Individual Criminal Responsibility in Article 25 ICC Statute

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Abstract

The collective nature of crimes under international law does not absolve us of the need to determine individual responsibility. Article 25 of the Statute of the International Criminal Court (ICC) now contains a detailed regulation of individual criminal responsibility. While discussing the elements of various modes of individual criminal responsibility, this essay shows that the most important difference between prior legal frameworks and Article 25(3) ICC Statute lies not in the redefinition of the scope of individual responsibility in international criminal law, but in the systematization of modes of participation. The case is made that Article 25(3) is best construed as a differentiation model with four levels of participation. In this model, modes of participation should be understood as indicative of the degree of individual guilt, and thus as helpful guidelines in sentencing matters. With particular reference to joint commission, the author shows that this concept also leads to a coherent interpretation of the various modes of participation.

1. Introduction

Committing crimes under international law typically entails the cooperation of a large number of persons. This generally occurs by way of a more or less established network, which is often part of the state or the military, but is in any case organized. However, the collective nature of crimes under international law does not absolve us of the need to determine individual responsibility. In fact, in all cases, specific individuals have worked together. They have

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determined the victims, and they have planned, organized and implemented the use of force against their victims. When allocating individual responsibility within networks of collective action, it must be kept in mind that the degree of criminal responsibility does not diminish as distance from the actual act increases; in fact, it often grows. Adolf Hitler, for example, sent millions of people to their deaths without ever laying a hand on a victim himself. And mass killer Adolf Eichmann organized the extermination of European Jews from his office in the Berlin headquarters of the 'Reichssicherheitshauptamt' of the SS. The Yugoslavia Tribunal vividly summarized the problem:

> 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 of individuals acting in pursuance of a common criminal design. Although some members of the group may physically perpetrate the criminal act (murder . . .), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question.[1]

A. International Case Law and Customary Law

At the inception of international criminal law, while the necessity and the difficulties of allocating individual criminal responsibility were already obvious, the rules on participation were only rudimentary and fragmentary.[2] The Nuremberg Charter contained rather archaic regulations on participation. For example, 'participation in a common plan or conspiracy' to wage a war of aggression was a crime.[3] Under Article 6(c) of the Nuremberg Charter, 'leaders, organizers, instigators and accomplices' who took part in the formulation or execution of a common plan or conspiracy to commit a crime against international law were responsible even for acts performed by others in execution of the plan.[4] In 1946, the International Law Commission's Nuremberg Principles stated that 'complicity in the commission of a crime against peace, a war crime or a crime against humanity . . . is a crime against international law'.[5]

Article II(2) of Control Council Law No. 10 of 20 December 1945 contained a quite detailed provision on who 'is deemed to have committed a crime' under

1 Judgment, *Tadić* (IT-94–1-A), Appeals Chamber, 15 July 1999, §191 (hereinafter: '*Tadić* Appeals Judgment').

2 For details, see K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Berlin: Duncker & Humblot, 2002), at 615; A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 180; A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002) 767–822, at 784 *et seq.*

3 Art. 6(a) Nuremberg Charter; see also Art. 5(a) Tokyo Charter.

4 See Nuremberg Tribunal, Judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (London: HMSO, 1950), Part 22, at 449.

5 Nuremberg Principle VII.

international law. It distinguished between the 'principal' (a) and the 'accessory to the commission of any such crime', or a person who ordered or abetted the crime (b), took a consenting part therein (c), was connected with plans or enterprises involving its commission (d), or belonged to an organization or group connected with the commission of any such crime (e). However, this nuanced provision did not meet with much practical interest. The evident goal of the Nuremberg Trial and the subsequent trials was to subject those responsible to criminal prosecution, and to do this as comprehensively as possible. Early adjudicators of international criminal law, therefore, did not pay much attention to distinguishing different modes of participation or separating principals from accessories, but rather applied a so-called unified perpetrator model. The guiding principle was that any support or promotion of the crime was to be considered criminal participation.[6]

The breakthrough to a more sophisticated doctrine of participation was ultimately achieved by the ad hoc Tribunals.[7] With the wording of Article 7(1) ICTY Statute and Article 6(1) ICTR Statute as a starting point, they distinguished between committing, planning, ordering, instigating and aiding and abetting. Moreover, the Yugoslavia Tribunal has acknowledged joint criminal enterprise as a form of (joint) commission in international customary law.[8]

In the ad hoc Tribunals' jurisdiction, each mode of participation is characterized by different elements, a particular *actus reus* and *mens rea* respectively. Furthermore, the modes of participation can be separated into modes of primary or principal liability, namely commission and — in the Tribunals' view — participation in a joint criminal enterprise, and modes of secondary or accessory liability, such as planning, ordering, instigating and aiding and abetting.

The denomination of a mode of participation as a form of accessory liability suggests that a person's act had a substantial effect on the commission of a crime by someone else, while in the case of commission as a principal, the crime is ascribed to one's own conduct. The ad hoc Tribunals attach increasing importance to this distinction, not only as a matter of clarifying individual criminal responsibility, but also in sentencing. For example, the ICTY Appeals Chamber has stated in *Vasiljević* that 'aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator'.[9] The differentiation between modes of participation is thus no longer merely descriptive, but indicates the weight of individual responsibility. This is also confirmed by recent decisions

6 For details, see Ambos, *supra* note 2, at 362 *et seq.*; G. Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005), marginal nos 339 *et seq.*

7 See *Tadić* Appeals Judgment, *supra* note 1, §§185 *et seq.*

8 For an in-depth discussion, see *ibid.*, §§185 *et seq.*

9 Judgment, *Vasiljević* (IT-98–32-A), Appeals Chamber, 25 February 2004, §182 (hereinafter: '*Vasiljević* Appeals Judgment'); Judgment, *Krstić* (IT-98–33-A), Appeals Chamber, 19 April 2004, § 268 (hereinafter: '*Krstić* Appeals Judgment').

of the ad hoc Tribunals on cumulative convictions. In *Semanza*, the Appeals Chamber held that, where the conduct of an accused in the commission of a crime fulfils the requirements of both aiding and abetting and ordering, it must be qualified as ordering.[10] The underlying premise of this assumption is, of course, that ordering is a mode of participation that generally yields a higher degree of individual criminal responsibility — and therefore a heavier sentence — than aiding and abetting. In sum, the practice of the ad hoc Tribunals suggests that in international criminal law the unified perpetrator model is loosing ground while a differentiated system of participation, involving value-oriented levels of responsibility, is gaining ground.

B. Article 25 ICC Statute

Article 25 of the ICC Statute now regulates individual criminal responsibility in detail. Article 25(1) provides that the Court shall have jurisdiction over natural persons, not over states or organizations. Paragraph 2 of Article 25 reiterates the principle of individual criminal responsibility. Paragraph 3 of the provision distinguishes various modes of individual responsibility. While Article 25(3)(a) to (d) addresses modes of criminal participation, subparagraphs (e) and (f) deal with incitement to genocide and with attempt and abandonment; this might be seen as misleading from a structural point of view, because neither incitement to genocide nor attempt can be classified as modes of participation, but should rather be classified as inchoate crimes. Finally, Article 25(4) of the ICC Statute rules that provisions on individual criminal responsibility do not affect the responsibility of states under international criminal law.

