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GENERAL PRINCIPLES OF CRIMINAL LAW IN THE ROME STATUTE

1. INTRODUCTION

More than fifty years after the Nuremberg trials, the international community has established a permanent International Criminal Court (ICC). The dramatic midnight vote in Rome on July 17, 1998, called by the United States of America, overwhelmingly approved the statute for the ICC by 120 votes to seven, with twenty-one abstentions.[1] The vote was a historical breakthrough and the message sent out from Rome is an unequivocal stop to impunity for grave human rights violations.

However, a closer look at the *Rome Statute* brings us quickly back to the world of complex legal technicalities and insufficiencies, a product of the "spirit of compromise" hanging over the diplomatic negotiations at the Food and Agriculture Organization building in Rome. The *Rome Statute* is not a dogmatically refined international model penal and procedural code. It could not be. But it is an attempt to merge the criminal justice systems of more than 150 States into one legal instrument that was more or less acceptable to every delegation present in Rome. This applies to all parts of the *Statute*, but in particular to Part 3, which is entitled "General Principles." For criminal lawyers, the general part is the centre of dogmatic reflections and the starting point for any criminal

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[1] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998), <http://www.un.org/icc>. See, for a general overview: Kai Ambos, *Zur Rechtsgrundlage des neuen Internationalen Strafgerichtshofs*, 111 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT-ZSTW 175 (1999); see also the special issue (4/1998) of the *European Journal of Crime, Criminal Law and Criminal Justice* (EUR. J. CRIME CR. L. CR. J.) and Triffterer (ed), Commentary (1999).

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justice system. Nowadays, this is increasingly the case even for so called common law countries, since recent works take dogmatic considerations more seriously.[2]

The following paper has a limited objective. It describes and critically analyses the general principles of the *Rome Statute* (arts. 22–33). The drafting history of these provisions has been described elsewhere.[3] The analysis can be divided into three parts. First, it is necessary to look at the general principles in the strict sense. In addition to the *nullum crimen* and *nulla poena* principles (arts. 22–24), this category includes some provisions in Part 2 of the *Statute* ("Jurisdiction, Admissibility and Applicable Law"): the *ne bis in idem* rule (art. 20) and the provision on applicable law (art. 21). Second are the norms providing for individual criminal responsibility (arts. 25, 28, 30), provisions which can be further subdivided into objective elements (*actus reus*) and subjective elements (*mens rea*) of individual criminal responsibility. The third category covers defences, in particular the substantive grounds excluding criminal responsibility (arts. 26, 27, 29, 31–33).

Certainly, one could argue for a twofold structure following the traditional offence-defence distinction. In this case, the principles in the strict sense would also be considered defences. However, given that the defences concept includes many different legal doctrines,[4] it appears more convincing to limit the consideration of defences to the procedural defences and the substantive grounds excluding criminal responsibility. This approach goes hand in hand with the decision of the Rome Conference not to use the term "defences" but rather to speak of grounds excluding criminal responsibility.

2. GENERAL PRINCIPLES IN THE STRICT SENSE (ARTS. 20–24)

General principles in the broad sense encompass all the principles and rules included in the general part; *i.e.*, apart from mere principles they

[2] See in particular: GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978); GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998); PAUL ROBINSON, FUNDAMENTALS OF CRIMINAL LAW (1988); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (1995, 2nd ed.). For a structural approach see: PAUL ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW (1997).

[3] William A. Schabas, *General Principles of Criminal Law*, 4 EUR. J. CRIME CR. L. CR. J., pp. 84–112 (1998). See also Claus Kreß, Die Kristallisation eines Allgemeinen Teils des Volterstrafrechts etc., 12 Humanitäres Völkerrecht 4 et seq. (1999).

[4] See Paul Robinson (1997), *supra* note 2, at 11–12.

also address the concrete rules of attribution. The *Rome Statute* does not make this distinction but puts some principles in the strict sense at the beginning of the general principles and two others in Part 2 of the Statute. This unusual arrangement arose during the deliberations of the Preparatory Committee (PrepCom)[5] and was left untouched in Rome.

Article 21 (applicable law) provides for a hierarchy of the applicable law: first, the *Statute*, the Elements of Crimes and the Rules of Procedure and Evidence are to be applied;[6] second, applicable treaties and the principles and rules of international law; failing that, general principles of national laws of States with jurisdiction over the crime, provided that those principles are compatible with international law. Thus, the Court can jump from one source to the next until it finds an applicable rule. In practice, it will often have recourse to the general principles of national law since international criminal law provides no rules in many areas, particularly in the general part.

A defendant can invoke the *ne bis in idem* principle (art. 20)[7] before any national court or the ICC if he or she has already been convicted or acquitted by the ICC with respect to the same conduct which forms the basis of crimes within the jurisdiction of the ICC (art. 20(1), (2)); *i.e.*, genocide, crimes against humanity, war crimes, aggression (arts. 5–8). Exceptionally, however, a person may be tried before the ICC if a national trial has only shielded him or her from criminal responsibility or was not conducted independently or impartially (art. 20(3)). This exception follows from the rule of complementarity (art. 17). Accordingly, a trial before the ICC is only admissible if the State which has jurisdiction is unwilling or unable to prosecute the person concerned. Article 20(3) sets out in essence the principles that are laid down in art. 17(2)(a) and (c) that allow the ICC to exercise jurisdiction even when national courts have judged or are judging the same case. As a consequence, the weakness of art. 20(3) lies in the vagueness of the criteria used by the complementarity principle.[8]

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[5] "Draft Statute for the International Criminal Court," U.N. Doc. A/CONF.183/2/Add.1 (1998), arts. 18–22.

[6] The Elements of Crimes and the Rules of Procedure and Evidence are to be adopted later by the Assembly of States Parties, pursuant to arts. 9 and 51 respectively.

[7] Edward Wise, "General Principles of Criminal Law", 13 *ter* NOUVELLES ETUDES PÉNALES 39, 61–63 (1998).

[8] See, for example: Andreas Zimmermann, *Die Schaffung eines ständigen internationalen Strafgerichtshofs*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 47, 97–99 (1998).

The principle of *nullum crimen* (*sine lege scripta, praevia, certa* and *stricta*) is explicitly laid down in its four different forms[9] (arts. 22, 24): A person can only be punished for an act which was codified in the *Statute* at the time of its commission (*lex scripta*), was committed after its entry into force (*lex praevia*), was defined with sufficient clarity (*lex certa*) and was not extended by analogy (*lex stricta*). The latter principles of certainty and of the prohibition of analogy entail the consequence that ambiguities are to be resolved in favour of the suspect. Further, the principles of written (statute) law (*lex scripta*) and of non-retroactivity (*lex praevia*)[10] give the suspect the right to rely on the law which was codified and valid at the time of commission. In case of a change of the law before the final judgment the law more favourable to the accused has to be applied.

This apparently strict understanding of the *nullum crimen* principle, in particular of the principle of non-retroactivity, has a solid basis in comparative criminal law[11] and is also recognized in international law.[12] However, in international criminal law the principle has, since Nuremberg, been interpreted in a more liberal way.[13] The International Military Tribunal rejected the defence argument that the prosecution of the major war criminals for aggression was an *ex post facto* prosecution, thereby violating the principle of *nullum crimen sine lege praevia* (and *scripta*) since aggression was no offence at the time of its commission by the Nazis. The Nuremberg

9 Claus Roxin, I STRAFRECHT-ALLGEMEINER TEIL 97–99 (1997, 3rd ed.).

10 See also, on jurisdiction *ratione temporis*, art. 11: "1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

11 Claus Roxin, *supra* note 9, at 99–101; Geroge Fletcher (1998), *supra* note 2, at 207; Mauro Catenacci, *Nullum crimen sine lege*, in THE INTERNATIONAL CRIMINAL COURT, COMMENTS ON THE DRAFT STATUTE 159–170 (Flavia Lattanzi, ed., 1998).

12 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 15; European Convention on Human Rights, 213 U.N.T.S. 221, *entered into force* Sep. 3, 1953, art.7; American Convention on Human Rights, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978, art. 9; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), art. 11(2); African Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *entered into force* Oct. 21, 1986, art. 7(2); Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, art. 99; Geneva Convention of August 12, 1949 Relative to the Protection of Civilians, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, arts. 64, 67; Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978, art. 74(4)(c); Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978, art. 6(2)(c).

