

## 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

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

#### Literature:

Kai Ambos, *Individual Criminal Responsibility in International Criminal Law*, in: Gabrielle K. McDonald/O. Svaak Goldman (eds.), *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* (1999, forthcoming); *id.*, *General Principles of Criminal Law in the Rome Statute*, 9 CRIM. L.F. issue 3 (1999, forthcoming); Klaus Marxen, *Beteiligung an schwerem systematischen Unrecht. Bemerkungen zu einer völkerstrafrechtlichen Straftatlehre*, in: Klaus Lüderssen (ed.), *AUFGEKLÄRTE KRIMINALPOLITIK ODER KAMPF GEGEN DAS BÖSE? BAND III: MAKRODELINQUENZ 220* (1998); William A. Schabas, *General Principles of Criminal Law*, 6 EUR. J. CRIME, CRIM. L. & CRIM. J. issue 4 (1998, forthcoming); Andrea Sereni, *Individual criminal responsibility*, in: Flavia Lattanzi (ed.), *THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 139* (1998); Otto Triffterer, *Bestandsaufnahme zum Völkerstrafrecht*, in: Gerd Hankel/Gerhard Stuby (eds.), *STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN 169* (1995); *id.*, *Acts of Violence and International Criminal Law – A New Position of Power to Fight Abuse of Power*, 4 CROATIAN ANN. CRIM. L. & PRAC. 811 (1997); Thomas Weigend, *Article 3: Responsibility and Punishment*, in: M. Cherif Bassiouni (ed.), *COMMENTARIES ON THE ILC'S 1991 DRAFT CODE 113* (1993); Edward Wise, *General Principles of Criminal Law*, in: Leila

Sadat Wexler (ed.), MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE'S TEXT TO THE DIPLOMATIC CONFERENCE 61 (1998); Christine Van den Wyngaert, *The Structure of the Draft Code and the General Part*, in: M. Cherif Bassiouni (ed.), COMMENTARIES ON THE ILC'S 1991 DRAFT CODE 55 (1993).

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### A. Introduction/General Remarks

- 1 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 Tribunal<sup>1</sup> 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 Conventions<sup>2</sup>. The drafting history has been described elsewhere<sup>3</sup>.
- 2 Subparagraphs (a)-(c) of paragraph 3 establish the basic concepts of individual criminal attribution. Subparagraph (a) refers to three forms of perpetration: on one's

<sup>1</sup> In THE TRIAL OF THE MAJOR WAR CRIMINALS (Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H.M. Attorney General by H.M.'s Stationery Office, 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."

<sup>2</sup> *Prosecutor v. Dusko Tadic a/k/a/ "Dule"*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-1-AR 72, 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." On the development of the case law see also K. Ambos, *Responsibility*. See also O. Triffterer, *Bestandsaufnahme* 211-3.

<sup>3</sup> Cf. W.A. Schabas, *Principles*.

own, as a co-perpetrator or through another person (perpetration by means). 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 Mankind<sup>4</sup> and the Statutes of the ad hoc Tribunals<sup>5</sup>, paragraph 3 distinguishes between perpetration (subparagraph (a)) and other forms of participation (subparagraphs (b) and (c)), with the latter establishing different degrees of responsibility. This approach confirms the general tendency in comparative criminal law to reject a pure unitarian concept of perpetration (*Einheitstätermodell*) and to distinguish, at least on the sentencing level, between different forms of participation<sup>6</sup>.

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.

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 a crime within the jurisdiction of the Court (articles 5-8). It must not be overlooked, however, that criminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person's individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently the individual's own contribution to the harmful result is not always readily apparent<sup>7</sup>.

## B. Analysis and interpretation of elements

### I. Paragraph 1

As far as the jurisdiction over natural persons is concerned, paragraph 1 states the obvious. Already the International Military Tribunal found that international crimes are "committed by men not by abstract entities"<sup>8</sup>. 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

<sup>4</sup> Draft Code of Offences Against the Peace and Security of Mankind, (1954) 2 Y.B.I.L.C., 151-152, article 2 para. 13; 1991 Draft Code, (1988) 2 Y.B.I.L.C., Part II, 70, article 3; 1996 Draft Code (Report of the International Law Commission on the Work of its Forty-Eighth Session, 5 June-26 Aug., 1996, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, p. 72, para. 1, p. 73), article

<sup>5</sup> 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 ...".