Section 3(a)–(d) is certainly the core of Article 25. Commission, ordering, instigating and aiding and abetting are confirmed as modes of participation. The same holds true for joint commission, although this form was never explicitly mentioned in former statutes or conventions. In addition, the ICC Statute also includes the concept of perpetration-by-means and contributions to a group crime. Section 3(a)–(d) affirms existing modes of participation in international criminal law, while cautiously rephrasing and supplementing them.

However, the most important difference between prior legal frameworks and Article 25(3) ICC Statute lies not in the redefinition of the scope of individual responsibility but in systematizing modes of participation. Unlike the statutes of the ad hoc Tribunals, Article 25(3) ICC Statute does not simply enumerate the different modes of participation, but also classifies them.

10 Judgment, *Semanza* (ICTR-97–20-A), Appeals Chamber, 20 May 2005, §§ 355 *et seq.*, 364 (hereinafter: '*Semanza* Appeals Judgement'). For details, see B. Burghardt, 'Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem' (PhD thesis, Humboldt-Universität zu Berlin, 2007).

It distinguishes four levels of criminal responsibility: first, the commission of a crime; second, ordering and instigating; third, assistance and fourth, contribution to a group crime. At the same time, the wording of the provision clearly reflects the difference between commission, as liability for the crime as the result of one's own conduct, and all the other modes of participation, as accessory liability for a crime committed by someone else. For in accordance with the case law of the ad hoc Tribunals, ordering, instigating, assistance and contribution to group crimes all require that the crime itself has in fact been committed, or at least attempted.

If the requirements for a form of participation are present, the legal consequence under Article 25(3) ICC Statute is that the perpetrator shall be 'criminally responsible and liable for punishment'. Explicitly, no gradations in the degree of criminal liability are provided for in Article 25(3)(a)–(d). Nevertheless, the structure of the provision takes a clear stand: the distinction between different modes of participation is not just a question of correct phenomenological description. Rather, ranking Article 25(3)(a)–(d) establishes a value oriented hierarchy of participation in a crime under international law. This flows from both the linguistic differentiation and the conceptual systematization of the norm.

Moreover, teleological reasons also weigh in favour of this interpretation of Article 25(3): as illustrated, committing crimes under international law generally and typically entails the cooperation of a large number of persons. Hence, the need to determine the degree of individual culpability in international criminal law is even more imperative than in national legal systems. As the recent case law of the Yugoslavia Tribunal suggests, distinguishing modes of participation is a useful tool to achieve this. These should be understood not only as descriptive concepts to establish individual criminal responsibility, but also as indicators of the degree of individual guilt. As such, they are helpful guidelines in sentencing matters.

Article 25(3)(a)–(d) ICC Statute is therefore best construed as a differentiation model with four levels of participation: at the top, commission as the mode of participation that warrants the highest degree of individual responsibility; on the second level, the different forms of instigation and ordering as accessory liability for those who prompt others to commit crimes under international law; on the third level, assisting a crime, for 'simple' accessories; and finally, contribution to a group crime, as the weakest mode of participation on the fourth level.

2. Commission

Article 25(3)(a) ICC Statute provides for three different forms of commission: commission as an individual, joint commission and commission through another person. As commission entails the highest degree of individual criminal responsibility, it must be construed strictly.

A. Commission as an Individual

The person whose conduct is directly covered by the definition of the crime and who acts with the requisite *mens rea* 'commits a crime as an individual' in terms of Article 25(3)(a), first alternative, and is clearly liable as a principal under international criminal law.[11]

B. Joint Commission

The basic idea of joint commission pursuant to Article 25(3)(a), second alternative, of the ICC Statute, is clear: if several people act together in committing a crime under international law ('jointly with another'), each one is individually responsible for the crime. What is crucial for co-perpetration is criminal cooperation within the framework of a common plan or design. It flows from this work sharing cooperation that every co-perpetrator is responsible for the acts of all the other co-perpetrators, which means that every co-perpetrator is responsible for the whole crime committed within the framework of the common plan.

What are the prerequisites and criteria for joint commission? When looking at the wording of Article 25, one must distinguish the two elements of 'committing' and 'jointly with another'. From this wording it is clear that joint commission or co-perpetration entails both an objective element, which is a contribution to the physical commission of the crime, and a subjective element, an agreement between the co-perpetrators, which can be named a common plan, or purpose, or design.

While these core elements can be clearly established, it is not surprising that different approaches to interpreting the objective and subjective elements of co-perpetration can be found in the various national legal orders. At the same time, a specific concept of liability for participation in a common criminal design has been developed in the case law of the Yugoslavia Tribunal: participation in a 'joint criminal enterprise'.[12] The doctrine of joint criminal enterprise is of great relevance to the work of the Yugoslavia Tribunal. It has since also been adopted by the ICTR.[13] Therefore, this case law will be sketched, and the article will then examine to what extent the features of joint criminal enterprise are relevant to the definition of joint commission under the ICC Statute.

11 See Eser, *supra* note 2, at 789. See also *Tadić* Appeals Judgment, *supra* note 1, §188; Judgment, *Kvočka et al.* (IT-98–30/1-T), Trial Chamber, 2 November 2001, §243 (hereinafter '*Kvočka* Trial Judgment').

12 See *Tadić* Appeals Judgment, *supra* note 1, §§194 *et seq.*, summary in §227. See also Judgment, *Vasiljević* (IT-98–32-T), Trial Chamber, 29 November 2002, §§63 *et seq.* (hereinafter: '*Vasiljević* Trial Judgment'); *Kvočka* Trial Judgment, *supra* note 11, §§265 *et seq.*, 312.

13 See e.g. Judgment, *Simba* (ICTR-01–76-T), Trial Chamber, 13 December 2005, §§385 *et seq.*

1. The Case Law of the Yugoslavia Tribunal

The Yugoslavia Tribunal qualifies participation in a 'joint criminal enterprise' as a form of commission. In the Tribunal's view, the concept is grounded in post-war jurisprudence, which has become part of customary international law.[14] As the Yugoslavia Tribunal has stated time and again, the three requisite elements of the joint criminal enterprise's *actus reus* are: (i) a group of persons, (ii) the existence of a common plan, and (iii) the contribution of the accused within the common plan.[15]

The common plan must be aimed at committing one or more crimes against international law. However, the plan need not be formed before the commission of the crime; it can also be spontaneous. Its presence may be deduced from the co-operation of several persons to carry out a criminal undertaking.[16]

In the Yugoslavia Tribunal's view, all of the participants in a joint criminal enterprise are equally responsible for the crime committed, 'regardless of the part played by each in its commission'.[17] In principle, any kind of contribution within the framework of the common plan can be sufficient. This was clarified by the Appeals Chamber in its *Kvočka et al.* Judgment. The Appeals Chamber noted that 'in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise'. In particular, it is not necessary that the accused takes part directly in committing the crime under international law, or that the contribution is indispensable for the realization of the common plan.[18]

According to the Yugoslavia Tribunal, the notion of a joint criminal enterprise encompasses three different categories: the basic form, the systemic form and the extended form.[19] While the *actus reus* can be the same for each of the three categories, the Appeals Chamber has declared that the three categories differ in respect of the *mens rea*.[20]

The first or basic category of participation in a joint criminal enterprise includes cases in which a group of persons plans the commission of a crime under international law and the crime is carried out according to the 'common design'. As each participant shares the same intent to commit the crime, each of them is responsible for it.[21]

The second category of joint criminal enterprises is also called the systemic form. Here, the joint criminal enterprise consists in running a system

14 The doctrine of the joint criminal enterprise can be traced to the ICTY Appeals Chamber judgment of the defendant *Tadić*, see *Tadić* Appeals Judgment, *supra* note 1, §§188 *et seq.*

15 See *ibid.*, §227; Judgment, *Krnojelac* (IT-97–25-A), Appeals Chamber, 17 September 2003, §31 (hereinafter: '*Krnojelac* Appeals Judgment'); *Vasiljević* Appeals Judgment, *supra* note 9, §100; Judgment, *Kvočka et al.* (IT-98–30/1-A), Appeals Chamber, 28 February 2005, §81 (hereinafter: '*Kvočka* Appeals Judgment').

