

Article 25. Individual criminal responsibility / Responsabilité pénale individuelle

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

1. La Cour est compétente à l'égard des personnes physiques en vertu du présent Statut.

2. Quiconque commet un crime relevant de la compétence de la Cour est individuellement responsable et peut être puni conformément au présent Statut.

3. Aux termes du présent Statut, une personne est pénalement responsable et peut être punie pour un crime relevant de la compétence de la Cour si:

- (a) Elle commet un tel crime, que ce soit individuellement, conjointement avec une autre personne ou par l'intermédiaire d'une autre personne, que cette autre personne soit ou non pénalement responsable;
- (b) Elle ordonne, sollicite ou encourage la commission d'un tel crime, dès lors qu'il y a commission ou tentative de commission de ce crime;
- (c) En vue de faciliter la commission d'un tel crime, elle apporte son aide, son concours ou toute autre forme d'assistance à la commission ou à la tentative de commission de ce crime, y compris en fournissant les moyens de cette commission;
- (d) Elle contribue de toute autre manière à la commission ou à la tentative de commission d'un tel crime par un groupe de personnes agissant de concert. Cette contribution doit être intentionnelle et, selon le cas:
 - (i) Viser à faciliter l'activité criminelle ou le dessein criminel du groupe, si cette activité ou ce dessein comporte l'exécution d'un crime relevant de la compétence de la Cour; ou
 - (ii) Être faite en pleine connaissance de l'intention du groupe de commettre ce crime;
- (e) S'agissant du crime de génocide, elle incite directement et publiquement autrui à le commettre;

- (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.
- (f) Elle tente de commettre un tel crime par des actes qui, par leur caractère substantiel, constituent un commencement d'exécution mais sans que le crime soit accompli en raison de circonstances indépendantes de sa volonté. Toutefois, la personne qui abandonne l'effort tendant à commettre le crime ou en empêche de quelque autre façon l'achèvement ne peut être punie en vertu du présent Statut pour sa tentative si elle a complètement et volontairement renoncé au dessein criminel.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.
4. Aucune disposition du présent Statut relative à la responsabilité pénale des individus n'affecte la responsabilité des États en droit international.

Introductory comments

The International Criminal Court, like its earlier models at Nuremberg, The Hague, and Arusha, seems targeted at the major criminals responsible for large-scale atrocities, although this focus is more a consequence of prosecutorial policy than normative provisions of the *Rome Statute*. A draft provision applicable only to the crime of aggression limits the scope of article 25 to 'persons in a position effectively to exercise control over or to direct the political or military action of a State'.¹ Nevertheless, the Appeals Chamber has held that the claim that the drafters of the *Statute* meant to confine the scope of prosecutions to the 'most serious' or 'most responsible' perpetrators is unsupported. 'Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly', said the Chamber.²

Most persons accused by the Court will not be the actual perpetrators of the crimes, in a physical sense, and in many legal systems they would be described as 'accomplices'. Early rulings by the Pre-Trial Chambers have endorsed a theoretical paradigm called 'co-perpetration', by which the leaders who control and direct crimes committed through organizations are in fact deemed principal perpetrators. Other forms of criminal responsibility, sometimes called 'accessory liability' and set out in article 25(3)(b), (c) and (d), are reserved both for secondary participation in a substantive sense but also, it would seem, secondary participants in an organizational sense.

Drafting of the provision

As with most other components of the general principles set out in the *Rome Statute*, there was essentially nothing about participation in crimes in the draft adopted in 1994 by the International Law Commission. Within the context of its work on the Code of

¹ 'Report of the Special Working Group on the Crime of Aggression', ICC-ASP/7/SWGCA/2, p. 13.

² *Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 79.

Crimes Against the Peace and Security of Mankind, the Commission had considered issues of perpetration, complicity, conspiracy, and attempt.³ A general provision to this effect was adopted as part of the 1991 draft Code.⁴

Relevant issues arose, but only summarily, in the discussions in the *Ad Hoc* Committee about general principles.⁵ Several specific proposals emerged in the early sessions of the Preparatory Committee.⁶ A more comprehensive text emerged for the third session of the Preparatory Committee, in early 1997, submitted by Canada, Germany, the Netherlands, and the United Kingdom. It was described as a submission by an 'informal group representing various legal systems'.

A person is criminally responsible and liable for punishment for a crime defined [in Article 20] [in this Statute] if that person:

- (a) commits such a crime, whether as an individual, jointly with another, or through a person who is not criminally responsible;
- (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) fails to prevent or repress the commission of such a crime in the circumstances set out in Article [referring to command/superior responsibility];
- (d) with intent to facilitate the commission of such a crime, aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;
- (e) either
 - (i) intentionally participates in planning to commit such a crime [which in fact occurs]; or
 - (ii) agrees with another person or persons that such a crime be committed and an overt act is committed by any of these persons that manifests their intent [and such a crime in fact occurs],¹
- (f) directly and publicly incites another individual to commit [such a crime] [genocide], with the intent that such crime be committed;
- (g) with the intent to commit such a crime, attempts to commit that crime by taking action that [is more than merely preparatory towards] [constitutes a substantial step towards] [concludes all necessary steps towards] [commences]

its execution, but that crime does not occur because of circumstances independent of the person's intentions.

¹ In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who 'participates in an organization which aims at the realization of such a crime'.⁷

³ 'Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, paras. 89-145; 'Report of the International Law Commission on the work of its thirty-ninth session, 4 May-17 July 1987', UN Doc. A/42/10, pp. 14-15.

⁴ 'Report of the International Law Commission on the work of its forty-third session', *Yearbook... 1991*, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), pp. 98-99. See also, for the final draft, with its substantial discussion on these issues: 'Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996', UN Doc. A/51/10, pp. 18-22.

⁵ *Ad Hoc* Committee Report, p. 58.