<sup>6</sup> Cf. O. Triffterer, *Bestandsaufnahme* 226; J. Pradel, *DROIT PÉNAL COMPARÉ* 271 et seq. (1995); G. Fletcher, *BASIC CONCEPTS OF CRIMINAL LAW* 188 et seq. (1998).

<sup>7</sup> See – for a first attempt to develop a theory of attribution in international criminal law – K. Marxen, *Beteiligung* 226 et seq.

<sup>8</sup> See already *supra* note 1.

important in terms of restitution and compensation orders for victims<sup>9</sup>. The final proposal presented to the Working Group was limited to private corporations, excluding states and other public and non-profit organizations<sup>10</sup>. Further, it was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities. Despite this rather limited liability, the proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems<sup>11</sup>. Consequently, the absence of corporate criminal liability in many states would render the principle of complementary (article 17)<sup>12</sup> unworkable.

## II. Paragraph 2

5 The provision repeats the principle of individual criminal responsibility.

A person may "commit" a crime by the different modes of participation and expansions of attribution set out in the following paragraph 3. In other words, commission in this context is not limited to perpetration within the meaning of paragraph 3(a) "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 falls within the jurisdiction of the Court; this jurisdiction can, however, only be exercised once an acceptable definition is adopted (article 5 para. 2).

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

## 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").

<sup>9</sup> U.N. Doc. A/CONF.183/C.1/L.3 (1998), article 23 paras. 5, 6. See also E. Wise, *Principles* 42; A. Sereni, *Responsibility* 145-6; W.A. Schabas, *Principles*.

<sup>10</sup> U.N. Doc. A/CONF.183/C.1/WGGP/L.5 (1998).

<sup>11</sup> Cf. recently: A. Eser/B. Huber/K. Cornils (eds.), *EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT. EUROPEAN COLLOQUIUM ON INDIVIDUAL, PARTICIPATORY AND COLLECTIVE RESPONSIBILITY IN CRIMINAL LAW* (1998); J. Pradel, *supra* note 6, 306 et seq.

<sup>12</sup> Cf. S.A. Williams, article 17, margin Nos. 1 et seq. and 21 et seq.

The characterization of direct perpetration as committing a crime "as an individual" is unfortunate since it does not make clear that the direct perpetrator acts on his or her own without relying on or using another person<sup>13</sup>. As it stands the formulation only repeats the principle of individual responsibility. While the original French version ("à titre individuel") was more precise, the new one ("individuellement") is identical to the English one; thus, only the Spanish version ("por sí solo") clearly refers to the concept of direct perpetration.

Co-perpetration is no longer included in the complicity concept but recognized as an autonomous form of perpetration. It is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator 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 crime. 8

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 "individual in the background" (*Hintermann*<sup>14</sup>)<sup>15</sup>. 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 law<sup>16</sup>. However, especially in the field of "macrocriminality", *i.e.*, systematic or mass criminality organized, supported or tolerated by the state<sup>17</sup>, 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 completely 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*"<sup>18</sup>. However, attribution in these cases may go too far if the 9

<sup>13</sup> See Model Penal Code (American Law Institute, 1985), § 2.06 (1): "committed by his own conduct"; Spanish Penal Code (Código Penal, Ley Orgánica 10/1995, de 23 Nov. 1995), article 28: "por sí solos"; German Penal Code (trans. by Joseph Darby, THE AMERICAN SERIES OF FOREIGN PENAL CODES (Vol. 28 1987), <<http://wings.buffalo.edu/law/bclc>>), § 25 (1): "selbst ... begeht" ("acting himself")

<sup>14</sup> The definition 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.

<sup>15</sup> See generally for perpetration by means G. Fletcher, *supra* note 6, 197-200; H.-H. Jescheck/Th. 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" (*cf.* A.-K. Czepluch, TÄTERSCHAFT UND TEILNAHME IM FRANZÖSISCHEN STRAFRECHT 30-33 (1994)).

<sup>16</sup> See comment to Model Penal Code, *supra* note 13, § 2.06.

<sup>17</sup> See H. Jäger, MAKROKRIMINALITÄT. STUDIEN ZUR KRIMINOLOGIE KOLLEKTIVER GEWALT (1989).

<sup>18</sup> See the fundamental work of C. Roxin, TÄTERSCHAFT UND TÄTHERSCHAFT 242-252, 653-4 (6th ed. 1994); also K. Ambos, *Responsibility* II. b) aa) with references.

indirect perpetrator cannot dominate the direct perpetrator sufficiently 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).

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

- 10** 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.
- 11** 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 responsible.