16 *Tadić* Appeals Judgment, *supra* note 1, §227.

17 See *Vasiljević* Trial Judgment, *supra* note 12, §67.

18 As recently expressly stated in *Kvočka* Appeals Judgment, *supra* note 15, §§97, 104, 187.

19 *Tadić* Appeals Judgment, *supra* note 1, §195.

20 *Ibid.*, §227; *Krnojelac* Appeals Judgment, *supra* note 15, §31.

21 *Tadić* Appeals Judgment, *supra* note 1, §195.

of ill-treatment of prisoners in a concentration camp or a detention facility. According to the Yugoslavia Tribunal, the perpetrator must be aware of the criminal character of the system and act with intent to further it.[22] He is then responsible for all crimes committed within the framework of the system of ill-treatment.

Under the first two categories of joint criminal enterprise, the participants are responsible for crimes committed within the framework of the common plan. In contrast, the third — so-called extended — form of joint criminal enterprise concerns the attribution of criminal responsibility for crimes committed by other participants exceeding the framework of the common plan.[23] According to the Yugoslavia Tribunal, a participant in a joint criminal enterprise can nevertheless be held accountable for crimes not included in the common plan if they are the 'natural and foreseeable consequence' of the plan's execution. Subjectively, the participant must have accepted the risk of the consequence occurring.[24] Thus, in these cases, it is not necessary that the participant fulfil the *mens rea* of the crime on his own. This is particularly relevant when the crime requires specific intent. For example, the Yugoslavia Tribunal has repeatedly held that, under the third category, a participant in a joint criminal enterprise can be held responsible for committing genocide without sharing the intent to destroy.[25]

The Yugoslavia Tribunal's jurisprudence on joint criminal enterprise can be viewed as settled. Although some judges of the Yugoslavia Tribunal were sceptical of the doctrine, the Appeals Chamber in *Stakić* rejected all objections and reaffirmed its holdings.[26] In academic debate, the concept has been criticized from various points of view. First of all, it has been questioned whether participation in a joint criminal enterprise is in fact 'firmly established in customary international law', as the Appeals Chamber noted in *Tadić*. Therefore, some authors hold that the application of the concept violates

22 *Ibid.*, §§202, 220. For details on the second category ('concentration camp cases'), see also *Kvočka* Trial Judgment, *supra* note 11, §§268 *et seq.*

23 *Tadić* Appeals Judgment, *supra* note 1, §204; *Vasiljević* Appeals Judgment, *supra* note 9, §99. On the terminology used by the ICTR ('basic', 'systemic' and 'extended' form of joint criminal enterprise), see *ibid.*, at §§97 *et seq.*

24 *Tadić* Appeals Judgment, *supra* note 1, §228; *Krnojelac* Appeals Judgment, *supra* note 15, §32; *Vasiljević* Appeals Judgment, *supra* note 9, §101; *Kvočka* Appeals Judgment, *supra* note 15, §83; Judgment, *E. and G. Ntakirutimana* (ICTR-96–10-A/ICTR-96–17-A), Appeals Chamber, 13 December 2004, §467.

25 Decision, *Brđanin* (IT-99–36-A), Appeals Chamber, 19 March 2004, §§5 *et seq.*; Decision, *Rwamakuba* (ICTR-98–44-AR72.4), Appeals Chamber, 22 October 2004, §6.

26 See Judgment, *Stakić* (IT-97–24-A), Appeals Chamber, 22 March 2006, §§58 *et seq.* This judgment rejects opinions expressed in other decisions that criticized the concept of joint criminal enterprise as applied by the Tribunal. See e.g. Judgment, *Stakić* (IT-97–24-T), Trial Chamber, 31 July 2003, §§433 *et seq.*; Judgment, *Gacumbitsi* (ICTR-2001–64-A), Appeals Chamber, 7 July 2006, Separate Opinion of Judge Schomburg, §§14 *et seq.* See also V. Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', 5 *International Criminal Law Review* (2005) 167–201, at 176.

the principle of legality.[27] Another objection is that joint criminal enterprise could not — given its broad nature — be qualified as a form of commission. In particular, it has been argued that the so-called extended form of joint criminal enterprise violates the principle of personal culpability, as the participant is held responsible for a crime although he does not need to act with the requisite mental element of the crime.[28] These critics suggest that the joint criminal enterprise doctrine should be abandoned, and that international criminal law should follow a more narrowly and more precisely defined concept of co-perpetration.

As the purpose of this article is not a critical evaluation of the ad hoc Tribunals' case law in terms of 'right' or 'wrong', these remarks may suffice. What matters in the present context is whether the doctrine of joint criminal enterprise can or should be applied in interpreting 'joint commission' in Article 25(3)(a) of the ICC Statute.

2. *Article 25(3)(a), Second Alternative, ICC Statute*

If one looks at the wording of Article 25(3)(a) ICC Statute ('commits such a crime . . . jointly with another'), it would of course be possible to transfer the ICTY case law to the ICC Statute. However, the ICC Statute must be seen on its own as an independent set of rules. Hence, a mechanical transfer of the ad hoc Tribunals' case law is definitely not the correct approach.[29] Nevertheless, the holdings of the Yugoslavia Tribunal relating to participation in a joint criminal enterprise may prove helpful in applying the ICC Statute.

Article 25(3) is best interpreted as a differentiated participation model. In this model of participation, joint commission as a sub-category of commission involves the highest degree of individual responsibility for a crime under international law. Therefore, both the *actus reus* and the *mens rea* of joint commission have to be construed strictly. This leads to an interpretation

27 See K. Ambos, *Internationales Strafrecht* (München: C.H. Beck, 2006), at 136 *et seq.*; A. Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the Ad Hoc International Tribunal for the Former Yugoslavia', 6 *International Criminal Law Review* (2006) 63–120, at 109 *et seq.*; S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *Journal of International Criminal Justice* (2004) 606–619, at 615 *et seq.*

28 M.E. Badar, '"Just Convict Everyone!": Joint Preparation: from Tadić to Stakić and Back Again', 6 *International Criminal Law Review* (2006) 293–302, at 301 *et seq.*; Haan, *supra* note 26, at 195, 197 *et seq.*; G. Mettraux, *International Crimes and the* ad hoc *Tribunals* (Oxford: Oxford University Press, 2005), 292 *et seq.*; Powles, *supra* note 27, at 611.