13 Kai Ambos, *Nuremberg revisited. Das Bundesverfassungsgericht, das Völkerstrafrecht und das Rückwirkungsverbot*, 17 STRAFVERTEIDIGER 39–43 (1997).

tribunal did not follow this positivist interpretation of the principle and rather considered it "a principle of justice": "[t]o assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker *must know* that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[14]

This idea was taken up in the codification efforts of the United Nations that followed Nuremberg. While the Nuremberg Principles[15] and the Draft Code of 1954[16] did not touch this delicate issue, the Draft Codes of 1991 and 1996 basically followed the approach of the International Military Tribunal in 1946. In fact, the Special Rapporteur of the International Law Commission (ILC), Doudou Thiam, made it clear in his fourth report that "the word 'law' [in the *nullum crime sine lege* principle] must be understood in its broadest sense, which includes not only conventional law, but also custom and the general principles of law."[17] Consequently, the ILC's codification of the principle of non-retroactivity maintains and even stresses the possibility of a prosecution "on different legal grounds"; *i.e.*, a prosecution not only based on the Code of Crimes but also on conventional and customary international law.[18] Therefore, art. 10(2) of the 1991 Draft Code[19] and art. 13(2) of the 1996 Draft Code[20] essentially adopted the famous Nuremberg clause that is set out in art. 15(2) of the *International Covenant on Civil and Political Rights* and other human rights instruments.[21] The only substantial difference was that the majority of the ILC

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[14] *France* et al. v. *Göring* et al., (1946) 23 I.M.T. 1, 444 (emphasis added).

[15] "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," *Yearbook . . . 1950*, Vol. II, pp. 374–378.

[16] "Draft Code of Offences Against the Peace and Security of Mankind," *Yearbook . . . 1954*, Vol. II, pp. 151–152 (also *Yearbook . . . 1983*, Vol. I, p. 4; *Yearbook . . . 1953*, Vol. II, p. 11; *Yearbook . . . 1984*, Vol. I, pp. 4–5; *Yearbook . . . 1984*, Vol. II, pp. 2, 8).

[17] Doudou Thiam, "Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind," *Yearbook . . . 1986*, Vol. II, para. 163.

[18] See, for the 1991 Draft Code: *Yearbook . . . 1988*, Vol. II, p. 70; for the 1996 Draft Code: "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," GAOR 51st Session, Supp. No. 10 (A/51/10), at 72, para. 1, 73, para. 5.

[19] "Draft Code of Crimes Against the Peace and Security of Mankind," *Yearbook . . . 1991*, Vol. II, pp. 94–97.

[20] "Draft Code of Crimes Against the Peace and Security of Mankind," U.N. Doc. A/51/332, *supra* note 18; also 18 HUM. RTS L. J. 96 (1997).

[21] International Covenant on Civil and Political Rights, *supra* note 12, art. 15(2): "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." See also: Universal Declaration

rejected the reference to "the general principles of law" as too vague and preferred international or national law as a basis for prosecution.[22] The *Rome Statute* confirms this almost historical discussion about the scope and limits of the *nullum crimen* principle stating that the recognition of the principle "shall not affect the characterization of any conduct as criminal under international law independently of this Statute" (art. 22(3), emphasis added).

Finally, article 23 provides for a very limited *nulla poena* (*sine lege scripta*, *praevia*, *certa* and *stricta*) principle, declaring that a person convicted may only be punished by penalties laid down in the *Statute*. However, given the general nature of the penalties provided for in the *Statute* – imprisonment up to thirty years or life on the one hand, and fine and forfeiture of proceeds on the other (arts. 77–80) – the *nulla poena* principle is only partly complied with. One may argue that articles 77 *et seq*. fulfil the requirements of written law and comply with the principle of non-retroactivity, yet they do certainly not comply with the standards of certainty and strictness of penalties common to national criminal law since they do not specify distinct sanctions depending upon the offences within the jurisdiction of the Court (art. 5–8). Still, the *Rome Statute* goes further than all previous international criminal law documents in specifying penalties at all and, therefore, complies with the *nulla poena* requirement as it is understood in international criminal law.[23]

3. INDIVIDUAL CRIMINAL RESPONSIBILITY (ARTS. 25, 28, 30)

A. Objective Elements of Individual Criminal Responsibility (actus reus)

Basic concepts of individual criminal responsibility are found in subparagraphs 25(3)(a), (b) and (c). The rest of the provision either states the obvious: recognizing individual criminal responsibility (para. 1, 2)

of Human Rights, *supra* note 12, art. 11(2), and European Convention on Human Rights, *supra* note 12, art. 7(2). Note, however, that the principle is not set out in the *nullum crimen* provisions of the American Convention on Human Rights, *supra* note 12, art. 9, and the African Charter of Human and Peoples' Rights, *supra* note 12, art. 8(2).

[22] *Supra* note 18.

[23] See OTTO TRIFFTERER, DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VÖLKERSTRAFRECHTS SEIT NÜRNBERG 139 (1966) (demonstrating that a general norm on penalties is sufficient).

and the parallel validity of the rules of state responsibility (para. 4);[24] or establishing specific forms of participation and/or expansions of attribution: contributing to the commission or attempted commission of a crime by a group, incitement to genocide, attempt (art. 25(3)(d), (e) and (f)). Thus, an individual is responsible for a crime within the jurisdiction of the *Statute* (art. 5–8) if he or she perpetrates, takes part in or attempts a crime according to subparagraphs (a) to (f). This wide range of liability is complemented by a specific rule on command and superior responsibility (art. 28). Taken together, articles 25(3) and 28 contain a complex set of objective rules of individual attribution which can be divided into basic rules of individual criminal responsibility and rules expanding attribution (which may or may not still be characterized as specific forms of participation).

The criminal responsibility of legal or juridical persons was promoted by France.[25] The final proposal presented to the Working Group[26] was limited to private corporations, excluding states and other public and non-profit organizations. 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 basically for several quite convincing reasons. The inclusion of collective liability would deflect 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, it is not even recognized in all major criminal law systems.[27] Consequently, the absence of corporate criminal liability in many States would render the complementary concept unworkable.

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[24] These declarations are as old as the codification history: see the 1954 Draft Code, *supra* note 16, art. 1; 1991 Draft Code, *supra* note 19, arts. 3(1), 1996 Draft Code, *supra* note 20, arts. 2(1), 4. See also Thomas Weigend, *Article 3: Responsibility and Punishment*, in COMMENTARIES ON THE ILC'S 1991 DRAFT CODE 113 (M.C. Bassiouni, ed., 1993).

[25] U.N. Doc. A/CONF.183/C.1/L.3 (1998), art. 23(5), (6). See also Edward Wise, *supra* note 7, at 42; Andrea Sereni, *Individual Criminal Responsibility*, in THE INTERNATIONAL CRIMINAL COURT, COMMENTS ON THE DRAFT STATUTE 145–146 (Flavia Lattanzi, ed., 1998).

[26] U.N. Doc. A/CONF.183/C.1/WGGP/L.5 (1998).

[27] Cf. recently: EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT. EUROPEAN COLLOQUIUM ON INDIVIDUAL, PARTICIATORY AND COLLECTIVE RESPONSIBILITY IN CRIMINAL LAW (A. Eser, B. Huber, K. Cornils, eds., 1998).

1. Basic Rules of Individual Criminal Responsibility

In contrast with the draft codes, subparagraphs 25(3)(a), (b) and (c)[28] seem to distinguish between perpetration (subpara. (a)) and other forms of participation (subparas. (b) and (c)).

a) Forms of Perpetration. Subparagraph (a) clearly 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"). Thus, co-perpetration is no longer included in the complicity concept but recognized as an autonomous form of perpetration. The drafting of subparagraph (a) is not very fortunate. First, direct perpetration is referred to as committing a crime "as an individual". This is confusing because it only seems to repeat the principle of individual responsibility and does not sufficiently stress the importance of the commission by an individual's *own* conduct (acting by himself or herself) without relying on or using another person.[29] The French version ("à titre individuel") is much clearer in this respect. Secondly, subparagraph (a) criminalizes the commission "with" or "through" another person "regardless of whether that other person is criminally responsible." This does not make sense in either case. The perpetration by means presupposes that the person who commits the crime can be used as an instrument or tool (*Werkzeug*) by the indirect perpetrator as the master-mind or "individual in the background" (*Hintermann*).[30] He or she normally is an innocent

[28] For convenience, we reproduce the text of paragraphs (a) to (c) of article 25(3):

"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 . . . "

[29] See Model Penal Code (American Law Institute, 1985, hereinafter MPC), s. 2.06(1): "committed by his own conduct"; Spanish Penal Code (Código Penal, Ley Organica 10/1995, de 23.11.1995, hereinafter SPC), art. 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/bc lc>, hereinafter GPC), § 25 (1): "selbst . . . begeht" ("acting himself"). In French criminal law the "auteur médiat" is not codified, but exceptionally recognized if the direct perpetrator is used as a "simple instrument" (cf. ANNA-KATHERINA CZEPLUCH, TÄTERSCHAFT UND TEILNAHME IM FRANZÖSISCHEN STRAFRECHT 30–33 (1994)).