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

- 12** The forms of participation established in this subparagraph are very different. 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 crimes<sup>19</sup>. The International Criminal Tribunal for Rwanda (ICTR), in the *Akayesu* judgement, correctly 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"<sup>20</sup>. These are, *inter alia*, exactly the requirements of command or superior responsibility as recently confirmed in the "*Celebici*" case<sup>21</sup>. Consequently, the first alternative in subparagraph (b) ("[o]rders") 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".
- 13** Soliciting a crime means, *inter alia*, to command, encourage, request or incite another person to engage in specific conduct to commit it<sup>22</sup>. To induce basically means

<sup>19</sup> Report of the ILC (1996), *supra* note 4, p. 25 (para. 14).

<sup>20</sup> *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 483.

<sup>21</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Case No. IT-96-21-T, 16 Nov. 1998, paras. 344 et seq. (346).

<sup>22</sup> BLACK'S LAW DICTIONARY 1392 (6th ed. 1990); Model Penal Code, *supra* note 13, § 5.02 (1).

to influence another person to commit a crime<sup>23</sup>. Inducing is a kind of umbrella term covering soliciting which, in turn, has a stronger and more specific meaning than inducing. Inducing is broad enough to cover any conduct which causes or leads another person to commit a crime, including soliciting that person. In fact, the French version of the Statute speaks of "sollicite ou encourage", thereby using a form of solicitation to express the English term induce. In sum, both forms of complicity are applicable to cases in which a person is influenced by another to commit a crime. Such influence is normally of psychological nature but may also take the form of physical pressure within the meaning of *vis compulsiva*<sup>24</sup>. Unlike in the case of "ordering" a superior-subordinate relationship is not necessary.

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

Subparagraph (c) codifies any other assistance not covered by subparagraph (b). 14  
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"**

"Aiding and abetting" as the weakest form of complicity covers any act which 15  
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"<sup>25</sup>. 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 crime<sup>26</sup>. "Substantial" means that the contribution has an effect on the commission, in other words, it must – in one way or another – have a causal relationship with the result<sup>27</sup>. However, this does not necessarily require physical presence at the scene of the crime. In *Tadic*, Trial Chamber II of the ICTY followed a broad concept of complicity based on the English "concerned in the killing" theory<sup>28</sup>. 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"<sup>29</sup>. This position was confirmed in the "*Celebici*" decision<sup>30</sup>.

<sup>23</sup> BLACK'S LAW DICTIONARY, *supra* note 22, 774.

<sup>24</sup> Unlike *vis absoluta vis compulsiva* leaves the person still a certain freedom to act and decide (*cf.* H.-H. Jescheck/T. Weigend, *supra* note 15, 224).

<sup>25</sup> Report of the ILC (1996), *supra* note 4, p. 24 (para. 10).

<sup>26</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 May 1997, paras. 674, 688-692.

<sup>27</sup> *Ibid.*, para. 688.

<sup>28</sup> *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 LAW REPORTS OF TRIALS OF WAR CRIMINALS 49-51; also: *Prosecutor v. Tadic*, *supra* note 26, para. 691.

<sup>29</sup> *Ibid.*, para. 689.

<sup>30</sup> *Prosecutor v. Delalic et al.*, *supra* note 21, paras. 325-9.

- 16 In the recent *Furundzija* judgement the ICTY took a more sophisticated view<sup>31</sup>. The Trial Chamber distinguished between the nature of assistance and its effect on the act of the principal (main perpetrator). Regarding the former it stated that the assistance need not be "tangible" but that "moral support and encouragement" is sufficient. Mere presence at the scene of the crime suffices if it has "a significant legitimizing or encouraging effect on the principals". The term "direct" – used by the ILC – in qualifying the proximity of the assistance is "misleading" since it implies that the assistance needs to be "tangible"<sup>32</sup>. 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". The "significant"-requirement, however, implies that it would not be sufficient if the accomplice has only "a role in a system without influence"<sup>33</sup>. 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."<sup>34</sup> In sum, aiding and abetting requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"<sup>35</sup>.
- 17 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"<sup>36</sup>. 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 sufficient<sup>37</sup>. In neither case, is it necessary that the aider or abettor be present during the commission. Further, the Chamber considered that aiding and abetting may consist in an omission<sup>38</sup>.
- 18 In sum, aiding and abetting encompasses any assistance, whether physical or psychological, which, however, had a substantial effect on the commission of the main crime. In other words, the limiting element is the "substantial effect" requirement. Thus, the question arises when an effect is "substantial". This cannot be decided by an abstract formula but only on a case by case basis taking into account modern theories of attribution<sup>39</sup>. At any rate, a concrete inquiry may be a mere academic exercise since the subsidiary mode of complicity of "assist otherwise" introduces an even lower threshold

<sup>31</sup> *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, 10 Dec. 1998, paras. 190-249.