29 That was also the position of the Prosecutor's Office in *Lubanga*: '[*L*]*'Accusation soutient qu'il importe de prendre en considération les différences fondamentales existant entre les tribunaux ad hoc et la Cour, cette dernière étant régie par un Statut qui non seulement expose très en détail les formes de résponsabilité pénale, mais s'écarte délibérément à cet égard des définitions plus générales figurant, par exemple, à l'article 7-1 du Statut du TPIY*.', ICC, Decision, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber, 29 January 2007, § 323. The Pre-Trial Chamber followed this approach, *ibid.*, at §§ 326 *et seq.*

of various key elements of joint commission that clearly differs from the ad hoc Tribunals' case law on participation in a joint criminal enterprise.

First, concerning the *actus reus*, the contribution rendered by each co-perpetrator must be essential to the realization of the common plan. As the co-perpetrator bears the same responsibility for the crime as the direct perpetrator or the perpetrator-by-means, the co-perpetrator's involvement in the commission of the crime has to be of similar weight in bringing about the criminal result. Thus, in contrast to the Yugoslavia Tribunal's holdings on participation in a joint criminal enterprise, within Article 25(3)(a), second alternative, of the ICC Statute not every kind of contribution is sufficient. While contributions of minor importance may be qualified as aiding and abetting or contribution to a group crime, they cannot be seen as joint commission.

A contribution is 'essential' if the common purpose cannot be achieved without it. Such an essential contribution to the realization of the common plan can be rendered in the course of the physical perpetration of the crime, but also by planning or otherwise organizing the actual commission of the crime. In these cases, the co-perpetrator controls the commission of the crime just as a direct perpetrator or a perpetrator-by-means does. Consequently, in many legal systems, the concept of control or 'domination of the criminal act' (*Tatherrschaft*) is seen as the common characteristic of the various forms of commission. This approach has now been followed by the ICC's Pre-Trial Chamber in *Lubanga* in interpreting Article 25(3)(a) of the ICC Statute.[30] This is convincing, especially when placed in the context of a differentiated model of participation.

Subjectively, each co-perpetrator has to act with the requisite *mens rea* for the crime. This is certainly the case where the common purpose explicitly involves the commission of the crime. This is questionable, however, where co-perpetrators commit a crime beyond the framework of the common design. In these cases, liability for joint commission depends on the *mental element* provided for in the definition of the crime. If the crime does not specify mental requirements, the co-perpetrator has to meet the general *mens rea* standard of Article 30 of the ICC Statute. While the provision's wording is confusing and has thus given rise to various interpretations,[31] the ICC Pre-Trial Chamber, in *Lubanga*, has stated that 'intent' in Article 30 of the ICC Statutes also covers *dolus eventualis*. The Pre-Trial Chamber continued by construing *dolus eventualis* as '*le suspect (a) est conscient du risque que les éléments objectifs du crime résultent de ses actions ou omissions et (b) accepte ce résultat en s'y résignant ou en l'admettant*'.[32] Consequently, unless otherwise

30 *Ibid.*, at §§ 330 *et seq.*

31 See Werle, *supra* note 6, at marginal nos 298 *et seq.*; G. Werle and F. Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 *Journal of International Criminal Justice* (2005) 35–55.

32 ICC, Decision, *Lubanga, supra* note 29.

provided in the definition of the crime, it suffices that the co-perpetrator is aware of the risk that the crime might be committed in the execution of the common plan, and that he accepted that risk. This standard seems to be consonant with the threshold established by the ICTY for the third category of the joint criminal enterprise doctrine.

However, the conclusions differ significantly from the Yugoslavia Tribunal's case law when it comes to liability as a co-perpetrator for a crime requiring *dolus specialis*. While even in these cases, foreseeability and acceptance of the risk suffices in the Yugoslavia Tribunal's view, this must be rejected for joint commission under Article 25(3)(a) of the ICC Statute. Under the ICC Statute, each co-perpetrator has to act with the requisite specific intent.[33] For example, a participant lacking the requisite intent to destroy cannot be held responsible for committing genocide as a co-perpetrator pursuant to Article 25(3)(a). Otherwise, the specific intent requirement would be attached to a participant who does not have it herself or himself, which would violate the principle of personal culpability. Rendering an essential contribution within the framework of a common plan warrants only the reciprocal attribution of acts, but not the attribution of another person's *mens rea*.[34]

In sum, the *actus reus* of joint commission requires (i) a plurality of persons; (ii) a common plan involving the commission of a crime under international law; (iii) an essential contribution to the execution of the common plan. Regarding the *mens rea*, every co-perpetrator has to act with the requisite mental element himself. Compared to the concept of joint criminal enterprise as set out by the Yugoslavia Tribunal, the ambit of liability as a co-perpetrator is thus considerably narrowed, with regard to both the requisite *actus reus* and the requisite *mens rea*.

C. Commission through Another Person

If the perpetrator uses another person as a tool to commit a crime under international law — that is, if he or she commits the crime 'through another person' — this is a basis for criminal liability under Article 25(3)(a), third alternative, of the ICC Statute. The perpetrator-by-means typically holds a superior position.[35]

The idea of a perpetrator-by-means is recognized by the world's major legal systems.[36] However, before the ICC Statute entered into force, it had neither

33 This has now been affirmed by the ICC Pre-Trial Chamber, *ibid.*, at § 349.

34 Similarly Ambos, *supra* note 27, at 138.

35 See also Eser, *supra* note 2, at 793.

36 For instance § 2.06(2) Model Penal Code states: 'A person is legally accountable for the conduct of another person when: (a) [. . .] he causes an innocent or irresponsible person to engage in such conduct [. . .]'. For details, see Ambos, *supra* note 2, at 568 *et seq.*; G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000), at 639.

been regulated by international criminal law nor dealt with by international courts. Thus the Statute provision has no model in customary law. Nevertheless, the importance of Article 25(3)(a), third alternative, of the ICC Statute does not lie in criminalizing acts that were not punishable so far. In fact, conduct that warrants individual responsibility for the crime as a perpetrator-by-means has always been punishable in international criminal law, at least as planning, ordering or instigating the crime. The importance of the provision lies in clarifying that perpetration-by-means is a sub-category of commission, and therefore involves a particularly high degree of responsibility for the crime.

Criminal responsibility under Article 25(3)(a), third alternative, is independent of whether the direct perpetrator is liable him or herself ('regardless of whether that other person is criminally responsible'). The norm first of all establishes that a perpetrator-by-means can be liable if the direct perpetrator is not responsible — for example, if he or she is not yet of legal age (Article 26 of the ICC Statute) or because a ground for exclusion of responsibility works in his or her favour. The norm second of all acknowledges the concept of the 'perpetrator behind the perpetrator' ('*Täter hinter dem Täter*'),[37] since the addition expressly does not rule out the possibility that the direct perpetrator can be manipulated, even if he or she is also fully responsible for the crime. This doctrine was recently used by the German Supreme Court in the cases of the killings at the inner-German border between 1961 and 1989.[38] In this regard, it is important to note that perpetration-by-means requires a situation of tight control by the person behind the direct perpetrator. Such control will usually be present in the context of an organized criminal hierarchy.