⁶ Preparatory Committee 1996 Report, Vol. II, pp. 81-85; Preparatory Committee 1996 Report, Vol. I, paras. 191-192, 202-203; 'Non Paper Sweden, General Rules of Criminal Law', 4 April 1996; 'Informal Group on General Principles of Criminal Law, Proposed new Part [III bis] for the Statute of an International Criminal Court General principles of Criminal Law', UN Doc. A/AC.249/CRP.13, pp. 4-8.

⁷ 'Working paper submitted by Canada, Germany, Netherlands and the United Kingdom', UN Doc. A/AC.249/1997/WG.2/DP.1. Also: 'Chairman's text', UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2.

This text, which broadly resembles the final version of article 25(3), immediately met with wide support.⁸ After some minor changes, it was incorporated within a broader provision entitled 'individual criminal responsibility' in the final draft adopted by the Preparatory Committee.⁹ Some difficult issues remained however, notably whether to provide for liability of legal entities or corporations, and the treatment of the issue of omission.¹⁰

At the Rome Conference, much of the Preparatory Committee draft, itself derived from the 1997 proposal, was adopted without difficulty. A paragraph dealing with omission was dropped. What became article 25(3)(d), on common purpose responsibility, was reworked in line with a proposal from the Coordinator.¹¹ The provision on attempt was expanded somewhat.¹²

Analysis and interpretation

Article 25, and especially paragraph 3, distinguishes various forms of criminal participation. Like much of the *Rome Statute*, it was a negotiated compromise crafted by jurists from very different legal traditions. Concepts and words in one system did not necessarily have the same connotations as they did in others.

'Commission' under article 25(3)(a) has been described as 'principal liability', while modes of participation punishable pursuant to paragraphs (b), (c) and (d) have been labelled 'accessory liability' or 'accessorial liability'.¹³ This distinction has also been described as 'perpetration' or 'co-perpetration' (art. 25(3)(a)) and 'accomplice' liability.¹⁴ When large-scale atrocities of the kind likely to attract the interest of international criminal tribunals take place, those who bear the greatest responsibility are often several layers removed from the physical perpetrators who actually carry out the killings, rapes, and other acts. Under some approaches to liability, those carrying out the crimes are the principal perpetrators, while those who organize and direct them are accessories or accomplices, responsible under a concept of 'secondary' liability. Yet there is nothing secondary about them. This so-called objective theory of liability has been discarded by Pre-Trial Chambers in favour of one emphasizing 'control over the crime'. It treats the organizer or director as a principal perpetrator or, rather, a 'co-perpetrator'.¹⁵

⁸ 'Chairman's Text, Article B b., c. and d.1, Individual criminal responsibility', UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2; 'Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5.

⁹ Preparatory Committee Draft Statute, pp. 49–50.

¹⁰ Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 199.

¹¹ 'Working paper on article 23, paragraph 7 (e)', UN Doc. A/CONF.183/C.1/WGPP/L3.

¹² 'Report of the Working Group on General Principles of Criminal Law', UN Doc. A/CONF.183/C.1/WGPP/L.4.

¹³ *Lubanga* (ICC-01/04-01/06), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 78; *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 320.

¹⁴ *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 77, fn. 101.

¹⁵ *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras. 480–484; *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 348–350.

Thus, the *Rome Statute*, as interpreted by judges of the Court, distinguishes between principal liability (art. 25(3)(a)) and accessory or secondary liability (art. 25(3)(b), (c) and (d)). It also contemplates two forms of inchoate or incomplete criminality, direct and public incitement to commit genocide (art. 25(4)) and attempt (art. 25(5)). The discussion of commission or participation in crimes within the jurisdiction of the Court is not complete without reference to article 28, where principles of superior responsibility are set out. The Document Containing the Charges (or 'DCC'), which is prepared by the Prosecutor for the purposes of the confirmation hearing, must contain a 'legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28'.¹⁶

Individual criminal responsibility (art. 25(1), (2))

Affirming that the Court has jurisdiction over 'natural persons' is an indirect way of clarifying that the Court does not have jurisdiction over corporate bodies.¹⁷ There are two notable exceptions to the Court's jurisdiction over natural persons: the exclusion of persons under the age of eighteen at the time the crime was committed, something provided for in article 26 of the *Rome Statute*, and of persons who benefit from immunities under customary law.¹⁸

Paragraph 2 of article 25 does not seem to add anything substantive to the *Rome Statute* that is not addressed in other provisions. Crimes within the jurisdiction of the Court are listed in article 5(1), and punishment issues are dealt with in Part 7.

Responsibility of corporations

Many States do not provide for corporate criminal liability in their national legal orders. Were corporations to be included in the personal jurisdiction of the Court, they would automatically find themselves 'unable' to prosecute, in the sense of article 17(1) of the *Rome Statute*. This proved an insurmountable obstacle to consensus on including a provision on corporate criminal liability in the *Rome Statute*.¹⁹ The original draft statute of an International Criminal Court prepared by the International Law Commission and submitted to the United Nations General Assembly in 1994 had not addressed the issue at all.

During the work of the Preparatory Committee, in 1996 and 1997,²⁰ a controversial proposal emerged to provide explicitly for jurisdiction over of legal persons.²¹ Because

¹⁶ Regulations of the Court, Regulation 52(c); *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 317.

¹⁷ Articles 9 and 10 of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex, permitted prosecution of 'a group or organization' and allowed the Tribunal to declare that it was a 'criminal organization'. However, the Security Council did not include criminal organizations or legal persons in the statutes of the *ad hoc* tribunals: see 'Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 51.

¹⁸ This is a matter of some debate, however. See the discussion of immunities in this *Commentary*, art. 27(2).

¹⁹ Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 199.

²⁰ 'Statute of International Court Must Not be Retroactive, Say Speakers in Preparatory Committee', Press Release L/2769, 29 March 1996.