[30] The translation of the German "Hintermann" into English is a difficult task. The translation as "master-mind" by Emily Silvermann (see Claus Roxin, *The Dogmatic Structure*

agent, not responsible for the criminal act. At common law the perpetrator by means is considered a principal. [31] A common example is the case where the individual agent or instrument acts erroneously or is not culpable because of minor age or a mental defect. Thus, because perpetration by means implies that the person used ("the instrument") is not criminally responsible, the *Statute*'s express recognition of this fact is superfluous. On the other hand, co-perpetration is characterized by a functional division of criminal tasks between the different 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. It is almost unthinkable that one of the co-perpetrators is not criminally responsible. The *Statute*'s references to "that other person" shows a lack of understanding of the concept of co-perpetration. In sum, this reference puts on the same footing concepts which are structurally very different and, therefore, should be dealt with in different paragraphs or sections.[32]

b) Other Forms of Participation. Subparagraphs (b) and (c) contain other forms of participation which themselves, however, establish different degrees of responsibility. Subparagraph (b) refers to a person who *orders*, *solicits* or *induces* the commission or attempt of a crime. Subparagraph (c) codifies *any other assistance* ("aids, abets or otherwise assists . . . including providing the means") in the commission or attempt of a crime "for the purpose of facilitating" it. Generally speaking, participation in the case of subparagraph (b) implies a higher degree of responsibility than in the case of subparagraph (c).

In fact, the forms of participation established in subparagraph (b) are themselves 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(1)(b) in the 1996 Draft Code of Crimes was intended to provide for the criminal responsibility of mid-level officials who order their subordinates to commit crimes.[33] In

of Criminal Liability in the General Part of the Draft Israeli Penal Code, 30 ISRAEL LAW REVIEW 71 (1996)) may omit cases in which the dominance of the "Hintermann" is physical (*e.g.*, by coercion) rather than intellectual.

[31] See comment to MPC, *supra* note 29, s. 2.06.

[32] *Ibid.*; also SPC, *supra* note 26, art. 28; GPC, *supra* note 29, § 25(1) and (2).

[33] "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," *supra* note 18, at 25 (para. 14).

this sense, the first alternative in subparagraph (b) ("[o]rders") complements the command responsibility provision (art. 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. Thus, 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."

Soliciting a crime means, *inter alia*, to command, encourage, request or incite another person to engage in specific conduct to commit it.[34] To induce basically means to influence another person to commit a crime.[35] 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.

Subparagraph (c), as the weakest form of complicity, covers *any act* which contributes to the commission or attempt of a crime. The only limitation is a subjective one as the accomplice must assist "for the purpose of facilitating" the commission. This expression is borrowed from the Model Penal Code (MPC). 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.[36] Otherwise, subparagraph (c) encompasses all forms of complicity which are not covered by subparagraph (b). At first sight, two questions arise. Firstly, 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. Secondly, and more importantly, it has to be asked what the minimum requirements for complicity are. Article 2(3)(d) of the 1996 Draft Code of Crimes 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."[37] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") referred to these criteria in the *Tadić* case and held that the act in question must constitute a direct and substantial contribution

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[34] Black's Law Dictionary 1392 (1990, 6th ed.); MPC, *supra* note 29, s. 5.02(1).

[35] *Ibid*., at 774.

[36] MPC, *supra* note 29, § 2.06.

[37] "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," *supra* note 18, at 24 (para. 10).

to the commission of the crime.[38] "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.[39] However, this does not necessarily require physical presence at the scene of the crime. In *Tadić*, Trial Chamber II followed a broad concept of complicity based on the English "concerned in the killing" theory.[40] In fact, the Chamber did not take the "direct and substantial" criterion very seriously since it included with the concept of aiding and abetting "all acts of assistance by words or acts that lend encouragement or support."[41] Thus, the silence of the *Rome Statute* follows the logic of international jurisprudence that leaves the question open. It remains (still!) a task for future jurisprudence or scholarly writing to develop more concrete guidelines regarding the minimum requirements for complicity. It is fair to say that, at this stage, there is no threshold at all for accomplice liability for international crimes.

The *Rome Statute* does not offer a solution for acts of complicity after the commission of the crime. The International Law Commission only included such acts within the concept of complicity if they were based on a commonly agreed plan; otherwise the person would be liable pursuant to a distinct offense ("harbouring a criminal").[42] The ICTY, however, extended liability also to these acts, even to "all that *naturally results* from the commission of the act in question."[43]

Of course, any participant in a crime can only be liable for his or her own contribution to the crime without regard to the liability of other participants. Although this is not expressly stated in the *Statute*, it follows logically from the guilt principle and the principle of individual criminal responsibility itself. This implies that the responsibility of each participant

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[38] *Prosecutor* v. *Tadic* (Case no. IT-94-1-T), Opinion and Judgment, May 7, 1997, paras. 674, 688–692.

[39] *Ibid.*, para. 688.

[40] *Ibid.*, para. 687: "…not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced." For the "concerned in the killing" doctrine, see: 15 L.R.T.W.C. 49–51; also: *Prosecutor* v. *Tadic*, *supra* note 38, para. 691.

[41] *Prosecutor* v. *Tadic*, *supra* note 38, para. 689.

[42] *Yearbook …1991*, Vol. II (Part 2), p. 98; *Yearbook …1991*, Vol. I, p. 188, para. 21 (Mr. Pawlak, chairman of the Drafting Committee). See also: *Yearbook …1990*, Vol. I, pp. 17, 23, 28, 48; *Yearbook …1990*, Vol. II (Part 1), pp. 28 et seq. (paras. 28 et seq.); *Yearbook …1990*, Vol. II (Part 2), pp. 12 et seq. (para. 50). Cf. also: MPC, *supra* note 26, § 2.06; Christine Van den Wyngaert, *The Structure of the Draft Code and the General Part*, in COMMENTARIES ON THE ILC'S 1991 DRAFT CODE 55–56 (M.C. Bassiouni, ed., 1993); Thomas Weigend, *supra* note 24, at 116–7.

[43] *Prosecutor* v. *Tadić*, *supra* note 38, para. 692 (emphasis added).

has to be determined individually on the basis of his or her factual contribution to the crime in question. This also excludes a form of vicarious liability of the accomplice for the principal. On the contrary, the accomplice is liable for his or her own contribution to the crime. This contribution determines the scope of attribution and guilt.[44]

2. Expansions of Attribution

a) Contribution to a Collective Crime or Its Attempt. Subparagraph (d) of article 25(3)[45] is the most restricted expansion of attribution, criminalizing "any other way" that contributes to the commission or attempt of a crime by a group of persons acting with a common purpose. Apart from the general subjective requirements – to be discussed below – such a contribution has 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. This formulation is based on a recently adopted anti-terrorism convention[46] and presents a compromise with earlier "conspiracy" provisions,[47] which since Nuremberg have been controversial.[48] The 1991 Draft Code held punishable an individual who

[44] Cf. Edward Wise, *supra* note 7, at 42–3; Andrea Sereni, *supra* note 25, 139. See also: "Draft Statute for the International Criminal Court," *supra* note 5, art. 23(3): "Criminal responsibility is individual and cannot go beyond the person and the person's possesions."

[45] "(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."

[46] International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), annex, art. 2(3)(c).

[47] For example: "Draft Statute for the International Criminal Court," *supra* note 5, art. 23(7)(e)(ii).

[48] See, for example, Vespasian Pella, "Mémorandum," *Yearbook . . . 1950*, Vol. II, pp. 278–362, 357; Jean Graven, *Les Crimes contre l'Humanité*, RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 433–605, 502–503 (1950); Hans-Heinrich Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, 66 ZStW 193–217, 213 (1954); recently: Rosemary 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 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 International Law Commission's Special Rapporteur, Doudou Thiam (*Yearbook . . . 1990*, Vol. II, p. 16, para. 66).