<sup>32</sup> *Ibid.*, paras. 199, 232.

<sup>33</sup> *Ibid.*, paras. 217, 233-4.

<sup>34</sup> *Ibid.*, para. 231.

<sup>35</sup> *Ibid.*, paras. 235, 249.

<sup>36</sup> *Prosecutor v. Akayesu*, *supra* note 20, para. 484.

<sup>37</sup> Similarly already O. Triffterer, *Bestandsaufnahme* 229.

<sup>38</sup> *Prosecutor v. Akayesu*, *supra* note 20, para. 548: "... may consist in failing to act or refraining from action" (unlike complicity in genocide).

<sup>39</sup> See generally C. Roxin, STRAFRECHT. ALLGEMEINER TEIL 287 et seq. (Vol. I, 3rd ed. 1997); G. Jakobs, STRAFRECHT. ALLGEMEINER TEIL. DIE GRUNDLAGEN UND DIE ZURECHNUNGSLEHRE 185 et seq. (2nd ed. 1993).

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 *Furundzija* 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 within the meaning of subparagraph (c).

### β) "For the purpose of facilitating"

This concept introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30<sup>40</sup>. The expression "for the purpose of facilitating" is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge<sup>41</sup>. The formula, therefore, ignores the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence<sup>42</sup>. Additionally, knowledge may be inferred from all relevant circumstances<sup>43</sup>, *i.e.*, it may be proven by circumstantial evidence<sup>44</sup>.

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 crime<sup>45</sup>.

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).

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

The whole subparagraph (d) is an almost literal copy of a recently adopted Anti-terrorism convention<sup>46</sup> and presents a compromise with earlier "conspiracy" provisions<sup>47</sup>, which since Nuremberg have been controversial<sup>48</sup>. The 1991 ILC Draft

<sup>40</sup> See D.K. Piragoff, article 30, margin Nos. 9 et seq. and 17 et seq.; generally about the mental element in international criminal law, *cf.* O. Triffterer, *Bestandsaufnahme* 221-4.

<sup>41</sup> Model Penal Code, *supra* note 13, § 2.06.

<sup>42</sup> *Prosecutor v. Tadic*, *supra* note 26, para. 692; *Prosecutor v. Delalic et al.*, *supra* note 21, paras. 326, 328; *Prosecutor v. Furundzija*, *supra* note 31, paras. 236-249 (236, 245-6, 249); *Prosecutor v. Akayesu*, *supra* note 20, paras. 476-9.

<sup>43</sup> *Prosecutor v. Tadic*, *supra* note 26, para. 676; *Prosecutor v. Delalic et al.*, *supra* note 21, para. 328; *Prosecutor v. Akayesu*, *supra* note 20, para. 478.

<sup>44</sup> *Cf. Prosecutor v. Tadic*, *supra* note 26, para. 689: "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ..."; *Prosecutor v. Delalic et al.*, *supra* note 21, para. 386 with regard to command responsibility: "... such knowledge cannot be presumed but must be established by way of circumstantial evidence."

<sup>45</sup> *Prosecutor v. Furundzija*, *supra* note 31, para. 231.

<sup>46</sup> 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).

<sup>47</sup> For example: Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (1998), reprinted in: M.Ch. Bassiouni (ed.), INTERNATIONAL CRIMINAL COURT. COMPILATION OF

Code held punishable an individual who "conspires 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"<sup>49</sup>. The 1996 Draft Code extends to a person who "directly participates in planning or conspiring to commit such a crime which in fact occurs"<sup>50</sup>. 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.

21 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 clearly – at least conceptually – 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 joint criminal enterprise, on the one hand, and aiders and abettors, on the other"<sup>51</sup>.

22 The distinction gains particular importance on the subjective level. While aiding and abetting generally and within the meaning of subparagraph (c) only requires the knowledge that the assistance contributes to the main crime<sup>52</sup>, 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 to be discussed below ([i] and [ii])<sup>53</sup>. It is, however, not absolutely clear what is meant by "intentional". Does it refer to the traditional use of "intent"<sup>53</sup> – as *dolus (Vorsatz)*<sup>54</sup> – including knowledge (*Wissen*) and

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UNITED NATIONS DOCUMENTS AND DRAFT ICC STATUTE BEFORE THE DIPLOMATIC CONFERENCE 7 (1998), article 23 para. 7 (e) (ii).