²¹ *Ad Hoc Committee Report*, Annex II, p. 58; Preparatory Committee 1996 Report, Vol. I, para. 194, p. 44; *ibid.* Vol. II, p. 81; UN Doc. A/AC.249/1997/L.5, p. 20; UN Doc. A/AC.249/1997/WG.2/CRP.1; UN Doc. A/AC.249/1998/L.13, pp. 52–53.

many States did not allow for such a form of criminal responsibility in their national law, there were difficult questions concerning the operation of the principle of complementarity. For the complementarity regime of the International Criminal Court to operate fairly, it was believed necessary to find a common denominator of all major criminal justice systems. The draft statute submitted to the Rome Conference contained a provision on legal persons in square brackets, indicating that it was not accepted by consensus:

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]²²

A footnote was appended to these two paragraphs, explaining the difficulty:

There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.²³

Associated with the text was a provision dealing with penalties for legal persons²⁴ and another concerning fines and forfeiture.²⁵ At the final session of the Preparatory Committee, France made a proposal that replaced the notion of 'legal persons' with 'criminal organisations'.²⁶ Although not incorporated in the Preparatory Committee draft, it made its way to the Rome Conference nevertheless.²⁷

A few States offered support without conditions,²⁸ while other delegations were sceptical but would not rule out the French initiative.²⁹ China warned against analogies with Nuremberg:

In references to the Nuremberg Charter and Tribunal, the Tribunal itself, the specific historical background and the special characteristics of those trials should be taken into account. The inclusion in the Charter of provisions whereby the Tribunal would declare an organization criminal and the fact that it had acted on such provisions had not been intended as a means of prosecuting legal persons or organizations as such. It had, rather, been a special procedure according to which the States concerned, acting upon the Tribunal's declaration, had prosecuted and tried individuals belonging to the organizations declared to be criminal. In the Nuremberg trials, those organizations themselves had not been subject to criminal punishment and the charges had been brought on grounds of individual responsibility. It should also be borne in mind that the trials had been conducted by victorious over defeated countries. The Court under discussion would be established against the background of a complex international political situation that differed sharply from the situation prevailing in 1945.³⁰

²² Preparatory Committee Draft Statute, p. 49.

²³ *Ibid.*, fn. 71. ²⁴ *Ibid.*, p. 121. ²⁵ *Ibid.*, p. 155.

²⁶ 'Proposal submitted by France', UN Doc. A/AC.249/1998/DP.14.

²⁷ Where it was resubmitted: 'Proposal submitted by France', UN Doc. A/CONF.183/C.1/L3; UN Doc. A/CONF.183/C.1/SR.1, paras. 32-33.

²⁸ UN Doc. A/CONF.183/C.1/SR.1, paras. 33 (Jordan), 41 (Tunisia).

²⁹ *Ibid.*, paras. 35 (Australia), 37 (Ukraine), 38 (Cuba), 39 (Argentina), 40 (Japan), 42 (Kenya).

³⁰ *Ibid.*, para. 36.

Several delegations did not consider that the French proposal was an improvement over the earlier text, to which they proposed a return.³¹ Indeed, it looked as if France's attempt to reformulate the issue within the framework of criminal organizations had backfired, and it had lost support rather than gaining it. Some delegations bluntly said they were opposed to the whole idea.³² Summing up the discussion in the Committee of the Whole, the Chair politely said that 'the debate confirmed the substantive difficulties involved in addressing the criminal responsibility of criminal organisations'.³³

In an effort to find some middle ground, the Coordinator of the Working Group on General Principles submitted an exceedingly complex 'Working Paper'.³⁴ Several days later, the Coordinator of the Working Group on General Principles reported to the Committee of the Whole that 'all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion. Consequently, the deletion of those paragraphs was noted'.³⁵ This concluded the saga of unsuccessful attempts to introduce some form of jurisdiction over legal persons in the *Rome Statute*.³⁶

Commission by a principal (art. 25(3)(a))

The basic form of criminal liability set out in article 25(3)(a) consists of commission: 'if that person: (a) Commits such a crime ...'. The term 'commission' is said to be synonymous with 'perpetration'.³⁷ Article 58(1)(a), which governs issuance of an arrest warrant, authorizes a Pre-Trial Chamber to proceed where there are reasonable grounds to believe a person has 'committed a crime within the jurisdiction of the Court'. There, 'committed' has a broader meaning; it has been held to cover the gamut of forms of perpetration addressed in article 25 as well as those contemplated by article 28.³⁸

Case law of the International Criminal Court supports a broad approach to the concept of commission, so as to encompass leaders and organizers who do not physically

³¹ UN Doc. A/CONF.183/C.1/SR.1, paras. 45 (Singapore), 52 (Tanzania), 54 (United States).

³² UN Doc. A/CONF.183/C.1/SR.1, paras. 43 (Sweden), 44 (Lebanon), 46 (Mexico), 47 (Thailand), 51 (Venezuela), 55 (Denmark), 56 (Syria), 57 (Greece), 59 (Egypt), 60 (Poland), 61 (Slovenia), 63 (El Salvador), 64 (Yemen), 65 (Iran).

³³ UN Doc. A/CONF.183/C.1/SR.1, para. 66.

³⁴ 'Working paper on article 23, paragraphs 5 and 6', UN Doc. A/CONF.183/C.1/WGPP/L.5/Rev.2.

³⁵ UN Doc. A/CONF.183/C.1/SR.26, para. 10. For academic discussion of the debates leading to the exclusion of corporate bodies, see: Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 199; Kai Ambos, 'General Principles of Law in the Rome Statute', (1999) 10 *CLF* 1, at p. 7; Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Zarifi, eds., *Liability of Multinational Corporations under International Law*, The Hague: Kluwer Law International, 2000, pp.139–195. See also: C. Chiamenti, 'Corporations and the International Criminal Court', in O. De Schutter, ed., *Transnational Corporations and Human Rights*, Oxford: Oxford University Press, 2006, pp. 287–309; J. Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objections Stripped Bare', (2008) 19 *CLF* 115; Jean-Philippe Bufferne, 'La mise en cause de la responsabilité des multinationales devant la Cour pénale internationale', (2005) 2 *Revue juridique d'Auvergne* 127; Anne-Laure Vauris Chaumette, *Les Sujets du droit international pénal, Vers une nouvelle définition de la personnalité juridique internationale?*, Paris: Pedone, 2009.