"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."[49] The 1996 Draft Code extends to a person who "directly participates in planning or conspiring to commit such a crime which in fact occurs."[50] 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. The *Rome Statute* 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. This, in fact, suppresses the conspiracy concept in favour of another, broad form of complicity similar to the aiding and abetting within the meaning of subparagraph (c).[51] The only difference between subparagraphs (c) and (d) – on an objective level – consists in the object of the contribution: it is in both cases a crime (or an attempt), but in the case of subparagraph (c) it need not be planned and carried out by a group. It is, however, difficult to imagine any situation in which conduct punishable according to subparagraph (d) could not be covered by subparagraph (c). In other words, subparagraph (d) appears – in the light of the broad liability established by subparagraph (c) – simply superfluous.

b) Incitement to Genocide. Subparagraph (e) of article 25(3) criminalizes direct and public incitement but only with regard to genocide. Being identical to article III(c) of the 1948 Genocide Convention[52] 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 (art. 6) in order to make it clear that incitement is not recognized for other crimes. This argument is questionable, however, 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. 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

[49] *Yearbook . . . 1991*, Vol. II, p. 99 (commentary to Art. 3).

[50] *Supra* note 20, art. 2(3)(e).

[51] Similarly, MPC, *supra* note 29, § 2.06, which does not make conspiracy as such a basis of liability but asks for the behaviour charged to constitute complicity.

[52] Convention for the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Raphael Lemkin, *Genocide as a Crime under International Law*. 41 AM. J. INT'L L. 145 (1947); Josef L. Kunz, *The United Nations Convention on Genocide*. 43 AM. J. INT'L L. 732, 738 (1949); Hans-Heinrich Jescheck, *supra* note 48, at 203 et seq.

towards a certain person or group of persons in private while the latter is directed to the public in general. The International Law Commission rightly referred to the use of the mass media to promote the commission of genocide in Rwanda to justify the inclusion of direct and public incitement as subparagraph (f) of art. 2 (3) of the 1996 Draft Code.[53] "Direct" in this context means that another person is concretely urged to take immediate criminal action while it is not sufficient that only a vague suggestion is made.[54] Thus, the qualifier "direct" brings the concept of incitement even closer to ordinary forms of complicity, such as instigation, solicitation or inducement. The concept loses its original purpose, which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes. If an individual urges another individual known to him to take criminal action he has the same control over the actual perpetrator as an instigator or any other accomplice causing a crime. Yet, subparagraph (e) has one big difference compared with 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, in this case genocide. 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.[55]

c) Attempt and Abandonment. Attempts are codified in paragraph (f) of article 25(3).[56] The concept is not limited to certain crimes (as was proposed

[53] "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," *supra* note 18, at 26–7 (para. 16). See also about the importance of incitement in relation to genocide in Rwanda: *Prosecutor* v. *Akayesu* (Case No. ICTR 96-4-T), Judgment, Sept. 2, 1998, paras. 672–675, <http://www.ictr.org/english/judgements/akayesu.html>; *Prosecutor* v. *Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, Sept. 4, 1998, para. 40 (count 3) <http://www.ictr.org/english/judgements/kambanda.html>.

[54] Cf. *ibid.*, at 26.

[55] Cf. Thomas Weigend, *supra* note 24, at 115–116 (regarding the 1991 Draft Code, *supra* note 19, art. 2(3)) distinguishing between soliciting and aiding on the one hand, and inciting and conspiring on the other.

[56] "(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."

within the ILC)[57] but generally defined as the commencement of execution of a certain crime by means of a substantial step. This definition is a combination of French and American law,[58] and was already used in the 1991 Draft Code (art. 3(3)) and the 1996 Draft Code (art. 2(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 no represent a "commencement of execution." In fact, this was the only issue which was not controversial within the ILC when discussing attempt.[59] It is not clear, however, whether the German concept of the commencement of attempt by "immediately proceeding to the accomplishment of the elements of the offence" (*unmittelbares Ansetzen zur Tatbestandsverwirklichung*) falls within the terms of art. 25(3)(f). At first glance, the German concept seems to differ from the "commencement of execution" since in the former case the perpetrator must only be very close to the actual execution of a crime but not have partly executed it. However, the International Law Commission 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."[60] 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."[61] This corresponds to the ILC's definition and means that, 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 gives attempt liability by its wording much more weight

[57] The International Law Commission 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 (*Yearbook . . . 1986*, Vol. II (Part 2), p. 49, para. 128; *Yearbook . . . 1990*, Vol. I, pp. 6, 21, 70; *Yearbook . . . 1990*, Vol. II (Part 2), p. 16 (para. 71); *Yearbook . . . 1991*, Vol. I, p. 188; *Yearbook . . . 1991*, Vol. II (Part 2), p. 99; *Yearbook . . . 1994*, Vol. II (Part 2), pp. 77, 85 (para. 196); *Yearbook . . . 1994*, Vol. I, pp. 110, 121, 145 (para. 10)).

[58] French *Code pénal*, art. 121–5: "commencement d'exécution"; MPC, *supra* note 29, § 5.01 (1) (c): "substantial step." Cf. Edward Wise, *supra* note 7, at 44.

[59] *Yearbook . . . 1986*, Vol. II, p. 49 (para. 129).

[60] "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," *supra* note 18, p. 27 (para. 17).

[61] Cf. HERVÉ PELLETIER, JEAN PERFETTI, CODE PÉNAL 1997–1998 20 (1997, 10th ed.).

since it is – at least theoretically – clearly delimited from liability for a complete crime.

The possibility of an abandonment was not provided for in the ILC Draft Code of Crimes[62] but was considered in the PrepCom.[63] It was included in the *Rome Statute* at the last minute upon a Japanese proposal. The formulation is based on the General Part of the updated Siracusa Draft[64] and rewards the person if he – 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 essential prerequisite of exemption from punishment in case of abandonment is that the perpetrator voluntarily abandons the further execution or prevents the completion of the act. This implies that he or she has given up the criminal purpose. Thus, the specific reference is redundant.

d) Command Responsibility. The long recognized principle of command responsibility is codified in article 28.[65] The provision distinguishes between responsibility of (*de facto*) military commanders (paragraph 1) and civilian superiors (paragraph 2).[66] Previous codifications or drafts,

[62] Similarly, French commentators consider the abandonment as part of the definition of attempt (cf. GASTON STEFANI, GEORGES LEVASSEUR, BERNARD BOULOC, DROIT PÉNAL GÉNÉRAL 203 (1997, 16th ed.)).

[63] "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/Re v.1, p. 22, fn. 12.

[64] 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., 1996), arts. 33–38.

[65] See the decision of the United States Supreme Court in *In re Yamashita*, 327 U.S. 1, 13–14 (1945): "... unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities ..." For further references see Kai Ambos, *Individual Criminal Responsibility in International Criminal Law*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW (G.K. McDonald, O. Swaak Goldman, eds., 1999, forthcoming). Recently, Ann Marie Prévost convincingly demonstrated that the Yamashita precedent was strongly influenced by racial bias of the U.S. against the Japanese (*Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 Hum. Rts Q. 303 (1992)).

[66] For convenience, we reproduce the text of article 28:

"Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and

in particular article 86(2) of Protocol Additional I to the Geneva Conventions,[67] did not make this distinction but rather treated military and civilian superiors equally.[68] The distinction in the *Rome Statute* goes back to a proposal from the United States of America whose fundamental objective was to introduce distinct subjective thresholds for military and civilian responsibility.[69] Accordingly, the military commander would be held liable – in accordance with the recognized standard – for knowledge or negligence ("should have known") but the civilian superior only for knowledge. The high threshold for the latter was not accepted by most delegations taking part in the informal discussions. An informal counter proposal by Argentina, Canada and Germany argued for a negligence standard in both cases.[70] The opposing positions were finally merged, the result of informal consultations chaired by Canada, into a compromise formula which replaced the negligence standard for the civilian superior with the wording "consciously disregarded information which should have (clearly) enabled him or her to conclude in the circumstances of the

control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in para. 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[67] See *supra* note 12. Comp. generally A.P.V. ROGERS, LAW ON THE BATTLEFIELD 138–142 (1996).

[68] Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993), Annex, art. 7(3): "... acts ... committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof" (emphasis added).

[69] U.N. Doc. A/CONF.183/C.1/L.2 (1998).