D. Commission by Omission?

The ICC Statute lacks a provision defining if and when liability for an omission arises. While the Draft Statute and the Draft Final Act at the Rome Conference still explicitly included omissions, these regulations did not become part of the

37 See also Eser, *supra* note 2, at 794 *et seq.*; J. Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht', 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2002) 403–436, at 427. Thus, the doctrine of the 'perpetrator behind the perpetrator' has been affirmed for international criminal law. It was originally developed by C. Roxin ('Straftaten im Rahmen organisatorischer Machtapparate', *Goltdammer's Archiv für Strafrecht* (1963), 193–207) in connection with the *Eichmann* trial — that is, in an international criminal law context — and has since considerably influenced German criminal jurisprudence. For a thorough discussion, see F.-C. Schroeder, *Der Täter hinter dem Täter: Ein Beitrag zur Lehre von der mittelbaren Täterschaft* (Berlin: Duncker & Humblot, 1965), at 119 *et seq.*

38 German Federal Supreme Court, Judgment of 26 July 1994, BGHSt 40, 218 *et seq.*, at 236; German Federal Supreme Court, Judgment of 4 March 1996, BGHSt 42, 65 *et seq.*, at 68; German Federal Supreme Court, Judgment of 8 November 1999, BGHSt 45, 270 *et seq.*, at 296.

ICC Statute, as France, especially, expressed serious reservations about establishing general liability for omissions.[39]

Nevertheless, there is no doubt that in certain circumstances, a mere omission can amount to a crime under international criminal law. One example relates to command responsibility under Article 28;[40] the basis for criminal liability in this case is the failure to prevent or to report a crime under international law. Furthermore, this is clearly the case where the definitions of offences explicitly criminalize the omission of certain conduct. In such cases, the criminal conduct consists in the very fact that the perpetrator failed to act. An example is starvation of civilians in armed conflict under Article 8(2)(b)(xxv) of the ICC Statute. Here the criminal conduct consists in depriving civilians of food necessary for survival. 'The deprivation of access to food and medicine' is expressly included in connection with the crime against humanity of extermination in Article 7(1)(b) and (2)(b).

Liability for omissions seems to be more problematic where the *actus reus* merely consists of a result caused by the accused's conduct (e.g. wilfully causing great suffering). However, the ad hoc Tribunals' case law takes a clear stand: both the Yugoslavia and the Rwanda Tribunals have stated time and again that even in these cases, liability can also arise from omission. On the one hand, an omission can be subsumed as conduct causing the requisite result of the crime. Examples are the war crimes of killing,[41] torture,[42] or wilfully causing great suffering.[43] On the other hand, various modes of accessory liability (e.g. instigation or aiding and abetting) may include omissions.[44]

These holdings are well anchored in international customary law. In treaty law, Article 86 of Additional Protocol I provides that breaches of the Geneva Conventions can result 'from failure to act when under a duty to do so' as well as from acting. Moreover, some of the Nuremberg follow-up trials

39 For a thorough discussion, see P. Saland, 'International Criminal Law Principles', in R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 189–216, at 212. At the same time, however, it is also reported that the majority of the negotiating delegations apparently assumed that in certain cases — some already addressed in the text — omissions should be criminal. See R.S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', 12 *Criminal Law Forum* (2001) 291–334, at 303.

40 For thorough discussion, see Werle, *supra* note 6, at marginal nos 367 *et seq.*

41 See Judgment, *Mucić et al.* (IT-96–21-T), Trial Chamber, 16 November 1998, §424 (hereinafter: '*Mucić* Trial Judgment'); Judgment, *Kordić and Čerkez* (IT-95–14/2-T), Trial Chamber, 26 February 2001, §229.

42 *Mucić* Trial Judgment, *supra* note 41, §494.

43 *Ibid.*, at § 511.

44 See Judgment, *Blaškić* (IT-95–14-A), Appeals Chamber, 29 July 2004, §47 (on aiding and abetting)(hereinafter: '*Blaškić* Appeals Judgment'); Judgment, *Limaj et al.* (IT-03–66-T), Trial Chamber, 30 November 2005, §514 (on instigation) (hereinafter: '*Limaj* Trial Judgment'). For an even wider concept of omission, see *Tadić* Appeals Judgment, *supra* note 1, §188.

also recognized criminal responsibility for omission.[45] Lastly, liability for omission can be qualified as a general principle of law, as comparative analysis shows that with the exception of French law, almost all legal cultures establish such liability.[46]

Consequently, Article 25 should be interpreted in such a way that it covers omissions, not only where they are explicitly criminalized in the Statute, but also where the omission equates to the active causation of the criminal result.[47] However, the exact requirements for such general liability by omission in international law are still unsettled and need to be clarified.

It flows from the ad hoc Tribunals' case law and Article 86 of Additional Protocol I that failure to act equates to the active causation of the criminal result only where a legal duty to act exists.[48] Although international law has not yet developed general criteria regarding when such a duty is established, one can nevertheless point out some situations where this is clearly the case. For example, a duty to act stems from the duty under international law to protect certain interests, such as objects or persons in custody. Whenever these interests are attacked, the obligated person has to intervene. The same holds true where a person is under a duty to supervise another person, especially within a superior-subordinate-relationship. Whenever the subordinate is about to commit a crime under international law, the superior must prevent him from doing so. In these cases, failure to act violates a legal duty to intervene and therefore entails liability for omission.

3. Instigation and Ordering

Under Article 25(3)(b) of the ICC Statute, anyone who orders the commission of a crime under international law or who instigates ('solicits' or 'induces')

45 See e.g. US Military Tribunal Nuremberg, Judgment of 20 August 1947 (*Brandt et al.*, so-called Medical Trial), in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. II (Washington, DC: US Government Printing Service, 1950), at 193 (concerning the supervisory duty of head doctors in regard to their assistants' acts); US Military Tribunal Nuremberg, Judgment of 28 October 1948 (*von Leeb et al.*, so-called High Command Case), in *ibid.*, Vol. XI, 542 *et seq.*; British Military Court Brunswick, Judgment of 3 April 1946 (*Gerike et al.*, so-called Velpke Children's Home Trial), in UNWCC, *Law Reports on Trials of War Criminals*, Vol. VII (London: HM Stationary Office, 1947), at 76.

46 See M. Duttwiler, 'Liability for Omission in International Criminal Law', 6 *International Criminal Law Review* (2006) 1–61, at 30 *et seq.*; K. Weltz, *Die Unterlassungshaftung im Völkerstrafrecht: eine rechtsvergleichende Untersuchung des französischen, US-amerikanischen und deutschen Rechts* (Freiburg im Breisgau: Ed. iuscrim, 2004), 189 *et seq.*

47 In *Lubanga*, the ICC Pre-Trial Chamber, by generally referring to '*actions ou omissions*', held *obiter* that liability for omission is included in the ICC Statute, see ICC, Decision, *Lubanga*, *supra* note 29, §§ 351 *et seq.*

48 See Duttwiler, *supra* note 46, at 14 *et seq.*; Weltz, *supra* note 46, at 227 *et seq.*

another to commit such a crime is criminally liable. Here criminal responsibility requires that the crime in question has actually been committed or has at least been attempted.[49] Ordering and instigation are thus accessory modes of liability.