<sup>48</sup> See, for example, V. Pella, *Mémorandum*, (1950) 2 Y.B.I.L.C. 278-362, 357; J. Graven, *Les Crimes contre l'Humanité*, RECUEIL DES COURS DE L'ACADÉMIE 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 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 193-217, 213 (1954); recently: 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). 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 ((1990) 2 Y.B.I.L.C., Part 1, p. 16, para. 66).

<sup>49</sup> (1991) 2 Y.B.I.L.C., Part 2, p. 99 (commentary to article 3).

<sup>50</sup> Report of the ILC (1996), *supra* note 4, article 2 para. 3 (e).

<sup>51</sup> *Prosecutor v. Furundzija*, *supra* note 31, para. 216; see also para. 249.

<sup>52</sup> See margin No. 19.

<sup>53</sup> W.R. LaFave/A.W. Scott, SUBSTANTIVE CRIMINAL LAW § 3.5., 302-3 (Vol. 1 1986).

<sup>54</sup> Cf. G. Fletcher, *supra* note 6, 112.

intention or purpose (*Wollen*) or is it limited to the latter, *i.e.*, the first degree *dolus directus*<sup>55</sup>? This view seems to be supported by the Spanish version ("intencional") since Spanish doctrine, based on German thinking, starts from the general concept of *dolus* (see article 10 of the 1995 Codigo Penal: "dolosas") and reserves the notion of "intención" or "intencional" for the "delitos de intención" or the first degree *dolus directus*<sup>56</sup>. The French version ("intentionnelle"), however, does not support this restrictive interpretation since in French thinking<sup>57</sup> "l'intention" consists of two elements: the foreseeability (element of knowledge) and the wish (element of will) of the criminal result. Thus, although the "faute intentionnelle" 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, "intentionnelle" in this general context is to be understood broadly in the sense of *dolus*. Also the (preliminary) official German translation of this subparagraph reads "vorsätzlich", *i.e.*, refers to *dolus* in its general sense<sup>58</sup>. Further, the ICTY considers that the *mens rea* of participation in a joint criminal enterprise is "intent to participate", *i.e.*, apparently understands intent in the traditional sense<sup>59</sup>.

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* since it is absolutely uncontroversial that genocide requires a *dolus specialis* (specific intention). Consequently, the French version speaks of "l'intention de détruire", the Spanish one of "intención de destruir" and the official German translation of "absichtlich"<sup>60</sup>. 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.

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<sup>55</sup> To avoid confusion this author uses "intent" in the sense of *dolus* in general and "intention" in the sense of first degree *dolus*.

<sup>56</sup> 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, 555 et seq., 561 (4th ed. 1996).

<sup>57</sup> See J. Larguier, DROIT PÉNAL GÉNÉRAL 38, 40 (15th ed. 1995); J.-C. Soyer, MANUEL DROIT PÉNAL ET PROCÉDURE PÉNAL 97 (13th ed. 1997).

<sup>58</sup> 25 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 618, 624 (1998).

<sup>59</sup> See *Prosecutor v. Furundzija*, *supra* note 31, para. 249.

<sup>60</sup> *Supra* note 58.

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

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

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

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

25 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 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 the ICTY<sup>61</sup> 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"**

26 The provision criminalizes direct and public incitement but only with regard to genocide. Identical to article III (c) of the 1948 Genocide Convention<sup>62</sup> 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 crimes. 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 above<sup>63</sup>. 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 general<sup>64</sup>. The ILC rightly

<sup>61</sup> *Prosecutor v. Furundzija*, *supra* note 31, para. 246.

<sup>62</sup> (1951) 78 U.N.T.S. 277. 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).

<sup>63</sup> See margin No. 13.

<sup>64</sup> 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 (*Prosecutor v. Akayesu*, *supra* note 20, para. 481).

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 Code<sup>65</sup>. The ICTR has confirmed the importance of incitement in relation to genocide in the *Akayesu* and *Kambanda* judgements<sup>66</sup>.

