penal Code²⁰⁶. 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 *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. 40

<<http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/doc/GENPART3.pdf>> (last visited 30 June 2008)) which uses the notion "substantial step" instead of "commencement of execution" since the former is more precise.

¹⁹⁸ Crit. also *supra* note 28, G. Werle, *VÖLKERSTRAFRECHT*, margin No. 594.

¹⁹⁹ *Supra* note 8, G. Fletcher, *CONCEPTS*, 171.

²⁰⁰ Article 121–5 of the French *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 *Código Penal* and Mir Puig, *DERECHO PENAL* 349-50 (2002⁶).

²⁰¹ For a more profound discussion see *supra* note 2, K. Ambos, *DER ALLGEMEINE TEIL* 709 *et seq.*

²⁰² Preparatory Committee Decisions Feb. 1997, p. 22, fn. 12.

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

²⁰⁴ See for the different theoretical justifications of abandonment: *supra* note 203, G. Fletcher, *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 *Alternative General Part*. Both rules are based on German law, *c. f.* sect. 24 *Strafgesetzbuch*.

²⁰⁶ *Supra* note 22, Model Penal Code, § 5.01 (4).

- 41 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) arise²⁰⁷. 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

- 42 This paragraph repeats a formulation as old as the codification history of international criminal law²⁰⁸. 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 Responsibility²⁰⁹.

C. Special Remarks

1. Issues of delimitation

- 43 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.
- 44 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 abettor²¹⁰. 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-perpetration²¹¹. In *Krstic*, Trial Chamber I held that co-perpetration requires participation "of an extremely significant nature and at the leadership level"²¹². In *Kvočka*, 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 intent²¹³. However, in *Krmjelac*, 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

²⁰⁷ There to *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.

²⁰⁹ 2 Y.B.I.L.C., Part 2, 30–34 (1980); also in: M. Spinedi/B. Simma, UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 325 (1987).

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

²¹¹ *Supra* note 24, *Prosecutor v. Tadic*, para. 229.

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

²¹³ *Supra* note 47, *Prosecutor v. Kvočka*, paras. 249, 284.

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

"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 that in some way are directed to the furtherance of the common design.

(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 *mens rea* is intent to pursue a common purpose"²¹⁶.

This latter approach was recently confirmed by the Appeals Chamber in the *Kvočka* Appeal Judgment²¹⁷. 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 abetter according to subparagraph (c)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 abetter 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 (c) 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))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 *ad hoc* Tribunals only requires knowledge that the assistance contributes to the commission of crimes²²⁰; but, on the other hand, it takes this limitation away by the low knowledge threshold in subparagraph (d) (ii)²²¹. 45

2. Complicity after commission

Article 25 does not refer to acts of complicity after the commission of the crime. The ILC 46 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

²¹⁴ *Supra* note 24, *Prosecutor v. Krnojelac*, para. 77.

²¹⁵ *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.

²¹⁶ *Supra* note 135, *Prosecutor v. Vasiljevic*, para. 102. See already *supra* note 24, *Prosecutor v. Tadic*, para. 229.

²¹⁷ *Supra* note 32, *Prosecutor v. Kvočka 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/icty/kvočka/appeal/judgement/foot.htm - 204>.”

²¹⁸ According to *supra* note 8, F. Mantovani, *Principles* 35 it is “superfluous”.

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

²²⁰ See *supra* margin No. 23 with *supra* note 135.

²²¹ For a more detailed discussion see *supra* note 2, K. Ambos, DER ALLGEMEINE TEIL 641 *et seq.* drawing an analogy to *Tadic*.

a distinct offence ("harbouring a criminal")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.

- 47 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 excluded²²³. If the accomplice, on the contrary, is liable only for his or her own contribution, this contribution determines the scope of attribution and guilt²²⁴.