A. Instigation

According to the jurisprudence of the ad hoc Tribunals, an instigator is someone who 'prompts' another to commit a crime under international law;[50] this can also be achieved by omission.[51] It is necessary that a causal link exist between the instigation and the commission of the crime. In the Yugoslavia Tribunal's view, it suffices, however, that the instigation has 'substantially' contributed to the conduct of the person committing the crime.[52] The mental element for instigation requires that the accused wished to 'provoke or induce' the commission of the crime or that he or she was aware of the 'substantial likelihood' that the crime would be committed as a result of his or her conduct.[53]

The question arises whether the instigator also needs to share the special intent on the part of the perpetrator, as required, for example, for genocide (intent to destroy). Thus far, the ad hoc Tribunals have not dealt with the issue. Within the framework of the differentiated participation model under the ICC Statute, it seems preferable to assume that the instigator must be aware of the perpetrator's special intent, but need not share it. Under this approach, instigation implies a lesser degree of responsibility than perpetration, as it is not necessary that the instigator fulfil the *mens rea* of the crime. At the same time, instigation is the graver mode of liability as compared to mere assistance. This is important, as unlike the mere aider and abettor, the instigator sets in motion a chain of events that eventually leads to the commission of the crime.

B. Ordering

Ordering is a special form of instigation. In contrast to the latter, an order assumes the existence of a superior-subordinate-relationship between the one giving and the one receiving the order. The person giving the order uses his or

49 This concept also forms part of customary international law. See Judgment, *Galić* (IT-98–29-T), Trial Chamber, 5 December 2003, §168; Judgment, *Ndindabahizi* (ICTR-2001–71-I), Trial Chamber, 15 July 2004, §455.

50 See Judgment, *Kordić and Čerkez* (IT-95–14/2-A), Appeals Chamber, 17 December 2004, §27 (hereinafter: '*Kordić and Čerkez* Appeals Judgment').

51 See Judgment, *Blaškić* (IT-95–14-T), Trial Chamber, 3 March 2000, §§280, 339 (hereinafter: '*Blaškić* Trial Judgment'); *Limaj* Trial Judgment, *supra* note 44, §514.

52 *Kordić and Čerkez* Appeals Judgment, *supra* note 50, §27.

53 See *Blaškić* Trial Judgment, *supra* note 51, §278; Judgment, *Brđanin* (IT-99–36-T), Trial Chamber, 1 September 2004, §269; *Kordić and Čerkez* Appeals Judgment, *supra* note 50, §32.

her authority to cause another person to commit a crime.[54] Subjectively, ordering requires that the person giving the order intended for the crime to be committed or that he or she at least was aware of the 'substantial likelihood' that the commission of the crime would result from his or her conduct.[55]

If one accepts that instigation does not require the accused to share particular mental elements possessed by the perpetrator, the same holds true for ordering. Thus, it suffices that the accused was aware of the perpetrator's special intent without sharing it. This approach gives ordering the correct weight within a differentiated participation model. It reflects the fact that the accused has exercised his or her authority to issue orders within a hierarchical system and therefore bears a higher degree of responsibility than someone merely assisting in the commission of the crime. Nevertheless, the person giving orders cannot be regarded as a perpetrator of the crime (not even under the concept of perpetration by means) if he or she does not fulfil all necessary mental elements him- or herself. Thus, ordering is particularly relevant to those cases in which the accused held a position in the mid-level of a hierarchy in which he or she both received and issued orders.

4. Assistance

Anyone who 'aids, abets or otherwise assists' in the commission or the attempted commission of a crime under international law is criminally liable under Article 25(3)(c) of the ICC Statute. A typical form of lending assistance, expressly mentioned in the Statute, is 'providing the means' for the commission of the crime.

Liability for assisting the primary perpetrator has been clarified in the jurisprudence of the ad hoc Tribunals.[56] According to the case law, the assistance must have a substantial effect on the commission of the crime.[57] However, the ad hoc Tribunals have construed this element in a broad way: encouragement of the perpetrator or granting moral support, in some circumstances even mere presence at the scene of the crime, can suffice.[58]

54 See *Kordić and Čerkez* Appeals Judgment, *supra* note 50, §28; *Semanza* Appeals Judgment, *supra* note 10, §361.

55 *Blaškić* Appeals Judgment, *supra* note 44, §42; *Kordić and Čerkez* Appeals Judgment, *supra* note 50, §30.

56 For a summary of the requirements, see *Vasiljević* Appeals Judgment, *supra* note 9, §102; *Blaškić* Appeals Judgment, *supra* note 44, §45; a thorough analysis of the state of customary law can be found in Judgment, *Furundžija* (IT-95–17/1-T), Trial Chamber, 10 December 1998, §§192 *et seq.* (hereinafter: '*Furundžija* Trial Judgment').

57 Judgment, *Aleksovski* (IT-95–14/1-A), Appeals Chamber, 24 March 2000, §162 (hereinafter: '*Aleksovski* Appeals Judgment'); *Blaškić* Appeals Judgment, *supra* note 44, §45; *Furundžija* Trial Judgment, *supra* note 56, §§235, 249; Judgment, *Kamuhanda* (ICTR-95–94A-T), Trial Chamber, 22 January 2004, §597.

58 See *Blaškić* Appeals Judgment, *supra* note 44, §48; *Furundžija* Trial Judment, *supra* note 56, §§231 *et seq.*

Moreover, assistance may be lent before, in the course of, or even — in the Yugoslavia Tribunal's view — after the commission of the crime.[59] A causal link to the commission of the crime is not necessary.[60]

The wording of Article 25(3)(c) does not require that the assistance has a substantial effect on the commission of the crime. However, within the ICC Statute's framework of modes of participation, it is reasonable to interpret the *actus reus* of assistance in this way.[61] The concept of a 'substantial' effect on the commission of the crime is broader than the 'essential' contribution required for joint commission. While the assistant's contribution facilitates the commission of the crime, the assistant wields no control over the commission of the crime as such. Without his or her contribution, the commission of the crime would still have been possible. Thus, assistance pursuant to Article 25(3)(c) of the ICC Statute captures contributions to the commission of a crime that are not covered as joint commission.

As regards the mental element, the person assisting must be aware that his or her contribution is supporting the commission of the crime.[62] Article 25(3)(c) of the ICC Statute additionally requires that the assistance be afforded 'for the purpose of facilitating the commission' of the crime.[63] Consequently, and consonant with the jurisprudence of the ad hoc Tribunals, it is not necessary that the accomplice share particular mental elements possessed by the perpetrator, such as the special intent to destroy required for genocide. It suffices that he or she knows of such intent.[64]

This conclusion has been criticized by various scholars, particularly with regard to participation in genocide. It has been held that convictions for genocide should require proof that the participant shared the genocidal *mens rea*, regardless of the mode of participation. These authors hold that any conviction under the heading of genocide is of such a stigmatizing nature that it should be limited to those sharing the specific intent to destroy.[65]

These arguments are not convincing. By the very nature of assistance — contribution to the crime of another — it is not the person assisting who

59 See *Blaškić* Appeals Judgment, *supra* note 44, §48; Judgment, *Kamuhanda* (ICTR-95–94A-T), Trial Chamber, 22 January 2004, §597. However, for a more restrictive approach see Judgment, *Blagojević and Jokić* (IT-02–60-T), Trial Chamber, 17 January 2005, §731. The ICC Statute does not expressly determine that abetting can lead to liability even after completion of the crime. A footnote to Art. 23 of the Draft ICC Statute (1998) states: 'This presumption [that successive assistance incur criminal liability] was questioned in the context of the ICC. If aiding, etc., ex post facto *were deemed* necessary to be criminalized, an explicit provision would be needed.' Eser, *supra* note 2, at 807 also supports the inclusion of 'successive assistance'.