³⁶ See: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press, 2006, at pp. 244–246.

³⁷ Robert Cryer, Håken Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, at p. 302.

³⁸ *Lubanga* (ICC-01/04-01/06), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 78. See also: *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 320.

perpetrate the criminal acts. Under this 'control over the crime' paradigm, an individual is deemed a co-perpetrator if he or she has 'joint control' as a result of an 'essential contribution' to its commission. Decisions of the Pre-Trial Chambers have used literal and contextual approaches to interpretation in order to reach this result.³⁹ As a result, and because the concept is rooted in interpretation of the provisions of the *Rome Statute*, Pre-Trial Chambers have distinguished 'co-perpetration' from the joint criminal enterprise approach to liability that has become firmly entrenched in the case law of the *ad hoc* tribunals. The International Criminal Court has characterized the approach of the *ad hoc* tribunals as subjective, in that it focuses on the individual state of mind of the accused rather than his or her actual control over the commission of the offence.⁴⁰ Accordingly, 'principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission, because they decide whether and how the offence will be committed'.⁴¹

Thus, according to the case law of the Court, perpetration within the meaning of article 25(3)(a) covers three categories of offenders: those who physically commit the crime (commission of the crime in person or direct perpetration); those who control the will of the physical perpetrators (commission through another person or indirect perpetration); and those who control the offence because of essential tasks assigned to them (commission of the crime jointly, or co-perpetration).⁴² According to Pre-Trial Chamber I, 'the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime'.⁴³ It does not seem to be substantially different from the vision of the District Court of Jerusalem which condemned Eichmann: 'His responsibility is that of a "principal offender" who has committed the entire crime in conjunction with the others'.⁴⁴ Pre-Trial Chamber I has explained that under the co-perpetration theory, 'none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control

³⁹ *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, paras. 334–335. Also: *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 210.

⁴⁰ *Ibid.*, para. 329; also para. 335. Also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras. 506–508. Recognition of the concept of co-perpetration by the Pre-Trial Chamber was welcomed by a judge of the Appeals Chamber of the International Criminal Tribunal for Rwanda (*Gacumbizi* (ICTR-2001-64-A), Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 21, fn. 609). However, the case law of the *ad hoc* tribunals has not been influenced by the positions taken at the International Criminal Court, where the divergence is explained either as a result of differences in the applicable legal texts (see, e.g., *Seromba* (ICTR-2001-66-A), Dissenting Opinion of Judge Liu, 10 March 2008, para. 10) or the questionable notion that the *ad hoc* tribunals apply customary international law whereas the International Criminal Court applies its *Statute*.

⁴¹ *Ibid.*, para. 332. Also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 485.

⁴² *Ibid.*, para. 332. Also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 488; *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 210.

⁴³ *Ibid.*, para. 326. Cited in: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 520.

⁴⁴ *A.-G. Israel v. Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 194.

because each of them could frustrate the commission of the crime by not carrying out his or her task'.⁴⁵ There must be an agreement or common plan between two or more persons, although its existence need not be explicit and may be inferred.⁴⁶ According to Pre-Trial Chamber III, 'criminal responsibility under the concept of co-perpetration requires the proof of two objective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime'.⁴⁷

At the time it issued the arrest warrants in *Ndjugolo* and *Katanga*, Pre-Trial Chamber I requalified the liability of the accused as fitting under paragraph (a) rather than paragraph (d), as had been submitted by the Prosecutor.⁴⁸ Noting that there were reasonable grounds to believe that the accused had played 'an essential role in the implementation of the common plan', and that he was 'aware of his essential role and that such a role gave him joint control over the implementation of the common plan', the Pre-Trial Chamber said it was better to describe this liability under article 25(3)(a).⁴⁹ It concluded: 'In the alternative, the Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo is criminally responsible under article 25(3)(b) of the Statute, as an accessory to the crimes committed by his subordinates during and in the aftermath of the attack'.⁵⁰ The reason for an 'alternative' formulation is that a person cannot be found guilty on the basis of both modes of liability for the same crime.⁵¹

In addition to simple commission, article 25(3)(a) allows for perpetration 'through another person, regardless of whether that other person is criminally responsible'. This mode of criminal liability is well recognized in national legal systems, the classic example being a perpetrator who acts through an individual who, because of young age, cannot incur criminal responsibility.⁵² According to Pre-Trial Chamber I, relying upon the writing of Claus Roxin, this mode of liability may also apply when the 'other person' is not innocent, such as when the accused person acts 'through another' by means of 'control over an organisation'.⁵³

⁴⁵ *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 342; also paras. 346–348. Cited in: *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 212.

⁴⁶ *Ibid.*, paras. 344–345. Also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras. 522–523.

⁴⁷ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 350.

⁴⁸ *Ngudjolo* (ICC-01/04-02/07), Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, para. 55; *Katanga* (ICC-01/04-02/07), Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, para. 54.

⁴⁹ *Ibid.*, paras. 60–61; *Katanga* (ICC-01/04-02/07), Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, paras. 59–60. See also: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras. 574–580.

⁵⁰ *Ibid.*, para. 61; *Katanga* (ICC-01/04-02/07), Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, para. 60.

⁵¹ *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 77, fn. 101; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 471.

⁵² *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 495.

⁵³ *Ibid.*, paras. 499–510.