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

- 48 The wide range of liability established in article 25 para. 3 is complemented by a specific rule on command and superior responsibility (article 28)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 omission²²⁶: the superior is punished for failing to prevent his or her subordinates from committing crimes or for failing to punish them for these crimes²²⁷. 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

²²² 2 Y.B.I.L.C., Part 2, 98 (1991); 1 Y.B.I.L.C., 188, para. 21 (1991) (Mr. Pawlak, chairman of the Drafting Committee). See also: 1 Y.B.I.L.C. 17, 23, 28, 48 (1990); 2 Y.B.I.L.C., Part 1, 28 *et seq.* (paras. 28 *et seq.*) (1990); Vol. II, Part 2, 12 *et seq.* (para. 50). *C. f.* also: *supra* note 22, Model Penal Code, § 2.06; Ch. van den Wyngaert, *The Structure of the Draft Code and the General Part*, in: M. Ch. Bassiouni (ed.), COMMENTARIES ON THE ILC' 1991 DRAFT CODE 55–56 (1993); *supra* note 176, T. Weigend, *Article 3*, 116–7; *supra* note 2, O. Triffterer, *Bestandsaufnahme* 228.

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.*).

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".

²²⁵ *C. f.* *supra* note 35, K. Ambos, *Joint Criminal Enterprise* 163 *et seq.*

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

²²⁷ See for a more detailed analysis O. Triffterer, *Command Responsibility, Article 28 Rome Statute, an Extension of Individual Criminal Responsibility for Crimes Within the Jurisdiction of the Court – Compatible with Article 22, nullum crimen sine lege?*, in: *id.*, *GEDÄCHNISSCHRIFT FÜR THEO VOGLER* 215 *et seq.* (2004); *id.*, "Command responsibility" – *crimen sui generic* or *participation as "otherwise provided"* in *Article 28 Rome Statute?*, in: J. Arnold *et al.* (eds.), *MENSCHENGERECHTES STRAFRECHT, FESTSCHRIFT FÜR ALBIN ESER ZUM 70. GEBURTSTAG 902 et seq.* (2005); *supra* note 91, K. Ambos, *Superior Responsibility*; *supra* note 327, *id.*, *DER ALLGEMEINE TEIL* 666 *et seq.* See also O. Triffterer/R. Arnold, *Article 28*; *supra* note 28, G. Werle, *VÖLKERSTRAFRECHT*, margin No. 472; B. Burghardt, *VORGESETZTENVERANTWORTLICHKEIT* 185 *et seq.* (2008) Crit. T. Weigend, *Bemerkungen zur Vorgesetztenverantwortlichkeit*, 116 *ZSTW* 999 *et seq.* (2004). On the ICTR case law J. Williamson, *Command Responsibility in the Case law of the International Criminal Tribunal of Rwanda*, 13 *CRIM. L.F* 365 (2002).

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*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 Tribunal²²⁹. To address the culpability problem, the German International Criminal Law Code (*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 other²³⁰.

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 proven²³¹. 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 crimes²³². 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) ..." 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. 3²³⁴. As a consequence, article 7 para. 1 constitutes a *lex specialis* that excludes simultaneous conviction on the basis of article 7 para. 3²³⁵. 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 nature²³⁶. Last but not least, the *Krnjelac* 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 factor²³⁷. The Trial Chambers in *Naletilic & Martinovic*²³⁸ and in *Stakic*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. 1²⁴⁰. In the meantime this position has been confirmed by the Appeals Chamber in various judgments²⁴¹.

²²⁸ *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgment Trial Chamber, 30 June 2006

²²⁹ Cf. T. Blumenstock/W. Pittman, *Prosecutor v. Naser Orić: The International Criminal Tribunal for the Former Yugoslavia Judgment of Srebrenica's Muslim Wartime Commander*, 19 LEIDEN J. INT'L L. 1077 (2006).

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).

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.*

²³² *Supra* note 124, *Prosecutor v. Kayishema & Ruzindana*, para. 223.