60 See *Blaškić* Appeals Judgment, *supra* note 44, §48; *Kvočka* Trial Judgment, *supra* note 11, §255.

61 See also Eser, *supra* note 2, at 800.

62 See *Aleksovski* Appeals Judgment, *supra* note 57, §162; *Blaškić* Appeals Judgment, *supra* note 44, §§45, 49; Judgment, *Kayishema and Ruzindana* (ICTR-95–1-A), Appeals Chamber, 1 June 2001, §186.

63 This requirement is taken from §2.06 Model Penal Code.

64 See *Furundžija* Trial Judgment, *supra* note 56, §§236, 252, 257; *Krnojelac* Appeals Judgment, *supra* note 15, §52; *Krstić* Appeals Judgment, *supra* note 9, §140.

65 Mettraux, *supra* note 28, at 212 *et seq.*, 286 *et seq.*; W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), at 221.

defines the crime committed; it is the perpetrator. If several persons are involved in killing members of a group with the intent to destroy the group as such, they commit genocide in terms of Article 6(a) of the ICC Statute. If a person engages in assisting the perpetrators, for example by providing them with weapons to kill, he or she is aiding and abetting genocide as long as he or she is aware of the perpetrator's intent. It is not necessary for the assistant to the crime to share the genocidal intent.

It is in fact important to correctly label the large-scale criminal events that are the object of international criminal law. This can be demonstrated using the example of the Holocaust planned by the Nazi leaders. Here anyone who was aware of the genocidal context and still engaged in deporting the victims to the extermination camps, or took part in the selections on the ramps at Auschwitz or patrolled as a guard, assisted in the commission of genocide, whether or not he or she shared the main perpetrators' intent to destroy. Not to hold such assistants responsible for genocide would blur the truth of the historical events they participated in.

The level of personal involvement in the criminal events, and therefore the degree of individual responsibility for the crime, is established by the mode of participation. Assistance covers acts that were neither essential in causing the criminal result nor rendered with the requisite *mens rea* for the crime. Thus, in a differentiated participation model, assistance is construed as a mode of participation that illustrates secondary responsibility and a rather low degree of individual guilt for the crime.

5. Contribution to a Group Crime

Article 25(3)(d) of the ICC Statute regulates a new form of criminal participation: contributing to the commission of a crime or an attempted crime by a group. The provision incorporates a rule from the International Convention for the Suppression of Terrorist Bombings of 12 January 1998 into general international criminal law.[66] The wording of Article 25(3)(d) is the result of complicated negotiations at the Rome Conference on the inclusion of conspiracy.[67]

Regarding the *actus reus*, Article 25(3)(d) requires a contribution to a crime under international law committed or attempted by a group. A group is any association of at least three persons[68] who act in furtherance of a 'common purpose'. The wording explicitly covers any contribution to the group crime ('in any other way contributes'). This catch-all provision applies to indirect forms of assistance — such as financing the group — that do not warrant liability for either co-perpetration or aiding and abetting, as they have no

66 See Art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings of 12 January 1998 (UN Doc. A/RES/52/164).

67 See Saland, *supra* note 39, at 199; Eser, *supra* note 2, at 802.

68 See Eser, *supra* note 2, at 802.

substantial effect on the commission of the crime under international law.[69] Thus, contribution to a group crime is best construed as a subsidiary mode of participation yielding the weakest form of liability.[70]

As regards the mental element, Article 25(3)(d) provides two different standards. The person giving the assistance must either aim at (i) furthering the criminal activity of the group or its common purpose; or (ii) he or she must be aware of the group's intent to commit a (specific) crime under international law. Consequently, it is not necessary that the participant share particular mental elements of the crime committed by the group, such as the specific intent to destroy in the case of genocide.

6. Inchoate Crimes

Many legal systems criminalize acts that have not yet caused any harm, but which are preparatory to prohibited offences. Here we must distinguish between conspiracy to commit a crime, planning or preparing a crime under international law, incitement to commit a crime, and attempt. To some extent, international law also covers such conduct in the preparatory stage of a crime.[71]

Here, the ICC Statute takes a narrow approach. The zone of criminality only begins once the perpetrator has taken a significant step toward carrying out the crime (attempt) or where he incites others to commit genocide. Neither conspiracy nor planning and preparing a crime under international law nor incitement to war crimes or crimes against humanity are covered by the ICC Statute.[72]

A. Incitement to Genocide

Incitement to commit genocide was already prohibited by the Genocide Convention. The provision was adopted into the ICC Statute word for word as Article 25(3)(e).[73] It provides a separate ground for criminalization. As the ICTR has put it, 'acts of incitement' are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results.[74] Public incitement creates, or significantly increases,

69 See Vogel, *supra* note 37, at 421.

70 This interpretation has now been upheld in ICC, Decision, *Lubanga*, *supra* note 29, § 337.

71 See Cassese, *supra* note 2, at 190 *et seq.*; Werle, *supra* note 6, at marginal nos 485 *et seq.*

72 Under Art. 23(7)(e) of the Draft ICC Statute (1998), anyone who '[intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted' is subject to criminal sanction.

73 See Genocide Convention, Art. III(c), Art. 4 (3)(c) ICTYSt., Art. 2(3)(c) ICTRSt. and Art. 25(3)(e) ICCSt.

74 See Judgment, *Akayesu* (ICTR-96–4-T), Trial Chamber, 2 September 1998, § 562 (hereinafter: '*Akayesu* Trial Judgment'). See also *Draft Code of Crimes against the Peace and Security of Mankind* 1996, Commentary on Art. 2, § 16.

the risk of an uncontrollable mass crime against members of the group under attack. A completed genocide is not required. Incitement also covers cases where genocide has been completed but where the causal nexus of an act of instigation can not be proven.

The criminal act is direct, public incitement to commit genocide. This requires that the perpetrator call for commission of genocide; provocative expressions alone are insufficient.[75] 'Direct' incitement includes cases in which the perpetrator does not call for commission of genocide expressly, but does so in a way that is unmistakable to the addressee;[76] in fact, perpetrators frequently use euphemistic, metaphorical or otherwise coded language that is nevertheless perfectly clear to their audience.[77]

The mental element of incitement to genocide requires that the perpetrator intentionally and knowingly perform the material element of the crime (ICC Statute, Article 30) and act with the specific intent to destroy a group in whole or in part. Here it could be argued that the perpetrator does not need specific intent, and that it may suffice that he knows all the elements of the crime to which he incites. This is at least the position that national legal systems take, e.g. the German Criminal Code. However, it seems that criminalization under international law is only justified at such an early stage of the crime if the person who acts does so with the intent to destroy a group in whole or in part.