To incite "publicly" means that the call for criminal action is communicated to a number of persons in a public place or to members of the general public at large, in particular by using technical means of mass communication such as radio and television<sup>67</sup>. The ICTR considers the place where the incitement occurred and the scope of the assistance as particularly important<sup>68</sup>. 27

To incite "directly" means that another person is concretely urged or specifically provoked to take immediate criminal action; a vague suggestion is not sufficient<sup>69</sup>. There must be a specific causal link between the act of incitement and the main offence<sup>70</sup>. The fulfillment of these requirements may also depend on the "cultural and linguistic" context<sup>71</sup>. What, for example, a Rwandan national understands as a "direct" call to commit a crime might not be understood as such by a German and *vice versa*. The qualifier "direct" brings the concept of incitement even closer to ordinary forms of complicity, such as instigation, solicitation or inducement. Thereby, the concept loses its original purpose, which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes. 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. 28

There still remains one important difference 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 subparagraphs (b) to (d). A person who directly and publicly incites the commission of genocide is punishable for the incitement even if the crime of genocide *per se* is never actually committed<sup>72</sup>. 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"<sup>73</sup>. This view is convincing since the act of incitement is as such sufficiently dangerous and blameworthy to be punished. 29

<sup>65</sup> Report of the ILC (1996), *supra* note 4, pp. 26-7 (para. 16).

<sup>66</sup> *Prosecutor v. Akayesu*, *supra* note 20, paras. 672-5; *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, 4 Sept. 1998, para. 40 (count 3).

<sup>67</sup> *Cf.* Report of the ILC (1996), *supra* note 4, p. 26; *Prosecutor v. Akayesu*, *supra* note 20, para. 556.

<sup>68</sup> *Prosecutor v. Akayesu*, *supra* note 20, para. 556.

<sup>69</sup> *Cf.* Report of the ILC (1996), *supra* note 4, p. 26; *Prosecutor v. Akayesu*, *supra* note 20, para. 557.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, paras. 557-8.

<sup>72</sup> *Cf.* Th. Weigend, 115-116 (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.

<sup>73</sup> *Prosecutor v. Akayesu*, *supra* note 20, paras. 561-2 (562).

- 30 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."<sup>74</sup> In other words, the person who incites must have the specific intention (*dolus specialis*) to destroy, in whole or in part, a protected group him- or herself. According to the ICTR, this requirement also applies to other forms of participation in genocide but not to complicity under article 2 para. 3 (e) ICTR Statute<sup>75</sup>.

(f) attempt

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

- 31 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 offence<sup>76</sup>. Thus, it is not surprising that all ILC Draft Codes contain an attempt provision<sup>77</sup>. The *Rome Statute* correctly follows this view; yet, it does not limit attempt to certain crimes – as proposed by the ILC<sup>78</sup> – but refers to "such a crime", *i.e.*, to any crime within the jurisdiction of the Court (articles 5-8). This is convincing since the Statute only includes the core crimes which are all equally serious<sup>79</sup> so that it would not be justified to admit attempt liability only for some, but not for others.
- 32 Attempt is defined as the commencement of execution (of "such a crime") by means of a substantial step. This definition is a combination of French and American Law<sup>80</sup> 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, the 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

<sup>74</sup> *Ibid.*, para. 560.

<sup>75</sup> *Ibid.*, paras. 485, 540, 546-7.

<sup>76</sup> Cf. O. Triffterer, *Bestandsaufnahme* 232-4.

<sup>77</sup> 1954 Draft Code, article 2 para. 13 (iv); 1991 Draft Code, article 3 para. 3; 1996 Draft Code, article 2 para. 3 (g) (for all *supra* note 4).

<sup>78</sup> 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 ((1986) 2 Y.B.I.L.C., Part 2, p. 49, para. 128; (1990) 1 Y.B.I.L.C. 6, 21, 70; (1990) 2 Y.B.I.L.C., Part 2, p. 16 (para. 71); (1991) 1 Y.B.I.L.C. p. 188; (1991) 2 Y.B.I.L.C., Part 2, p. 99; (1994) 2 Y.B.I.L.C., Part 2, 77, 85 (para. 196); (1994) 1 Y.B.I.L.C. 110, 121, 145 (para. 10)).

<sup>79</sup> See also *Prosecutor v. Akayesu*, *supra* note 20, 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 Second Add. Prot.) "on an equal footing".

<sup>80</sup> 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, Model Penal Code, *supra* note 13, § 5.01 (1) (c): "substantial step" Cf. E. Wise, *Principles* 44; G. Fletcher, *supra* note 6, 171-2.

issue which was not controversial within the ILC when discussing attempt<sup>81</sup>. 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*)<sup>82</sup> 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"<sup>83</sup>. 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"<sup>84</sup>. The Spanish version does not even speak of "commencement of execution" but requires "actos que supongan un paso importante para su ejecución". Thus, in practical terms, there is no difference between "commencement of execution" and "immediately proceeding to the accomplishment of the elements of the offence". Still, the latter definition is more precise and gives attempt liability *by its wording* much more weight since it is – at least theoretically – clearly distinguishable from liability for a complete crime<sup>85</sup>.