[70] Proposal by Argentina, Canada and Germany, Jun. 17, 1998 (on file with author).

time that the subordinates were committing or about to commit a crime . . . " The word "clearly" was only inserted later in the official working paper.[71] Subsequently, in a further version, the wording was simplified by stating "consciously disregarded information which clearly indicated that subordinate s were committing or about to commit such crimes."[72]

Given this drafting history it is clear that article 28 establishes a different subjective standard for military and civilian superiors. The question remains, though, as to the extent that the traditional "should have known" standard differs from the new standard for civilian superiors established in article 28 (2) (a). The answer is that this new standard repeats the "wilfully blind" criterion known from common law and war crimes trials.[73] The "wilful blindness" standard presents an exception to the positive knowledge requirement in that the latter is considered satisfied – regarding the existence of a particular fact – "if a person is *aware* of a high *probability* of its existence, *unless* he actually believes that it does not exist."[74] Knowledge is not presumed, though, when what is involved is the result of the defendant's conduct.[75] Wilful blindness and thereby the new standard of article 28(2)(a) stands between knowledge and recklessness. In other words, the provisions require a higher threshold than negligence.[76] Thus, the *Rome Statute* changes the law of command responsibility with regard to civilian superiors and makes it more difficult to prosecute them for a failure to exercise control properly over their superiors. Further, it ignores the recent application of the traditional command responsibility doctrine to civilian superiors.[77]

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71 U.N. Doc. A/CONF.183/C.1/WGGP/L.7 (1998).

72 U.N. Doc. A/CONF.183/C.1/WGGP/L.7/Rev. 1 (1998).

73 See, for example, *R.* v. *Finta* (1990), 92 D.L. R. (4th) 1, 1 O.R. (3d) 183, 98 I.L.R. 520 (Ontario C.A.), at 595 (I.L.R.).

74 See MPC, *supra* note 29, § 2.02 (7) (emphasis added). See also WAYNE R. LAFAVE, AUSTIN W. SCOTT, CRIMINAL LAW I 307-8 (1986).

75 Comment to MPC, *supra* note 29, § 2.02.

76 See also William A. Schabas, *supra* note 3, who sees the new standard as establishing a "full knowledge requirement."

77 See the decisions of the ICTY under Rule 61, Rules of Procedure and Evidence, U.N. Doc. IT/32: *Prosecutor* v. *Nikolic* (Case No. IT-94-2-R 61), Review of Indictment Pursuant to Rule 61, Oct. 20, 1995, para. 24; *Prosecutor* v. *Karadzic and Mladic* (Case Nos. IT-95-5-R 61/IT-95-18-R 61), Review of Indictment Pursuant to Rule 61, July 11, 1996, paras. 42, 65–85; *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), judgement 16 November 1998, par. 333 et seq. See also the recent decisions of the ICTR: *Prosecutor* v. *Jean Kambanda*, *supra* note 53, para 40; *Prosecutor* v. *Akayesu*, *supra* note 53, para. 487–91 where, however, it is stated that command responsibility of civilians "remains contentious" (para. 491).

In a way, the *Rome Statute*'s restriction of command responsibility, at least in the case of civilians, is the result of certain dogmatic inconsistencies of this doctrine. First of all, it is doubtful whether negligence – still sufficient for (*de facto*) military commanders – can be logically construed with respect to the commission of intent or even special intent crimes. How, for example, can a military commander negligently commit a crime against humanity which requires, apart from the general *mens rea* (art. 30, see *infra*), a specific knowledge regarding the commission "as part of a widespread or systematic attack" (art. 7)? How can he or she have a genocidal intent to destroy (art. 6) if he does not even know that his or her subordinates are committing the crime? Professor William A. Schabas has rightly stated that "logically, it is impossible to commit a crime of intent by negligence."[78] Insofar, the new standard for civilian superiors seems to show a way out of a logical impasse.

Secondly, it must be stressed that command responsibility establishes liability for omission.[79] The superior is punished because of his or her lack of control of the subordinates and a failure to prevent or repress their commission of atrocities. Certainly, the superior is only responsible in case of effective authority and control – this is especially so in the case of the civilian superior (art. 28(2)(b))[80] – and only if he or she failed to take all necessary and reasonable measures; yet, the superior is still conceptually liable for an omission, for doing nothing to prevent the atrocities committed by his or her troops, and fundamentally for losing control over the troops in the field if it was possible to retain control. Such a liability for omission is unique in international criminal law. The *Rome Statute* confirms this rule since a general provision on act and/or omission[81] was deleted[82] based on the argument that only article 28 creates and should create liability for omission.[83] However, such liability for a non-act stands and falls – on an objective level – with the effective authority and control of the superior; the possibility of control forms the legal and legitimate basis of the superior's responsibility, it justifies his or her duty of intervention (*Garantenpflicht*) and, finally, it implies the moral equivalence between the failure to prevent harm and the active causation of harm.

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78 William A. Schabas, *supra* note 3. Critically also: Edward Wise, *supra* note 7, at 46.

79 See the critical discussion by George Fletcher (1998), *supra* note 2, at 45–50.

80 Article 28(2)(b) is redundant since it only repeats the *effective* control requirement already mentioned in the first phrase of subparagraph 2.

81 "Draft Statute for the International Criminal Court," *supra* note 5, art. 28.

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

83 Edward Wise, *supra* note 7, at 48–50, argues for a general norm on omission.

Nevertheless, in those cases where the legitimacy of command responsibility can hardly be questioned – in the case of positive knowledge of the superior – the delimitation between liability for omission (command responsibility) and acting as an accomplice (complicity) is vague. Apart from the structural similarities between these two forms of derivative liability,[84] evidence in war crimes trials normally permits conclusions in both directions. A superior who has knowledge of atrocities of his or her troops can be held responsible as an accomplice (aiding and abetting) by, at least psychologically, encouraging and supporting the troops; or the superior can be held responsible by means of command responsibility for failure to prevent the atrocities. In fact, the Rule 61[85] decisions of the ICTY have used both forms of liability. For example, Karadzić and Mladić were deemed responsible for the planning of genocide and for the failure to prevent this and other crimes as commanders.[86] Such parallel liability may be confusing,[87] but it is a consequence of the recognition of command responsibility. The apparent contradiction may be reconciled by arguing for a prevalence of liability for acts over liability for omission (principle of subsidiarity) if the different forms of conduct in question are temporarily and subjectively interrelated.[88]

B. Subjective Elements of Individual Criminal Responsibility (mens rea)

Apart from the specific subjective requirements already mentioned, article 30 requires that the material elements of a crime within the jurisdiction of the Court are committed with intent and knowledge.[89] The formula "[u]nless otherwise provided" recognizes exceptions, in particular the

84 Comp. George Fletcher (1978), *supra* note 2, at 582–583.

85 Rules of Procedure and Evidence, *supra* note 77.

86 *Prosecutor* v. *Karadzic and Mladic*, *supra* note 77, paras. 84, 94.

87 William A. Schabas, *supra* note 3, fn. 133.

88 Such a prevalence is implied in *Prosecutor* v. *Karadzić and Mladić*, *supra* note 77, para. 83: "The evidence and testimony rendered all concur in demonstrating that Radovan Karadzić and Ratko Mladić would not only have been informed of the crimes allegedly committed under their authority, but also and, *in particular*, that they exercised their power in order *to plan, instigate, order or otherwise aid and abet in the planing, preparation or execution of the said crimes*." (emphasis added).

89 "Article 30. Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

lower thresholds in the case of article 28 (command responsibility). The 1996 Draft Code did not provide for such an exception and conflicted, therefore, with lower subjective thresholds in some offences.[90] Allain and Jones have pointed out, for example, that the "wantonly" requirement in the grave breaches provisions of the Geneva Conventions[91] (art. 8(2)(a)(iv)) of the *Rome Statute* corresponds to "recklessly" rather than to "intentionally" and therefore is a lower threshold.[92] Thus, the "[u]nless otherwise provided" formula is a necessary caveat.

The question remains, though, whether article 30 excludes *per definitionem* any lower threshold than intent and knowledge. According to paragraph 2, *intent* means that a person means to engage in a certain *conduct* or means to cause a certain consequence or is aware that it will occur in the ordinary course of events. Does this definition, as meant by the drafters, exclude any lower threshold? Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted.[93] The same applies for the higher threshold of *dolus eventualis*: this is a kind of "conditional intent" by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness.[94] The perpetrator may be indifferent to the result or be "reconciled" with the harm as a possible cost of attaining his or her goal (*sich mit der Rechtsgutsverletzung abfinden*).[95] However, the perpetrator is not, as required by article 30(2)(b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of article 30 hardly

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

90 *Supra* note 20, art. 2(3)(a).

91 For example, Geneva Convention of August 12, 1949 Relative to the Protection of Civilians, *supra* note 12, art. 147.

92 John Allain, John R.W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*, 8 EUR. J. INT'L L. 100, 106 (1997).

93 See "Draft Statute for the International Criminal Court," *supra* note 5, art. 29(4). A consensus on a common definition could not be reached.

94 Recklessness stands between *dolus eventualis* and conscious negligence ("bewußte Fahrlässigkeit"). See Thomas Weigend, *Zwischen Vorsatz und Fahrlässigkeit*, 93 ZStW 657, 673 et seq. (1981).