B. Attempt and Abandonment

Criminal responsibility for attempt requires, under Article 25(3)(f) of the ICC Statute, the undertaking of conduct that 'commences' the execution of a crime under international law 'by means of a substantial step'. Under this redundant wording,[78] the line between preparatory actions, which are not

75 For more information, see V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (New York: Transnational Publishers, 1998), 183; D.D.N. Nsereko, 'Genocide: a Crime against Mankind', in G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, Vol. 1 (The Hague: Kluwer Law International, 2000) 117–140, at 132 *et seq.*

76 See *Akayesu* Trial Judgment, *supra* note 74, §§ 557 *et seq.*; Judgment, *Ruggiu* (ICTR-97–32-I), Trial Chamber, 1 June 2000, § 17; Schabas, *supra* note 65, at 277.

77 See Judgment, *Kambanda* (ICTR-97–23-S), Trial Chamber, 4 September 1998, § 39 (x). The Appeals Chamber affirmed the perpetrator's conviction, see Judgment, *Kambanda* (ICTR-97–23-A), Appeals Chamber, 19 October 2000.

78 To separate criminal attempt and mere non-criminal preparation, the provision connects two criteria that are usually applied in the alternative: 'commencement of execution', a criterion borrowed from French criminal law, and a 'substantial step' towards carrying out the crime, according to US law. See K. Ambos, 'Article 25', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), marginal no. 32. See also § 5.01 Model Penal Code; T. Weigend, 'Article 3', in M.C. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (Toulouse: Érès, 1993), 117.

criminal under the ICC Statute, and criminal attempt is of course crossed if one of the material elements of the crime is already in place. Otherwise, a 'substantial step' is present if the perpetrator's purpose has been reinforced or corroborated.[79]

Participating in an attempt is criminal, as is an ineffective attempt.[80] The Statute makes no explicit provision for mitigation of punishment for attempted crimes under international law, but mitigation is possible within the framework of the sentencing rules.

Under the ICC Statute, a person is not guilty of attempt if he or she abandons the commission of the crime. The wording of Article 25(3)(f) is unfortunate. It can be gathered from sentence 1 of this norm that no criminal liability arises for attempt if the crime fails to be carried out because of circumstances dependent on the person's intentions. Under sentence 2, there is no liability if a person 'abandons the effort to commit the crime or otherwise prevents the completion of the crime' and in the process 'completely and voluntarily gave up the criminal purpose'. This repetition of the rule on abandonment has been blamed on an editing error,[81] and it does not affect the result: if a person abandons his or her efforts to commit the crime, there is no criminal liability.[82] Under the wording of the provision, it remains unclear whether abandonment negates the offence or if it simply functions as grounds for excluding responsibility. This could have an effect on the possibility of participation in an attempted crime under international law, which is explicitly recognized by the ICC. Here, the correct view is to see abandonment as a ground for excluding responsibility.

The Statute's rules leave some questions unanswered. For example, it is not clear when an attempt begins if more than one person is involved. If we recall the complex questions raised by attempt and abandonment in domestic criminal law, it becomes clear how much doctrinal effort is still needed to clarify the requirements for attempt and abandonment.[83] However, it remains to be seen whether attempt and abandonment will actually play a significant role in the work of the ICC. The concentration on the most serious crimes affecting the international community as a whole makes it likely that the focus will be on prosecution of fully executed crimes.[84]

79 See § 5.01(2) Model Penal Code: 'when it is strongly corroborative of the actor's criminal purpose'.

80 For more, see Ambos, *supra* note 2, at 488; Eser, *supra* note 2, at 813.

81 See Ambos, *supra* note 2, at 709 *et seq.* with additional citations. See also Eser, *supra* note 2, at 815.

82 See Ambos, *supra* note 78, at marginal no. 34.

83 See T. Hillenkamp, 'Versuch', in B. Jähnke *et al.* (eds), *Strafgesetzbuch: Leipziger Kommentar*, Vol. I (11th edn., Berlin: De Gruyter Recht, 2003), Vor § 22, marginal nos 53 *et seq.*

84 For a critical view of the inclusion of attempt in the *Draft Code of Crimes against the Peace and Security of Mankind* 1996, see C. Tomuschat, 'Die Arbeit der ILC in Bereich des materiellen Völkerstrafrechts', in G. Hankel and G. Stuby (eds), *Strafgerichte gegen Menschheitsverbrechen* (Hamburg: Hamburger Edition, 1995) 270–294, at 288.

7. Conclusion

Article 25 ICC Statute definitely does not achieve perfection, in either its substance or its language. But perfection and linguistic elegance could hardly be expected, considering the origins of the norm at the conference of states in Rome. All the same, Article 25 provides an appropriate assessment of international customary law on individual criminal responsibility. Furthermore, the established modes of participation are carefully supplemented, and the model of participation is refined.

Article 25 follows a systematic approach to complicity, distinguishing between four levels of participation: commission, ordering/instigating, assistance and contribution to a group crime. This distinction is relevant in assessing the extent of individual criminal responsibility and it will prove helpful in the meting out of punishment.

As regards Article 25(3)(a), three forms of commission are set out. Commission warrants the highest degree of individual criminal responsibility. Therefore, it must be construed strictly. This holds true particularly for joint commission. Here, the doctrine of participation in a joint criminal enterprise, developed by the Yugoslavia Tribunal, cannot be transferred to the Rome Statute. It was not absolutely necessary to include perpetration-by-means in Article 25(3)(a), because the relevant conduct could also have been covered as co-perpetration or ordering. The explicit inclusion of perpetrator-by-means helps to clearly qualify these persons as principals in the crime. Article 25(3)(a) also makes it clear that the perpetrator-by-means may use others as tools even if they are themselves criminally responsible. Article 25(3)(a) does not explicitly deal with omission. However, in view of the case law of the ad hoc Tribunals and consonant with general principles of law, failure to act under the duty to do so generally entails liability.

Instigation and ordering, assistance and contribution to a group crime are all forms of accessory liability for participating in the crime of another. The Statute clarifies the accessorial character of these modes of participation, requiring that the crime must at least be attempted. As regards the *mens rea*, accessorial liability does not require that the accessory share the mental element of the crime committed by the principal.

Modes of participation defined in Article 25(3)(b) have in common that a person who does not commit the crime himself or herself causes another person's decision to do so by exercising influence on this person through ordering, inducing or soliciting. Article 25(3)(c) is helpful in that the comprehensive notion of assistance is used. It will be fairly easy to apply that law and to rely upon both international and national case law. Article 25(3)(d) entails criminal responsibility for indirect forms of participation not covered by any other mode of participation. As the broadest mode of participation, it may cover acts that in

the Yugoslavia Tribunal's case law warranted liability for participation in a joint criminal enterprise.

As regards inchoate crimes, the Statute takes a narrow approach. Only incitement to genocide and attempt are punishable independently of the commission of the crime.

In sum, Article 25 provides a solid basis for the ICC to deal with individual criminal responsibility.