That "the crime does not occur" already follows from the concept of attempt as a non-completed (inchoate) offence. Further, the non-completion is "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 lacks attempt is a complete *actus reus*, since "the harm is absent"<sup>86</sup>.

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

The possibility of an abandonment was not provided for in the ILC Draft Codes of Crimes<sup>87</sup> but was considered in the Preparatory Committee<sup>88</sup>. It was included in the

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<sup>81</sup> (1986) 2 Y.B.I.L.C., p. 49 (para. 129).

<sup>82</sup> 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).

<sup>83</sup> Report of the ILC (1996), *supra* note 4, p. 27 (para. 17).

<sup>84</sup> Cf. H. Pelletier/J. Perfetti, CODE PÉNAL 1997-1998 20 (10th ed. 1997).

<sup>85</sup> See also article 3 para. 6 of the *Alternative General Part*, prepared by A. Eser/O. Lagody/O. Triffterer (in: O. Triffterer, *Acts* 872-881, <www.iuscrim.mpg.de>) which uses the notion "substantial step" instead of "commencement of execution" since the former is more precise.

<sup>86</sup> G. Fletcher, *supra* note 6, 171.

<sup>87</sup> Similarly, French commentators consider the abandonment as part of the definition of attempt (cf. G. Stefani/G. Levasseur/B. Bouloc, DROIT PÉNAL GÉNÉRAL 203 (16th ed. 1997)).

*Rome Statute* in the last minute upon a Japanese proposal, supported by Germany, Argentina and other like-minded states after informal consultations. This last minute inclusion is necessary since the possibility of abandonment is recognized in all modern legal systems and can, therefore, be truly considered a general principle of international law<sup>89</sup>. It also makes sense in that it creates an incentive for the perpetrator to withdraw from the commission<sup>90</sup>.

35 The formulation is based on the General Part of the updated Siracusa Draft<sup>91</sup> and the US-Model Penal Code<sup>92</sup>. 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.

36 The provision does not address the difficult problems related to abandonment, *e.g.* at what stage of the commission abandonment is still admissible or under which circumstances the abandonment is "voluntarily". 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

37 This paragraph repeats a formulation as old as the codification history of international criminal law<sup>93</sup>. It affirms the parallel validity of the rules of state responsibility, *i.e.*, in particular the rules as embodied in the ILC Draft articles on State Responsibility<sup>94</sup>.

<sup>88</sup> Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.9/Rev.1, p. 22, fn. 12.

<sup>89</sup> Cf. G. Fletcher, RETHINKING CRIMINAL LAW 185 (1978); *id.*, *supra* note 6, 181; J. Pradel, *supra* note 6, 243.

<sup>90</sup> See for the different theoretical justifications of abandonment: G. Fletcher, *supra* note 89, 186 et seq.; H.-H. Jescheck/Th. Weigend, *supra* note 15, 538 et seq.

<sup>91</sup> 1994 ILC Draft Statute for an International Criminal Court with suggested modifications (Updated Siracusa-Draft) (Association Internationale de Droit Pénal (AIDP)/International Institute of Higher Studies in Criminal Sciences (ISISC)/Max Planck Institute for Foreign and International Criminal Law (MPI) et al.), article 33-8 (1996). See also article 3 para. 6 of the *Alternative General Part*, *supra* note 85.

<sup>92</sup> Model Penal Code, *supra* note 13, § 5.01 (4).

<sup>93</sup> See the 1954 Draft Code, article 1; 1991 Draft Code, article 3 para. 1; 1996 Draft Code, article 2 paras. 1, 4 (for all *supra* note 4). See also Th. Weigend, *supra* note 72, 113.

<sup>94</sup> (1980) 2 Y.B.I.L.C., Part 2, 30-34; also in: M. Spinedi/B. Simma, UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 325 (1987).