²³³ *Supra* note 113, *Prosecutor v. Blaskic*, para. 337.

²³⁴ *Supra* note 24, *Prosecutor v. Kordic & Cerkez*, paras. 366 *et seq.* (367, 369).

²³⁵ C. f. *ibid.*, paras. 370–1.

²³⁶ *Supra* note 42, *Prosecutor v. Krstic*, para. 605.

²³⁷ *Supra* note 24, *Prosecutor v. Krnjelac*, para. 173, 496.

²³⁸ *Supra* note 24, *Prosecutor v. Naletilic & Martinovic*, para. 81.

²³⁹ *Supra* note 26, *Prosecutor v. Stakic*, para. 463 *et seq.*

²⁴⁰ *Ibid.*, para. 466.

²⁴¹ *Supra* note 25, *Prosecutor v. Delalic et al.*, para. 745; *Supra* note 118, *Prosecutor v. Blaskic*, para. 90-2;

50 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 law²⁴², 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 Conventions²⁴³, 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 Chamber²⁴⁴, confirming the Trial Chamber's view²⁴⁵, 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*²⁴⁶. In addition, it refers in agreement to the analysis of the sources presented by the Trial Chamber²⁴⁷. Still, if one assumes that this is the correct view, the principle of legality would bar 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 provisions²⁴⁸. Yet, while it is certainly true that "criminal liability must rest on a positive and solid foundation of a customary law principle"²⁴⁹, 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 elsewhere²⁵⁰ and correctly recognized by Judge Hunt's dissenting opinion²⁵¹, a separate and own responsibility of the superior for his or her omission to intervene. This obligation arises, so to speak, in its own

Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment, Appeals Chamber, 17 Dec. 2004, para. 33-35; with regard to joint liability and superior responsibility *supra* note 32, *Prosecutor v. Kvočka et al.*, para. 104.

²⁴² *C. f. supra* note 91, K. Ambos, *Superior Responsibility* 807 *et seq.*; *supra* note 227, B. Burghardt, 83 *et seq.*

²⁴³ See *supra* note 2.

²⁴⁴ *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 10 *et seq.* (31).

²⁴⁵ *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.

²⁴⁶ *Supra* note 244, *Prosecutor v. Hadzihasanovic et al.*, para. 18: "Customary international law recognizes that some war crimes can be committed ... in the course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes".

²⁴⁷ *Supra* note 245, *Prosecutor v. Hadzihasanovic et al.*, paras. 67 *et seq.*; *supra* note 244, *Prosecutor v. Hadzihasanovic et al.*, para. 27.

²⁴⁸ *Supra* note 244, *Prosecutor v. Hadzihasanovic et al.*, paras. 37 *et seq.* (45, 51); Dissenting opinion Judges Hunt and Shahabuddeen. For the majority Ch. Greenwood, *Command Responsibility and the Hadzihasanovic decision*, 2 J. INT'L CRIM. JUST. 603 *et seq.* (2004); *supra* note 27, E. van Sliedregt, 168, 170; *crit. supra* note 59, G. Mettraux, 301

²⁴⁹ *Supra* note 244, *Prosecutor v. Hadzihasanovic et al.*, para. 52.

²⁵⁰ *Supra* note 91, K. Ambos, *Superior Responsibility* 850 *et seq.*

²⁵¹ *Prosecutor v. Hadzihasanovic et al.*, Separate and partially dissenting opinion of Judge David Hunt, 16 July 2003, para. 9.

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*, 51 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.

²⁵⁴ U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1 (1998).

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.

²⁵⁸ *Supra* note 24, *Prosecutor v. Tadic*, para. 188; conc. *supra* note 24, *Prosecutor v. Kordic & Cerkez*, paras. 375–6; *supra* note 123, *Prosecutor v. Hadzihasanovic et al.*, *Prosecutor v. Musema*, para. 123.

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.