

# INDIVIDUAL RESPONSIBILITY FOR CRIMES UNDER INTERNATIONAL LAW THE UN *AD HOC* TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

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## INTRODUCTION

The present article is based on a lecture at the Summer School of the Grotius Centre for International Legal Studies, held by Reinhold Gallmetzer in The Hague on 5 July 2005. It dwells on the responsibility of individuals pursuant to international criminal law and compares the law and the practice of the two UN *ad hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) with the relevant legal background of the International Criminal Court (ICC).

The principle of individual responsibility for crimes under international law was recognized in the Charter and the Judgment of the Nuremberg Tribunal. The recognition of this principle has made it possible to prosecute and punish individuals for serious violations of international law. The Nuremberg precedent also established a number of other important related principles aimed at ensuring individual accountability for crimes under international law, such as the exclusion of the official position of an individual, including a head of State or other high-level official, or the mere existence of superior orders, as valid grounds for relieving an individual of responsibility for such crimes.

At the request of the General Assembly of the United Nations, the International Law Commission prepared a formulation of the principles of international law recognized in the Charter and the Judgment of the Nuremberg Tribunal (Nuremberg Principles).<sup>3</sup> The General Assembly unanimously affirmed these principles and in 1947 further requested the

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<sup>3</sup> Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace [...]; (b) War crimes [...]; (c) Crimes against humanity [...].

Principle VII: Complicity 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.

International Law Commission to take them into account in preparing the Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code).<sup>4</sup>

In 1993, the Security Council of the United Nations established an international tribunal for the prosecution of person responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>5</sup> Article 7 of the Statute of the ICTY, dealing with individual criminal responsibility, was inspired by the Nuremberg Principles. In his report of 3 May 1993, the Secretary General of the United Nations stated that “all persons who participate in the planning preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible”.<sup>6</sup> This report further suggests that “[t]he Statute should [...] contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment” and that “[a] person in a position of superior authority should [...] be held individually responsible for giving the unlawful order to commit a crime under the present statute” and “for failure to prevent a crime or to deter the unlawful behaviour of his subordinates”.<sup>7</sup>

Similarly, in 1994, the Security Council of the United Nations established “an international tribunal for the [...] purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”.<sup>8</sup> Article 6 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) on individual criminal responsibility is identical to Article 7 of the ICTY.

In 1996, the International Law Commission completed the Draft Code which reflects the Nuremberg Principles relating to individual criminal responsibility. At the request of the General Assembly, the Preparatory Committee took into account the Draft Code in preparing the Draft Statute for the International Criminal Court (Draft Statute).<sup>9</sup>

The Rome Statute of the International Criminal Court (ICC Statute) was established on 17 July 1998 by a multilateral treaty signed in Rome by 120 States. The ICC Statute entered into force on 1 July 2002 after it had been ratified by 60 states. Like the statutes of the ICTY and the ICTR, the ICC Statute enshrines the principle of individual criminal responsibility of natural persons.<sup>10</sup> Moreover, the ICC Statute applies equally to all persons without any distinction based on official capacity, such as official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official.<sup>11</sup> Finally, there is a specific provision dealing with the responsibility of commanders and other superiors.<sup>12</sup>

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<sup>4</sup> Resolution 177(II), adopted on 21 November 1947, A/177(II).

<sup>5</sup> Resolution 808 (1993), adopted on 22 February 1993, S/RES/808.

<sup>6</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, para. 54.

<sup>7</sup> *Ibid*, paras. 55-56.

<sup>8</sup> Resolution 955 (1994), adopted on 8 November 1994, S/RES/955.

<sup>9</sup> Analysis of Issues in the Draft Statute (<http://www.un.org/icc/statute.htm>).

<sup>10</sup> ICC Statute, Article 25.

<sup>11</sup> ICC Statute, Article 27.

<sup>12</sup> ICC Statute, Article 28.