Much of article 25 is associated with the mental and material elements of crimes. The mental element (or *mens rea*) is dealt with in article 30 of the *Statute*. But there is no equivalent provision on the material element (or *actus reus*). During the Preparatory Committee sessions, there were proposals to define the *actus reus* of crimes within the jurisdiction of the Court. This, in turn, provoked debate about the role of omission.⁵⁴ On both issues, *actus reus* and omission, it proved too difficult to reach a consensus. Obviously, omission is at the heart of the concept of superior responsibility, which is addressed in article 28. No more general principle can be divined from the *Statute*. This does not mean that in specific circumstances, probably largely dependent upon the position of authority of the accused person, failure to act may amount to more than a violation of article 28, and may indeed be prosecuted under the provisions of article 25. Although mere presence at the scene of a crime, in the absence of a material act or omission, does not constitute criminal participation, where the accused has a legal duty to intervene, mere presence may constitute a form of participation.⁵⁵ Case law of the *ad hoc* tribunals holds that 'commission by omission requires an elevated degree of "concrete influence"', in contrast with aiding and abetting by omission, where a 'substantial effect' upon the perpetration of the crime must be established.⁵⁶

Accessory or secondary liability (art. 25(3)(b), (c), (d))

Virtually all criminal law systems punish those who participate in criminal offences, even if they are not the 'principal' offenders.⁵⁷ The responsibility of accomplices was recognized in the Nuremberg Charter and in subsequent instruments of international criminal law.⁵⁸ Indeed, those convicted at Nuremberg were generally held responsible as accomplices rather than as principals in the crimes that were committed.⁵⁹ Even in the absence of a text, responsibility of accessories can be derived from general principles. According to a United States Military Commission, '[t]his is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.'⁶⁰ The Trial Chamber

⁵⁴ E.g., 'Chairman's text, article G1, Actus reus (act and/or omission)', UN Doc. A/AC.249/1997/WG.2/CRP.5; 'Acts of Omission, Negligence, Conspiracy Resulting in Crimes discussed by Preparatory Committee for International Criminal Court', Press Release L/2770, 29 March 1996.

⁵⁵ *Orić* (IT-03-68-A), Judgment, 3 July 2008, para. 43; *Ntagerura* (ICTR-99-46-A), Judgment, 7 July 2006, paras 334, 370.

⁵⁶ *Ibid.*, para. 156.

⁵⁷ *United Kingdom v. Schonfeld et al.*, (1948) 11 LRTWC 64 (British Military Court), at pp. 69–70; *United Kingdom v. Golke et al.*, (1948) 5 LRTWC 45 (British Military Court), at p. 53.

⁵⁸ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex, art. 6 *in fine*: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' See also: Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/1316, Principle VII, declaring that '[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in principle VI is a crime under international law'.

⁵⁹ *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, 41 AJIL 172. In *Tadić* (IT-94-1-AR72), Opinion and Judgment, 7 May 1997, at para. 674. According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, the post-Second World War judgment generally failed to discuss in detail the criteria upon which guilt was determined.

⁶⁰ *United States of America v. Alstötter et al.* ('Justice trial'), (1948) 3 TWC. 1, 6 LRTWC 1, 14 ILR 278, p. 62 (TWC).

of the International Criminal Tribunal for the former Yugoslavia has stated that there is a customary law basis for the criminalization of accessories or participants.⁶¹

Characterizing those who do not physically commit the crime as 'accomplices', however, fails to capture the significance of their role. The District Court of Jerusalem, in the *Eichmann* case, considered the accused to be a principal offender, 'in the same way as two or more persons who collaborate in forging a document are all principal offenders'.⁶² For this reason, decisions of the International Criminal Court have preferred the doctrine of co-perpetration and applied article 25(3)(a). The consequence has been to diminish the significance of the complicity provisions – paragraphs (b), (c) and (d) – quite considerably, as discussed above.

Article 25(3)(b) lists ordering, soliciting, and inducing as secondary or accessory liability. Paragraph (c) covers those who aid, abet, or otherwise assist in the perpetration of a crime. The terms in paragraph (b) seem to be drawn from continental models, whereas those of paragraph (c) belong to the common law. In practice, the two paragraphs overlap very considerably. They should not be viewed as two different or distinct bases of liability, but rather as an effort to codify exhaustively various forms of complicity by drawing upon concepts familiar to jurists from different legal traditions. Such an interpretation finds some support in the drafting history. The text of these two paragraphs was proposed early in the sessions of the Preparatory Committee, by an 'informal group representing various legal systems', and remained unchanged and untouched subsequently.⁶³ As a result, there is nothing in the *travaux* to assist in construing the specific language, but this also tends to indicate that sophisticated deconstruction of these terms will yield little of interest. Probably, the International Criminal Court will view the texts as an attempt to cover complicity generally. Judges at the *ad hoc* tribunals have behaved in this manner, reading in forms of criminal participation not explicitly described in their statutes.⁶⁴

Aside from the terms describing forms of complicity used in paragraphs (b) and (c), each of the two provisions also includes additional elements. Thus, paragraph (b) requires that the crime 'in fact occurs or is attempted'. On the other hand, paragraph (c) speaks of 'its commission or its attempted commission'. Although the language is formulated differently, these requirements seem to be equivalent. The underlying crime for which the accomplice is charged must either be committed or attempted. Commission is addressed in article 25(3)(a), while attempt is covered by article 25(3)(f). Nevertheless, according to case law of the *ad hoc* tribunals, 'assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal'.⁶⁵ The principal perpetrator need not be charged or convicted for the liability of the accomplice to be established.

⁶¹ *Tadić* (IT-94-1-AR72), Opinion and Judgment, 7 May 1997, paras. 666, 669. The Trial Chamber provided several examples of post-Second World War cases to support its assertion: *France v. Wagner et al.*, (1948) 3 LRTWC 23 (Permanent Military Tribunal at Strasbourg), at pp. 24, 40–42, 94–95; *Martin Weiss et al.*, (1948) 11 LRTWC 5 (General Military Government Court of the United States Zone); 'Netherlands Law Concerning Trials of War Criminals', (1948) 11 LRTWC 86, at pp. 97–98; 'Digest of Laws and Cases', (1949) 15 LRTWC 1, at p. 89; *United Kingdom v. Sandrock*, (1947) 1 LRTWC 35 (British Military Court).

⁶² *A.-G. Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 194.