## C. Special Remarks

### 1. Issues of delimitation

The analysis of paragraph 3, subparagraphs (b) and (c), shows that it is hardly possible to delimitate the different forms of complicity mentioned in these subparagraphs. Thus, it may be sufficient and more reasonable to limit a rule of complicity to inducement and aiding and abetting. It is submitted that these forms of complicity cover any conduct which should entail criminal responsibility. "Ordering" a crime rather belongs to subparagraph (a), *i.e.*, acting through another. 38

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). On the objective level, subparagraphs (c) and (d) are quite similar, the only difference being that (c) is concerned with individual responsibility, (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, subparagraph (d) establishes a considerably higher subjective threshold than subparagraph (c). Again, however, this difference does not matter for liability under subparagraph (c) but only under subparagraph (d). A person who – in accordance with subparagraph (d) – makes an intentional contribution and acts purposely (i) or knowingly (ii) will generally fulfill the subjective requirements of subparagraph (c). Notwithstanding whether intentional is understood as including – apart from intention – also knowledge, a person acting with intention will normally know that his or her acts assist the perpetrator in the commission of the crime; it may be recalled that subparagraph (c) only requires a general awareness that the assistance contributes to "one of a number of crimes"<sup>95</sup>. After all, it is hardly conceivable that a case which entails liability according to subparagraph (d) will not do so according to subparagraph (c). 39

### 2. Complicity after commission

Article 25 does not refer to acts of complicity after the commission of the crime. The ILC only wanted to include such acts within the concept of complicity if they were based on a commonly agreed plan; in the absence of such a plan the person would only be liable pursuant to a distinct offence ("harbouring a criminal")<sup>96</sup>. 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 only entails criminal responsibility 40

<sup>95</sup> *Prosecutor v. Furundzija*, *supra* note 31, para. 246 and also *supra*, margin No. 19.

<sup>96</sup> (1991) 2 Y.B.I.L.C., Part 2, p. 98; (1991) 1 Y.B.I.L.C., p. 188, para. 21 (Mr. Pawlak, chairman of the Drafting Committee). See also: (1990) 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.); Vol. II, Part 2, 12 et seq. (para. 50). *Cf.* also: Model Penal Code, *supra* note 13, § 2.06; Ch. Van den Wyngaert, *Structure* 55-56; Th. Weigend, *supra* note 72, 116-7; O. Triffterer, *Bestandsaufnahme* 228.

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.

- 41 This reasoning also follows from the guilt principle. Accordingly, a participant in a crime can only be liable for his or her own contribution to the crime, regardless of the liability of other participants. This implies that the responsibility of each participant has to be determined individually on the basis of his or her factual contribution to the crime in question. A form of vicarious liability of the accomplice for the principal is excluded<sup>97</sup>. On the contrary, the accomplice is liable only for his or her own contribution to the crime. This contribution determines the scope of attribution and guilt<sup>98</sup>.

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

- 42 The wide range of liability established in article 25 para. 3 is complemented by a specific rule on command and superior responsibility (article 28)<sup>99</sup>. This provision constitutes the classical rule expanding attribution – apart from conspiracy (only included in a modified version in subparagraph (d), see *supra*) and attempt (subparagraph (f)). Article 28 establishes a – in international criminal law unique – responsibility for omission: the superior is punished since he or she failed to prevent his or her subordinates from committing crimes or to punish them for these crimes<sup>100</sup>.

The Rome Conference missed the opportunity to propose a general rule on omission although the final Draft Statute contained a general *actus reus* article<sup>101</sup>. This article was deleted<sup>102</sup>, basically, because it was not possible to reach consensus on the definition of an omission<sup>103</sup>. Further, it was argued that liability for omission based on article 28 and on the crimes themselves may be sufficient<sup>104</sup>. 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 liability<sup>105</sup>.

<sup>97</sup> In American law, however, the doctrine of vicarious liability serves as the basis for the formal equivalence of perpetrators and accomplices (*cf.* G. Fletcher, *supra* note 6, 190 et seq.).

<sup>98</sup> *Cf.* E. Wise, *Principles* 42-3; A. Sereni, *Responsibility* 139. See also: Draft Statute, *supra* note 47, article 23 para. 3: "Criminal responsibility is individual and cannot go beyond the person and the person's possessions."

<sup>99</sup> See W.J. Fenrick, article 28.

<sup>100</sup> See more exactly K. Ambos, *Principles*.

<sup>101</sup> Draft Statute, *supra* note 47, article 28.

<sup>102</sup> U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1 (1998).

<sup>103</sup> But see, for example, articles 33-5 Updated Siracusa Draft, *supra* note 91; article 2 para. 2 *Alternative General Part*, *supra* note 85. For a general rule also E. Wise, *Principles* 48-50.

<sup>104</sup> See W.A. Schabas, *Principles*.

<sup>105</sup> But see, for example, the ICTR's view that aiding and abetting can be committed by omission (*supra* note 38, margin No. 17).