95 Comp. George Fletcher (1978), *supra* note 2, at 446, and George Fletcher (1998), *supra* note 2, at 123. For the various theories in German scholarship see Claus Roxin, *supra* note 9, at 372–400.

leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of "indirect intent."[96]

Finally, there is a terminological point. Being aware means that the perpetrator knows that the harmful result will occur and belongs to the knowledge requirement. In fact, article 30 (3) defines knowledge as meaning "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." This shows that article 30 ignores the difference between "intent" and "knowledge" and mixes up two different categories of conduct characterized in German doctrine as knowing and wanting (*Wissen und Wollen*).[97] Also modern common law distinguishes between "purpose," "knowledge," "recklessness" and "negligence."[98]

4. DEFENCES, IN PARTICULAR GROUNDS EXCLUDING CRIMINAL RESPONSIBILITY (ARTS. 26, 27, 29, 31–33)

For the purposes of our analysis, a distinction is made between procedural defences (arts. 26, 27, 29), general grounds excluding responsibility (paras. (a) and (b) of art. 31 (1)) and grounds of justification and excuse (arts. 31 (1) (c) and (d), 32 and 33).

A. Procedural Defences

Article 26 provides for a jurisdictional solution regarding the age of responsibility since a consensus on the age of responsibility was not possible. The proposals ranged from 13 to 21 years. Now the Court simply has no jurisdiction over persons who were under 18 years at the time of commission.

Official capacity, invoked by a Head of State or person in some other public position, is excluded as a defence or as a ground for mitigation of punishment by article 27.[99] Nor can immunities or other procedural

[96] But comp. Edward Wise, *supra* note 7, at 52–54, who offers a definition which includes *dolus eventualis* but excludes recklessness.

[97] Similarly Edward Wise, *supra* note 7, at 51.

[98] Comp. MPC, *supra* note 29, § 2.02.

[99] "Article 27. Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

rules be considered as procedural obstacles. This is one of the few provisions which has survived since Nuremberg without being substantially amended or challenged.[100] One of the few issues under discussion during the codification efforts since the Second World War has been whether the rule extends to all public officials, from the very top to the bottom. The 1948 *Genocide Convention* limited the rule to "constitutionally responsible rulers" taking into consideration national immunity rules;[101] on the other hand, it was controversial whether "public officials" also included elected members of parliament.[102] The ILC Draft Codes of 1991 (art. 13) and 1996 (art. 7) extended the provision to heads of state, ministers and public officials, although the 1954 Draft Code (art. 3) did not yet clearly include ministers.[103] On the other hand, initially the ILC did not want to exclude the possibility of mitigation of punishment explicitly: a proposal by the rapporteur[104] was rejected during deliberations on the 1954 Draft Code.[105] The decision was to be left to the court. This position was maintained in the 1991 Draft Code, but the 1996 Draft Code (art. 7) excluded any mitigation of punishment. The ILC, however, did not consider it necessary to exclude procedural immunity explicitly. Its exclusion was considered a logical corollary to the lack of substantive immunity.[106] All of these outstanding issues are addressed in article 27 of the *Rome Statute*, where they

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[100] See: Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), *adopted* Aug. 8, 1945, 82 U.N.T.S. 279, art. 7; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany, art. II(4)(a); "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," *supra* note 15, Principle III; Convention for the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), art. IV; Statute of the International Criminal Tribunal for the former Yugoslavia, *supra* note 67, art. 7(2); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1944), Annex, art. 6(2).

[101] Convention for the Prevention and Punishment of the Crime of Genocide, *ibid.*, art. IV. Crit. Jean Graven, *supra* note 48, at 508 et seq.; ANTONIO PLANZER, LE CRIME DE GÉNOCIDE 136–137 (1956).

[102] See PIETER N. DROST, THE CRIME OF STATE, VOL. 2, GENOCIDE 8, 94 (1959) (proposing the term "agent of state"); see also N. ROBINSON, THE GENOCIDE CONVENTION 70–71 (1960).

[103] D.H.N. Johnson, *The Draft Code of Offences against the Peace and Security of Mankind*, 4 INT'L COMP. L. Q. 462–463 (1955), at 462–3.

[104] Jean Spiropoulos, Report, in *Yearbook . . . 1950*, Vol. II, pp. 253–278, 273.

[105] *Yearbook . . . 1954*, Vol. I, p. 138; *Yearbook . . . 1951*, Vol. II, pp. 51–52.

[106] "Report of the ILC on the work of its forty-eighth session, Jun. 5–Aug. 26, 1996," *supra* note 18, at 41 (para. 6).

are resolved in favour of an unlimited prosecution of perpetrators acting in their official capacity.

Any statutory limitations on the crimes within the jurisdiction of the Court are ruled out by article 29. Such a rule is possible because the Court's jurisdiction is limited to the core crimes set out in articles 5 to 9, namely genocide, war crimes, crimes against humanity and aggression. In former instruments or drafts, a statute of limitations was either not totally excluded or the question was left open due to uncertainty about the crimes to be included in the instrument.[107] Schabas rightly points out that a problem of complementarity could arise if the prosecution of a crime is barred by a national statute of limitations but still possible pursuant to the ICC *Statute*.[108] In such a case, were the ICC to assume jurisdiction, the complementarity rule (art. 17) would be undermined. It may be argued, however, that under current international law no statutory limitations are permitted for the core crimes, and that national legislation has to be amended accordingly. If a State fails to do so, it shows its unwillingness to prosecute the crimes concerned and cannot invoke the principle of complementarity.

B. General Grounds Excluding Responsibility

Subparagraphs (a) and (b) of article 31(1) provide for the exclusion of responsibility based on the capacity or ability to control and assess one's own conduct.[109] There is, however, a fundamental difference between the two provisions which lies in the degree of blameworthiness of the perpetrator: in case of a mental disease or defect (subparagraph (a)), the perpetrator cannot be blamed for his or her unlawful conduct because nor-

[107] The 1991 Draft Code, *supra* note 19, art. 7, excluded a statute of limitations, but the provision was deleted during discussion s on the 1996 Draft Code (*supra* note 20), because it was considered that such a rule should not apply to all crimes provided for in the Code (see *Yearbook . . . 1994*, Vol. II, pp. 80–81 (paras. 147 et seq.); *Yearbook . . . 1994*, Vol. I, p. 146 (para. 16).

[108] William A. Schabas, *supra* note 3.

[109] "1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court."

mally he or she has not caused the disease or defect, or at least not in order to commit a crime without culpability. The perpetrator cannot "appreciate the unlawfulness or nature of his or her conduct" (art. 31(1)(a)) or lacks capacity to control it in accordance with the law because of a defect or disease which lies beyond his or her responsibility. The perpetrator does not know what he or she is doing and, therefore, does not act culpably.[110]

In the case of intoxication (art. 31(1)(b)) the situation is substantially different, because a person takes a free and autonomous decision to drink alcohol and normally knows that this will affect his or her capacity of self-control and appreciation. Starting from this premise, it is understandable that the legal consequences of a state of intoxication are controversial. Most Arab countries, governed by Islamic law, consider the (excessive) use of alcohol as an aggravating factor while western countries, as a consequence of the legalization of alcohol consumption, in principle consider it to be a factor in mitigation or even exclusion of punishment. Thus, consensus at the Rome Conference was only possible at the cost of a footnote stating that "voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes."[111] The field of application of subparagraph (b) is further limited by the adoption of the *actio libera in causa* principle ("unless the person has become voluntarily intoxicated . . . "). The fundamental idea of this principle is to prevent a *mala fide* intoxication; *i.e.*, intoxication with the objective to commit a crime in a state of non-responsibility and later to invoke this state as a ground for excluding responsibility. This principle is generally recognized in both continental and common law[112] and codified in many national codes.[113] However, it is rather difficult to prove that a defendant became voluntarily drunk in order to commit a crime. For this reason, and because voluntary human conduct is involved in getting drunk, the common law does not, in principle, recognize intoxication, at least when it is self-induced, as a full defence,[114] and continental legal systems provide for a specific offence in the case of crimes committed in a state of

110 See also the similar provision of MPC, *supra* note 29, § 4.01.

111 U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 (1998), p. 4, fn. 8.

112 Comp. George Fletcher (1978), *supra* note 2, at 846–847. See also MPC, *supra* note 29, § 2.08 (2), and commentary, at 357.

113 See, for example, Swiss Penal Code, art. 12, Italian Penal Code, art. 92 – most recently – Spanish Penal Code, art. 20, no. 1(2): "El trastorno mental transitorio no eximirá de pena cuando hubiese sido provocado por el sujeto con el propósito de cometer el delito o hubiera previsto o debido prever su comisión."