⁶³ 'Working paper submitted by Canada, Germany, Netherlands and the United Kingdom', UN Doc. A/AC.249/1997/WG.2/DP.1. Also: 'Chairman's text', UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2.

⁶⁴ *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 193.

⁶⁵ *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para. 209; *Bagilishema* (ICTR-95-1A-T), Judgment, 7 June 2001, para. 33. But see *Bagilishema* (ICTR-95-1A-T), Separate and Dissenting Opinion of Judge Mehmet Güney, 7 June 2001.

In some cases, prosecution may be quite impossible, because the principal offender is dead or has disappeared, or because he or she is unfit to stand trial, or is too young, or is immune from process. According to a Trial Chamber of the International Criminal Tribunal for Rwanda, '[a]s far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven'.⁶⁶

The first specific term, 'orders', is comparable to the term 'ordering' as used in the statutes of the *ad hoc* tribunals.⁶⁷ 'Ordering' has been held to describe the act of a person in a position of authority using that position to convince another to commit an offence.⁶⁸ A Pre-Trial Chamber of the International Criminal Court has noted that this is a different kind of 'ordering' than that of the leader in command of an organization, who commits crimes 'through another person' and thereby incurs liability as a principal perpetrator, under article 25(3)(a).⁶⁹ In other words, '[t]he highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed'.⁷⁰

The case law is divided as to a requirement of a superior-subordinate relationship, or whether it is sufficient to demonstrate that the accused possessed the authority to order.⁷¹ Ordering the commission of an offence is closely related to command or superior responsibility, except that in the case of command or superior responsibility there is no need to prove that an actual order was given or that authority was exercised.⁷² An order may be explicit or implicit, and its existence can be proven through circumstantial evidence.⁷³ It need not be given directly to the person who carries out the act, because '[w]hat is important is the commander's *mens rea*, not that of the subordinate'.⁷⁴ The offender must be aware of the substantial likelihood that a crime will be committed in the execution of that order. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, '[o]rdering with such awareness has to be regarded as accepting that crime'.⁷⁵

There is to date no judicial interpretation at the International Criminal Court of the term 'solicit'. According to the Oxford English Dictionary, to solicit is to '[e]ntreat, petition, urge, (a person)'. The statutes of the *ad hoc* tribunal do not use the term, but it would seem that a broadly equivalent concept is conveyed by the term 'instigating'. Instigating a crime means 'prompting another to commit an offence'.⁷⁶ The words 'provoke'

⁶⁶ *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 530. Also: *Musema* (ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 174.

⁶⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, art. 7(1); Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), art. 6(1); Statute of the Special Court for Sierra Leone, (2002) 2178 UNTS 138, annex, art. 6(1).

⁶⁸ *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 601; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 483.

⁶⁹ *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 517.

⁷⁰ *Ibid.*, para. 518.

⁷¹ *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 483. *Contra: Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 388.

⁷² *Kayishema et al.* (ICTR-95-1-T), Judgment and Sentence, 21 May 1999, paras. 223–224. See the discussion of superior responsibility in this *Commentary*, art. 28.

⁷³ *Blaskić* (IT-95-14-T), Judgment, 3 March 2000, para. 281.

⁷⁴ *Ibid.*, para. 282.

⁷⁵ *Blaskić* (IT-95-14-A), Judgment, 29 July 2004, para. 42.

⁷⁶ *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 601; *Blaskić* (IT-95-14-T), Judgment, 3 March 2000, para. 280.

and 'incite' have sometimes been used by the *ad hoc* tribunals, suggesting that they are synonymous with 'instigate'.⁷⁷ A crime is instigated if 'the conduct of the accused was a clear contributing factor to the conduct' of the person who actually committed the crime. It is not necessary to show that the crime would not have occurred had it not been for the involvement of the accused, however.⁷⁸ Case law requires proof of a 'causal relationship between the instigation and the crime itself, and the contribution of the accused in fact had an effect on the commission of the crime'.⁷⁹

In *Akayesu*, for example, a Trial Chamber of the International Criminal Tribunal for Rwanda concluded that the accused had instigated rape, because he was present while rapes were being conducted by others, he was 'laughing and happy to be watching and afterwards told the Interahamwe to take her away and said "you should first of all make sure that you sleep with this girl"'.⁸⁰ Instigation can take the form of an omission as well as an act.⁸¹ Mere presence when an atrocity is being committed may amount to instigation, if the accused is a figure in authority who does nothing to discourage or halt the attack.⁸²

The term 'induces' has been used in the charges in the *Harun* case: 'Between on or about 3 August 2003 and 10 August 2003. Ahmad Harun induced the commission of a war crime which in fact occurred, namely the pillaging of property belonging to the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur, including the pillaging of shops, houses and livestock, in violation of Articles 8(2)(c)(v) and 25(3)(b) of the Rome Statute'.⁸³ Authorizing issuance of an arrest warrant on this charge, a Pre-Trial Chamber found there were reasonable grounds to believe that Harun had:

personally incited Militia/Janjaweed to attack the civilian populations on several occasions. In particular, just prior to the attack on Mukjar town at the beginning of August 2003, he gave a speech in which he stated that 'since the children of the Fur had become rebels, all the Fur and what they had had become booty for the Mujahidin' and he promised a large amount of money to the Militia/Janjaweed and the continuous support of the government.⁸⁴

Accordingly, the Chamber concluded Harun could be criminally responsible for inducing the commission of war crimes.⁸⁵ From this, it appears that inducement is synonymous with incitement, encouragement, and abetting.

Complicity also exists where the offender 'aids, abets or otherwise assists' in commission, or attempted commission, of a crime. Similar terminology is used in the statutes of the *ad hoc* tribunals, which speak of 'aiding and abetting'. These terms are a rather

⁷⁷ *Akayesu* (ICTR-96-4-A), Judgment, 1 June 2001, paras. 474-483; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 209; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 60.

⁷⁸ *Kvočka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 252; *Naletilić et al.* (IT-98-34-T), Judgment, 31 March 2003, para. 60.