## **I. ARTICLE 7 OF THE ICTY STATUTE (ARTICLE 6 OF THE ICTR STATUTE)**

Article 7 of the Statute of the ICTY, as well as Article 6 of the Statute of the ICTR are the principal provision dealing with individual criminal responsibility. They state as follows:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was 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.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The following sections will examine the applicable modes of liability as defined in the jurisprudence of the two UN ad hoc Tribunals:

### **1. Planning**

Planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.<sup>13</sup> Moreover, it needs to be established that the accused, directly or indirectly, intended the crime in question to be committed.<sup>14</sup> Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime.<sup>15</sup> Involvement in the planning may however be considered an aggravating factor.<sup>16</sup>

### **2. Instigating**

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<sup>13</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, (*Akayesu* Trial Judgement), para. 480, reiterated in *Prosecutor v. Krstić*, IT-98-33, Trial Judgement, 2 August 2001, (*Krstić* Trial Judgement), para. 601; in *Prosecutor v. Blaškić*, IT-95-14, Trial Judgement, 3 March 2000, (*Blaškić* Trial Judgement), para. 279; in *Prosecutor v. Kordić et al.*, IT-95-14/2, Trial Judgement, 26 February 2001, (*Kordić* Trial Judgement), para. 386; and in *Prosecutor v. Naletilić et al.*, IT-98-34, Trial Judgement, 31 March 2003, para. 59.

<sup>14</sup> (*Blaškić* Trial Judgement), para. 278; (*Kordić* Trial Judgement), para. 386.

<sup>15</sup> (*Kordić* Trial Judgement), para. 386.

<sup>16</sup> *Prosecutor v. Stakić*, IT-97-24, Trial Judgement, 31 July 2003, (*Stakić* Trial Judgement), para. 443.

Instigating means prompting another to commit an offence.<sup>17</sup> Both acts and omissions may constitute instigating, which covers express as well as implied conduct.<sup>18</sup> The *nexus* between instigation and perpetration requires proof.<sup>19</sup> It is not necessary to demonstrate that the crime would not have been perpetrated without the accused's involvement;<sup>20</sup> it is sufficient to prove that the instigation was a factor clearly contributing to the conduct of other persons committing the crime in question.<sup>21</sup> It has further to be demonstrated that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.<sup>22</sup>

### 3. Ordering

Responsibility for ordering requires proof that a person in a position of authority uses that authority to instruct another to commit an offence.<sup>23</sup> It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the perpetrator; it is sufficient that the accused possessed the authority to order the commission of an offence and that that authority can be reasonably implied.<sup>24</sup> The order does not need to be given in any particular form,<sup>25</sup> nor does it have to be given by the person in a position of authority directly to the person committing the offence.<sup>26</sup> The person ordering must have the required *mens rea* for the crime with which he or she is charged<sup>27</sup> and he or she must also have been aware of the substantial likelihood that the crime committed would be the consequence of the execution or implementation of the order.<sup>28</sup>

### 4. Committing

The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute, through positive acts or omissions.<sup>29</sup> The head of liability of committing covers physically perpetrating a crime or engendering a culpable omission in violation of criminal

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<sup>17</sup> (*Akayesu* Trial Judgement), para. 482; (*Blaškić* Trial Judgement), para. 280; (*Krstić* Trial Judgement), para. 601, (*Kordić* Trial Judgement), para. 387.

<sup>18</sup> (*Blaškić* Trial Judgement), para. 280.

<sup>19</sup> (*Blaškić* Trial Judgement), para. 280.

<sup>20</sup> (*Kordić* Trial Judgement), para. 387; *Prosecutor v. Galić*, IT-98-29, Trial Judgement, 5 December 2003, (*Galić* Trial Judgement), para. 168.

<sup>21</sup> (*Kordić* Trial Judgement), para. 387; *Prosecutor v. Kvočka et al.*, IT-98-30/1, Trial Judgement, 2 November 2001, (*Kvočka* Trial Judgement), para. 252.

<sup>22</sup> (*Kvočka* Trial Judgement), para. 252.

<sup>23</sup> (*Krstić* Trial Judgement), para. 601; (*Galić* Trial Judgement), para. 168.

<sup>24</sup> (*Akayesu* Trial Judgement), para. 483; (*Blaškić* Trial Judgement), paras 281-282; (*Kordić* Trial Judgement), para. 388.

<sup>25</sup> (*Blaškić* Trial Judgement), para. 281.

<sup>26</sup> (*Blaškić* Trial Judgement), para. 282.

<sup>27</sup> (*Blaškić* Trial Judgement), para. 282.