114 See MPC, *supra* note 29, § 2.08, and commentary at 350 et seq, on the one hand, and § 4.01 on the other. See also George Fletcher (1978), *supra* note 2, at 847–52.

intoxication.[115] This offence is based on negligence (as to the risk of committing a crime while intoxicated) and would, therefore, conflict with the subjective requirements of the crimes within the subject matter jurisdiction of the *Statute* to the extent contemplated by article 28. Yet this shows the position of the Arab States was not at all far-fetched, and that the footnote was well-founded. In fact, if the scope of subparagraph (b) is really limited to "isolated acts constituting war crimes," is it really appropriate for the ICC to concern itself with the prosecution of drunk soldiers committing war crimes, rather than with the sober commanders and civilian superiors usually responsible for the planning and organization of the atrocities.[116]

C. Grounds of Justification and Excuse

The *Statute* recognizes proportional self-defence and defence of others against an imminent and unlawful use of force in subparagraph 31(1)(c).[117] Although it was recognized by the International Law Commission,[118] no detailed codification of this defence previously existed, except in connection with crimes against peace.[119] Most controversial was the inclusion of the defence of property. It was promoted by the United States of America and Israel, the former invoking constitutional provisions and insisting that "the defence of one's home can be perfectly legitimate." The United States proposed an equal treatment of defence of life and physical integrity, on the one hand, and property on the other.[120] The United States position did not find much sympathy, and the final text of subparagraph (c) shows that protection of property is limited to war crimes situations in

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115 See, for example, German Penal Code, § 330: "Whoever intentionally or negligently becomes intoxicated . . . is punishable . . . if while in that intoxicated condition he commits a wrongful act and if by virtue of the intoxication is not responsible . . . " (translation, according to George Fletcher (1978), *supra* note 2, at 847).

116 Even more radical: William A. Schabas, *supra* note 3: "... the provision ... borders on the absurd."

117 "1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: [...]

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph."

118 *Yearbook ... 1994*, Vol. II, p. 84.

119 See 1954 Draft Code, *supra* note 16, art. 2(1), (3).

120 U.N. Doc. A/CONF.183/C.1/WGGP/L.2 (1998).

which this is "essential for the survival of the person or another person" or "essential for accomplishing a military mission."[121] Further limitations, such as those proposed by Germany (reference to property in a separate phrase in order to clarify the difference), were refused by the United States delegation.

The last phrase of subparagraph (c) clarifies the difference between collective and individual self defence.[122] Participation in a collective defensive operation[123] does not in itself exclude criminal responsibility but the person concerned has to have behaved within the limits of individual self defence, as defined in the first phrase of subparagraph (c). Collective self defence is governed by article 51 of the *Charter of the United Nations*.[124]

The defence of duress is set out in subparagraph 31(1)(d). It requires: (1) a threat of imminent death or continuing or imminent serious bodily harm against the person concerned or a third person; (2) a necessary and reasonable reaction to avoid this threat; (3) on the subjective level, the corresponding *dolus* (not intending to cause a greater harm than the one sought to be avoided). This defence has been recognized by the International Law Commission,[125] the *Ad Hoc* Committee of the General Assembly and the PrepCom.[126] The drafting, however, mixes up different concepts relating to duress on the one hand, and necessity on the other.[127] It is now generally recognized that duress refers to lack of freedom of will or choice in the face of an immediate threat,[128] while necessity is based on a choice of evils and the incrimination act is eliminated by the higher legal good protected; necessity justifies a *per se* unlawful act, and is a justification.[129] In the case of duress, on the other hand, such a justification cannot be invoked; it can only be argued that the accused cannot fairly be

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121 Comp. U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add. 1 (1998), pp. 4–5 and U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add. 3 (1998), p. 2.

122 See also *Yearbook . . . 1994*, Vol. II, p. 84 (para. 178); Doudou Thiam, "Twelfth Report," U.N. Doc. A/CN.4/460 (1994), para. 159.

123 Some delegations were of the view that this only applies to lawful defensive operations (U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add. 3 (1998), p. 2, fn. 3).

124 See also the footnote to "accomplishing a military mission" which declares that the use of force by States is governed by the applicable international law (U.N. Doc. A/CONF.183/C.1/WGGP/L. 4/Add. 3 (1998), p. 2, fn. 1).

125 *Yearbook . . . 1994*, Vol. II, p. 87 (paras. 206–207).

126 See the references in William A. Schabas, *supra* note 3.

127 See also: Edward Wise, *supra* note 7, at 57.

128 Cf. PAUL ROBINSON, CRIMINAL LAW DEFENCES II 351 (1994): "relative impairment of the psychological control mechanisms."

129 See MPC, *supra* note 29, § 3.02, comment, at 9: ". . . a principle of necessity . . . affords a general justification for conduct, that would otherwise constitute an offense."

expected to resist the threat. In other words, the underlying rationale of duress is not the pondering of different legal interests but the criterion of *Zumutbarkeit* (could it fairly be expected that the person concerned resisted the threat?).[130] Therefore, duress is an excuse.[131]

Subparagraph (d) uses objective elements of both concepts. The "threat" refers to necessity and duress, while the "necessary and reasonable reaction" refers only to necessity, introducing a new subjective requirement which relates to the choice of evils criterion. Further, the distinction between a threat made by persons and a threat constituted by other circumstances beyond the person's control refers to duress (the former) and necessity (the latter).[132] In sum, the drafting confirms the conceptual vagueness surrounding international criminal law defences.[133] The provision is still an advance, however, in that it recognizes duress as a defence, setting aside the unfortunate jurisprudence of the ICTY.[134] Finally, the ICC will be able to reduce the harm caused by the bad drafting as it

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130 See German Penal Code, § 35, and George Fletcher (1978), *supra* note 2, at 833. See also MPC, *supra* note 29, § 2.09(1), which, however, employs a rather objective criterion ("reasonable firmness").

131 See generally for the (necessary) difference between justification and excuse: A. Eser, *Justification and excuse: A key issue in the concept of crime*, in I RECHTFERTIGUNG UND ENTSCHULDIGUNG. JUSTIFICATION AND EXCUSE 17 (A. Eser, G. Fletcher, eds., 1987); George Fletcher (1978), *supra* note 2, at 759–774; Paul Robinson, *supra* note 128, §§ 24, 25; against the distinction, Kent Greenawalt, *The perplexing borders of justification and excuse*, in I RECHTFERTIGUNG UND ENTSCHULDIGUNG. JUSTIFICATION AND EXCUSE *ibid.*, at 265; and also sceptical: Thomas Husak, *The Serial View of Criminal Law Defenses*, 3 CRIM. L.F. 369 (1992).

132 Cf. A. Eser, "*Defences*" *in War Crime Trials*, 24 ISRAEL Y.B. HUM. RTS. 201–222, 213 (1995).

133 Recently, Christiane Nill-Theobald has tried to develop some general rules ("DEFENCES" BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLANDS UND DER USA (1998)).

134 *Prosecutor* v. *Erdemovic* (IT-96-22-A), Oct. 7, 1997, para. 19, and disposition 4 (see Olivia Swaak-Goldman, *Prosecutor* v. *Erdemovic*, 92 AM. J. INT'L L. 282 (1998)). See in particular – against a defence – the separate vote of McDonald/Vohrah, paras. 59 et seq. (at 66–7, 72, 75, 78, 88). However, Cassese argues much more convincingly in favour of a defence, para. 11 et seq. (at 12, 16–7, 21 et seq., 41 et seq., 49–50). See also, on the decision of the Trial Chamber (in favour of a defence): Sien Ho Yee, *The Erdemovic Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GEORGIA JOURNAL OF INT'L & COMP. L. 263, 295–302 (1997). Against duress (or necessity) as a defense to murder or genocide see YORAM DINSTEIN, THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW 80 (1965); Yoram Dinstein, *International criminal law*, 20 ISRAEL L. REV. 206, 235 (1985); followed by Enrico Mezzetti, *Grounds for excluding criminal responsibility*, in THE INTERNATIONAL CRIMINAL COURT, COMMENTS ON THE DRAFT STATUTE 147–157, 152–153 (Flavia Lattanzi, ed., 1998).

"shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it" (art. 31 (2)).