⁷⁹ *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 387; *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, paras. 278, 280.

⁸⁰ *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 180.

⁸¹ *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 387; *Blaškić* (IT-95-14-T), Judgment, 3 March 2000, para. 280.

⁸² *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 678, referring to *Schonfeld et al.*, (1948) 11 LRTWC 64 (British Military Court), at pp. 69-70.

⁸³ *Harun et al.* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, p. 52.

⁸⁴ *Ibid.*, para. 90.

⁸⁵ *Ibid.*, para. 94.

classic common law formulation of the concept of complicity. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, practice of the institution 'indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence'.⁸⁶ Professor Ambos describes it as 'the weakest form of complicity', covering 'any act which contributes to the commission or attempted commission of a crime'.⁸⁷ 'Aiding' generally refers to some form of physical assistance in the commission of the crime, while 'abetting' suggests encouragement or another manifestation of moral suasion. Like many common law terms, 'abetting' is actually drawn from the old Norman French word *abêter*, meaning to incite or encourage. Obviously, 'abetting' overlaps considerably with other concepts of participation spelled out in paragraph (b), namely ordering and inducement. According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, '[t]he concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act... has a basis in customary international law'.⁸⁸

The authorities suggest that the contribution, in terms of aiding or otherwise assisting, must meet a qualitative and quantitative threshold. The Prosecutor of the International Criminal Tribunal for the former Yugoslavia initially argued that 'any assistance, even as little as being involved in the operation of one of the camps', constitutes sufficient participation to meet the terms of complicity. '[T]he most marginal act of assistance' can constitute complicity, said the Prosecutor.⁸⁹ But the *ad hoc* tribunals have viewed the matter otherwise, saying that criminal participation must have a direct and substantial effect on the commission of the offence.⁹⁰ Endorsing the views of the International Law Commission, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said that while the latter provided no definition of 'substantially', the case law requires 'a contribution that in fact has an effect on the commission of the crime'.⁹¹ The Trial Chamber suggested that participation is substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed'.⁹² In *Kvočka*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia said it considered that:

⁸⁶ *Šljivančanin* (IT-95-13/1-A), Judgment, 5 May 2009, para. 407.

⁸⁷ Kai Ambos, 'Article 25', in Triffterer, *Commentary*, pp. 743-770c, at p. 756.

⁸⁸ *Tadić* (IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 666.

⁸⁹ *Ibid.*, para. 671.

⁹⁰ *Ibid.*, paras. 691, 692. Also: *Kayishema et al.* (ICTR-95-1-A) Judgment (Reasons), 1 June 2001, paras. 186, 199; *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 601; *Vasiljević* (IT-98-32-T), Judgment, 29 November 2002, para. 70; *Ntakirutimana et al.* (ICTR-96-10 & ICTR-96-17-T), Judgment, 21 February 2003, para. 787; *Bagilishema* (ICTR-95-1A-T), Judgment, 7 June 2001, para. 33; *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 379.

⁹¹ The International Law Commission required that accomplices participate 'directly and substantially' in the commission of the crime. In addition, the commentary to the draft Code noted that 'the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.' Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UN Doc. A/51/10, p. 24.

⁹² *Tadić* (IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 688.

whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused. The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons.⁹³

There is as yet no indication as to whether the criterion of substantiality will be imposed by judges of the International Criminal Court, although the case law of the *ad hoc* tribunals will undoubtedly be influential and even persuasive.

Under many legal systems, complicity may take place after the crime as well as prior to or during its commission.⁹⁴ The two provisions in the *Rome Statute* dealing with complicity leave this question unresolved. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, assistance may occur not only before or during the commission of the crime itself, but also after.⁹⁵ In the *Tadić* case, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia declared that complicity involved 'supporting the actual commission before, during, or after the incident'.⁹⁶ In *Blagojević*, the Prosecutor argued that the reburial of victims of the Srebrenica massacre constituted complicity after the crime had been committed. The Trial Chamber said that '[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime'.⁹⁷ When article 25(3) was being drafted, it was noted that aiding, abetting or assisting *ex post facto* had been implicitly included in the International Law Commission draft Code of Crimes, adopted the previous year, but that a specific provision would be required for this to be incorporated within the *Rome Statute*.⁹⁸ No further action was taken. Thus, the *travaux préparatoires* provide support for the view that silence of the provision on complicity after the fact indicates it was intentionally excluded.

Paragraph (c) of article 25(3), but not paragraph (b), requires that the act of complicity be '[f]or the purpose of facilitating the commission of such a crime'. This amounts to a form of specific intent, whereby evidence of a particular motive must be demonstrated. The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation. The initial draft of article 25(3) used the words 'with intent to facilitate the commission of such a crime, aids, abets or otherwise assists...',⁹⁹ while the final Preparatory Committee draft

⁹³ *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, para. 90.

⁹⁴ *United Kingdom v. Oenning and Nix*, (1948) 11 LRTWC 74 (British Military Court), p. 75; *United States of America v. Pohl et al.*, (1948) 5 TWC 193 (United States Military Tribunal). See generally, 'The Parties to Crimes', (1949) 15 LRTWC 49, at pp. 49–58.

⁹⁵ *Blaskić* (IT-95-14-A) Judgment, 29 July 2004, para. 48. Also: *Blaskić* (IT-95-14-T), Judgment, 3 March 2000, para. 285; *Aleksovski* (IT-95-14/1-T), Judgment, 25 June 1999, para. 62. Other judgments speak of assistance 'before or during' and make no reference to after. See, e.g., *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 385.

⁹⁶ *Tadić* (IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 692. Also: *A.-G. Israel v. Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 193.

⁹⁷ *Blagojević* (IT-02-60-T) Judgment, 17 January 2005, para. 731.

⁹⁸ 'Chairman's text', UN Doc. A/AC.249/1997/WG.2/CRP2/Add.2.