The solution provided for in article 32, concerning mistake of fact or law, is based on the traditional common law understanding that a mistake is only admissible if it is the negation of *mens rea*. Thus, a mistake of fact normally excludes criminal responsibility while a mistake of law does so only exceptionally, since only the former negates *mens rea*.[135] Mistake of law is only explicitly recognized in the case of an erroneous assessment regarding the lawfulness of an order (art. 33(1)(b), see *infra*). Thus, the *Statute* follows the *error iuris nocet* doctrine. But it does not cover all possible cases where, for considerations of justice, error ought to be taken into account as a defence. Article 33 is similar to § 2.04 Model Penal Code (MPC) in that if focusses on the mental element as the determining factor of the relevance or irrelevance of a mistake. It is, however, narrower than the MPC's provision since it recognizes a mistaken belief in the legality of one's conduct only in the case of a superior order and not, as is the case in § 2.04 (3) MPC, in the case of ignorance of statute law or of acting in reasonable reliance upon official statements of the law. Although the MPC follows a practical, non-principled approach,[136] it recognizes at least that the reference to the mental element does not cover all possible cases. Nevertheless, both the MPC and the *Rome Statute* fall short, in that they do not contemplate all possible mistakes and thus do not allow the judges to find dogmatically correct and just solutions. Given the limited space of this article it is not possible to expand upon all possible situations where a mistake can be of relevance;[137] one recent and historical case should suffice as an example. In *Erdemovic*, the defendant pleaded guilty but at the same time invoked the defence of duress.[138] As already mentioned, the Appeals

[135] Wayne R. LaFave, Austin W. Scott, *supra* note 71, at 575 et seq.; JOHN SMITH, BRIAN HOGAN, CRIMINAL LAW 83 et seq. (1996, 8th. ed.); see also Jens WATZEK, RECHTFERTIGUNG UND ENTSCHULDIGUNG IM ENGLISCHEN STRAFRECHT 275 et seq. (1997).

[136] See George Fletcher (1998) *supra* note 2, pp. 153–4.

[137] But see George Flectcher, *id.*, at 146–167, who convincingly demonstrates, distinguishing between six forms of mistake, that the MPC, *supra* note 29, fails to recognize mistakes not covered by the mental element criterion, in particular mistakes about norms of justification ("Erlaubnisirrtum") or excuse ("direkter" or "indirekter Verbotsirrtum"). For the extensive German scholarship on the subject, see for example Claus Roxin, *supra* note 9, §§ 12 II, 21; KRISTIAN KÜHL, STRAFRECHT. ALLGEMEINER TEIL § 13 (1997, 2nd ed.). See also the correct critical observations of Edward Wise, *supra* note 7, at 54–55.

[138] Erdemovic said: "Your honour – I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my

Chamber rejected this defence for general considerations.[139] The correct solution would have been to examine whether Erdemovic objectively acted in a situation of duress; if this was not the case, the defendant could still have *believed* he was acting under duress. Such an error with respect to an excuse[140] would be irrelevant according to article 33 of the *Rome Statute* because it does not negate the *mens rea* of Erdemovic concerning the crime he committed. Yet such an error can eliminate the blameworthiness or culpability of the conduct in question, as does every excuse (*e.g.*, insanity). The underlying question, then, is, whether it is just to punish a defendant who believes himself or herself to have acted in accordance with the ethical requirements (blameworthiness!) of the law. Certainly, this specific example suffers from the controversial classification and recognition of duress as a relevant excuse. The argument is much more evident with norms of justification. If, for example, an accused believes, mistakenly, to have acted in self-defence, necessity or on the basis of the consent of the victim, the individual believes he or she has acted in accordance with the law. Can such a person only be exempted from punishment if, as a consequence of the mistake, he or she acted without *mens rea*? Would it be just to convict the accused despite such an error? It seems to be clear from this and other cases and it is generally accepted in contemporary doctrine that the *error iuris* rule cannot be applied without exceptions. This is even more evident in international criminal law where the criminality is circumscribed by such a complex set of vaguely codified offences (arts. 5–9, *Rome Statute*) making even a mistake about the existence of a prohibition more than possible.[141] It would appear that the ICC will have to have recourse to general principles of national law (art. 21(1)(c)) because article 32 does not cover all possible cases.

The provision concerning superior orders, set out in article 33, was one of the most controversial provisions of Part 3. The United States delegation, assisted by Professor Theodor Meron, sought to convince other major delegations in an informal meeting that acting on superior orders has been recognized as a substantive defence in international law. This position was supported by a reference to current United States military doctrine and a statement by Meron putting the Nuremberg precedent in a historical context. The United States position was particularly criticized by the United Kingdom, New Zealand and Germany, which argued that superior orders

family, my wife and son who then had nine months, and I could not refuse because than they would have killed me."(Prosecutor v. *Erdemovic* (IT-96-22-T), Nov. 29, 1996, para. 10).

139 See *supra* note 134.

140 Duress is an excuse: see *supra* note 131 and main text.

141 See recently also Christiane Nill-Theobald, *supra* note 133, at 347–8.

per se cannot be considered a defence but that a subordinate in a given case may invoke other defences, such as duress and mistake of fact or law. The adopted provision is a compromise formula between these two positions. It attempts to affirm the principle that superior orders is not a defence, although it can, exceptionally, be invoked in cases of war crimes under strictly limited conditions. The provision follows the "manifest illegality principle"[142] while current international law rather tends to the "*mens rea* principle,"[143] rejecting superior orders as a defence *per se*.[144] While earlier doctrines are overwhelmingly rejected today,[145] there is still an exciting controversy going on between the two principles mentioned. Certainly both can rely on convincing arguments (although the practical difference is difficult to establish).[146]

It follows from this controversy that there are cases in which a subordinate acting on the basis of superior orders does not deserve punishment. The most recent example is the case of Erdemovic. The only question is if, in such cases, a defence (*per se*) of superior orders is necessary or not. It is argued that the order forms only a factual element of another defence, namely duress or mistake of fact or law, and that this defence may help the subordinate. This seems to be the correct view on the basis of a comparison of the legal values involved. The superior orders concept arises from the need to maintain discipline and order within a hierarchical organization. But such objectives are outweighed by the legal values protected through international criminal law, codified in the *Rome Statute*, and the special gravity of the offences involved. In fact, article 33(2) assumes this position with respect to genocide and crimes against humanity, because orders

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142 See MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 440–2, 490–496 (1959); L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 237–8, 243 et seq. (1976); see recently Enrico Mezzetti, *supra* note 134, at 155–7, who, however, seems to ignore the "*mens rea* principle."

143 See Yoram Dinstein, *supra* note 134, pp. 87–90, at 88: "…the fact of obedience to orders constitutes not a defence per se but only a factual element that may be taken into account in conjuntion with the other circumstances of the given case with in the compass of a defence based on a lack of mens rea, that is, mistake of law or fact or compulsion."

144 See most recently the 1996 Draft Code, *supra* note 20, art. 5. See for a thorough analysis of the positive law and the jurisprudence: Christiane Nill-Theobald, *supra* note 133, at 73–107; see also A.P.V. Rogers, *supra* note 67, 143–148; Edward Wise, *supra* note 7, at 58; Kai Ambos, *Aur strafbefreienden Wirkung des 'Handelns Auf Befehl' aus deutscher und völkerstrafrechtlicher Sicht*, JURISTISCHE RUNDSCHAU 221–226, 223 et seq. (1998).

145 For the "respondeat superior" doctrine, on the one hand, and the "absolute liability" doctrine, on the other, see; Christiane Nill-Theobald, *supra* note 133, at 69-72; also Albin Eser, *supra* note 132, at 204, 206–8.

146 Cf. A.P.V. Rogers, *supra* note 67, at 146–8.

to commit such crimes are considered *per se* manifestly unlawful. However, this is not enough. The correct approach was proposed by Professor Edward Wise: "[a] person shall not be exempted from criminal responsibility on the sole ground that the person's conduct was undertaken pursuant to the order . . . of a superior . . . "[147]

Apart from the defences set out in the *Rome Statute*, the Court may also consider other grounds for excluding criminal responsibility than those referred to in article 31(1), in accordance with a procedure to be provided for in the Rules of Procedure and Evidence, where such grounds are derived from applicable law as set forth in article 21 (art. 31(3)).[148]

5. CONCLUSION

This initial analysis of the general principles of the *Rome Statute* shows that further work is necessary in order to develop a sufficiently concrete and differentiated system of rules of attribution in international criminal law. Such work has to start from a solid basis of comparative criminal law but must not lose sight of the fact that international crimes do not follow the same patterns of attribution as crimes under national law. Patterns of international and national criminality can be identified in transnational organized crime. Thus, its rules of attribution may serve as a basis for the development of rules for international crimes.

147 Edward Wise, *supra* note 7, at 58.

148 See also art. 3 (1): "*In addition to other grounds . . .*" (emphasis added).