⁹⁹ 'Working paper submitted by Canada, Germany, Netherlands and the United Kingdom', UN Doc. A/AC.249/1997/WG.2/DP1. Also: 'Chairman's text', UN Doc. A/AC.249/1997/WG.2/CRP2/Add.2.

read: '[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists...'¹⁰⁰ No comparable requirement exists in the applicable law of the *ad hoc* tribunals. In practice, this 'purpose' will be deduced from the acts of the accused. In the case of abetting, where the complicity will generally be manifested by speech or expression of the perpetrator, this will not pose difficulty in practice. Where aiding or otherwise assisting are involved, this criterion becomes more vital. Aiding and assisting often involve acts which are ambiguous, in the sense that they may be entirely innocent to the extent that the accused is unaware of the intentions of the principal perpetrator.

A third form of secondary or accessorial liability is provided for in article 25(3)(d) of the *Rome Statute*. It imposes liability where the offender '[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'. The contribution need involve intent to commit the specific crime, as long as it is 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 'in the knowledge of the intention of the group to commit the crime'. The text was derived from the International Convention for the Suppression of Terrorist Bombings¹⁰¹ which was in turn borrowed from article 3(4) of the 1996 Convention Relating to Extradition between the Member States of the European Union.¹⁰²

Article 25(3)(d) was cited by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia as authority for introduction of the concept of 'joint criminal enterprise'.¹⁰³ However, the judges of the International Criminal Court have not been enamoured of the joint criminal enterprise theory. They prefer the approach of 'co-perpetration', which they locate within article 25(3)(a) rather than 25(3)(d). Joint criminal enterprise has proven to be quite central to prosecutions at the *ad hoc* tribunals. However, article 25(3)(d) seems destined to play a rather minor role in the work of the International Criminal Court, given the robust approach to article 25(3)(a). Indeed, it has been described as a 'residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting'.¹⁰⁴

The provision has sometimes been described as encompassing the notion of conspiracy, probably because the ancestor of article 25(3)(d) contained the following: 'agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent'.¹⁰⁵ But the provision was replaced entirely at the Rome Conference,¹⁰⁶ and

¹⁰⁰ Preparatory Committee Draft Statute, p. 50.

¹⁰¹ International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1998), annex, art. 2(3). See: Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at pp. 199–200.

¹⁰² Convention Relating to Extradition between the Member States of the European Union, OJ C 313 of 23 June 1996.

¹⁰³ *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 222.

¹⁰⁴ *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 337.

¹⁰⁵ Preparatory Committee Draft Statute, p. 50.

¹⁰⁶ 'Working paper on article 23, paragraph 7 (e)', UN Doc. A/CONF.183/C.1/WGPP/L3. See also: 'Acts of Omission, Negligence, Conspiracy Resulting in Crimes discussed by Preparatory Committee for International Criminal Court', Press Release L/2770, 29 March 1996.

language evoking the concept of conspiracy disappeared. The Coordinator of the Working Group described conspiracy as a 'very divisive issue'.¹⁰⁷

In the *Situation in Darfur, Sudan*, both Kushayb and Harun were charged under this provision.¹⁰⁸ They were alleged to have contributed to the activities of 'a group which shared a common criminal purpose: to persecute civilians they associated with rebels, primarily from the Fur, Zaghawa and Masalit tribes, through indiscriminate attacks against the civilian population'.¹⁰⁹ According to the Pre-Trial Chamber, 'there are reasonable grounds to believe that, by reason of his position on the Darfur Security desk and through his overall coordination of and personal participation in key activities of the Security Committees, Ahmad Harun intentionally contributed to the commission of the above-mentioned crimes, knowing that his contribution would further the common plan carried out by the Sudanese Armed Forces and the Militia/Janjaweed, which consisted in attacking the civilian populations in Darfur'.¹¹⁰

When issuing a summons to appear against Bahr Idriss Abu Garda, the Pre-Trial Chamber appears to have added a reference to article 25(3)(f), noting that there were 'reasonable grounds to believe that Abu Garda is criminally responsible as a co-perpetrator or as an indirect co-perpetrator under articles 25(3)(a) and/or 25(3)(f) of the Statute'.¹¹¹ However, it did not go beyond the Prosecutor's application, and only issued the summons with respect to article 25(3)(a).¹¹² It was probably attempting to send a message to the Prosecutor that charges of attempt should be included in future applications.

Article 25(3)(d) has also been cited in case law of the Court to bolster the rejection of a subjective approach to perpetration pursuant to article 25(3)(a). Under a subjective approach, principal perpetrators and accessories are distinguished with reference to their own subjective intent. Explaining that this was not consistent with modern legal doctrine, Pre-Trial Chamber I said that in addition:

An application of the subjective criterion would be inconsistent with the provision for accessory responsibility in article 25(3)(d) of the Statute. If the subjective approach were the basis for distinguishing between principals and accessories, those who know of the intent of a group of persons to commit a crime, and who then aim to further this criminal activity by intentionally contributing to its commission, should be considered principals rather than accessories to a crime. In particular, the Chamber noted that because article 25(3)(d) of the Statute begins with, '[i]n any other way contributes to the commission or attempted commission of such a crime' (emphasis added), it must be concluded that the Statute rejects the subjective criterion approach.¹¹³

¹⁰⁷ Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 199.

¹⁰⁸ *Situation in Darfur, Sudan* (ICC-02/05), Prosecutor's Application under Article 58(7), 27 February 2007, pp. 6–23.

¹⁰⁹ *Harun et al* (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 178.

¹¹⁰ *Ibid.*, para. 88. Also: *ibid.*, para. 106.

¹¹¹ *Abu Garda* (ICC-02/05-02/09), Decision on the Prosecutor's Application under Article 58, 7 May 2009, para. 28. Although the Prosecutor's application is not public, the decision notes that he alleged that Abu Garda was liable under art. 25(3)(a) (see *ibid.*, para. 24).

¹¹² *Ibid.*, p. 18.

¹¹³ *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 483 (references omitted).