<sup>28</sup> *Prosecutor v. Blaškić*, IT-95-14, Appeal Judgement, 29 July 2004, (*Blaškić* Appeal Judgement), paras 41-42.

<sup>29</sup> *Prosecutor v. Tadić*, IT-94-1, Appeal Judgement, 15 July 1999, (*Tadić* Appeal Judgement), para. 188; (*Kvočka* Trial Judgement), paras. 250 and 251.

law.<sup>30</sup> Proof is further required that the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.<sup>31</sup>

## 5. Joint Criminal Enterprise

Although Article 7(1) of the Statute does not make explicit reference to joint criminal enterprise (JCE), according to the jurisprudence of the Tribunal, persons who contribute to the commission of crimes in execution of a common criminal purpose are subject to criminal liability as a form of ‘commission’ of a crime pursuant to Article 7(1) of the Statute, subject to certain conditions.<sup>32</sup> There are three distinct categories of JCE set out in the jurisprudence of the ICTY.<sup>33</sup>

For all three categories of JCE the Prosecution must prove:<sup>34</sup>

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<sup>30</sup> (*Krstić* Trial Judgement), para. 601, referring to (*Tadić* Appeal Judgement), para. 188.

<sup>31</sup> *Prosecutor v. Tadić*, IT-94-1, Trial Judgement, 7 May 1997 (*Tadić* Trial Judgment), para. 688 and *Prosecutor v. Mucić et al.*, IT-96-21, Trial Judgement, 16 November 1998, (*Čelebići* Trial Judgement), para. 327.

<sup>32</sup> (*Tadić* Appeal Judgement), para. 190; *Prosecutor v. Ojdanić*, IT-99-37, Appeal Decision on Motion Challenging Jurisdiction, 21 May 2003, (*Ojdanić* Appeal Decision on Motion Challenging Jurisdiction), para. 20; *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Appeal Judgement, 17 September 2003, (*Krnojelac* Appeal Judgement), paras 28-32, para.73.

<sup>33</sup> According to the Appeals Chamber, the first category of JCE consists of “cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proved to have, effected the killing are as follows: (i) The accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitate the activities of his co-perpetrators), and (ii) The accused, even if not personally effecting the killing, must nevertheless intend the result.”: (*Tadić* Appeal Judgement), para. 196.

The second category of JCE “is in many respects similar to that set forth above, and embraces the so-called “concentration camp” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan.”: (*Tadić* Appeal Judgement), para. 202.

The third category of JCE “concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk”: (*Tadić* Appeal Judgement), para. 204. See also *Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgement, 25 February 2004, (*Vasiljević* Appeal Judgement), paras 95-101.

<sup>34</sup> (*Tadić* Appeal Judgement), para. 227; (*Vasiljević* Appeal Judgement), paras 95-101. As to a practical application of the law on JCE, see *Prosecutor v. Brđanin et al.*, IT-99-36, Judgement, 1 September 2004, (*Brđanin* Trial Judgement) paras. 340-356.

1. a plurality of persons;
2. the existence of a common plan, design or purpose (“common plan”) that amounts to or involves the commission of a crime provided for in the Statute; and
3. the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.

The plurality of persons need not be organised in a military, political or administrative structure.<sup>35</sup>

A common plan amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved.<sup>36</sup> It need not have been previously arranged but may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put the plan into effect.<sup>37</sup> In addition, the common plan need not be express and may be inferred from all the circumstances.<sup>38</sup>

Individual criminal responsibility for participation in a JCE does not arise as a result of mere membership in a criminal enterprise. In order to incur criminal liability, the accused is required to take action in contribution of the implementation of the common plan.<sup>39</sup> Participants in a JCE may contribute to the common plan in a variety of roles. Indeed, the term participation is defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan.<sup>40</sup> Participation includes both direct participation and indirect participation. An accused’s involvement in the criminal act must form a link in the chain of causation.<sup>41</sup> This means that the Prosecution must at least establish that the accused took action in furtherance of the criminal plan. However, it is not necessary that the participation be a *conditio sine qua non*, or that the offence would not have occurred but for the accused’s participation.<sup>42</sup>

The *mens rea* requirements for liability under the first and the third categories of JCE are different. The first category of JCE requires that all participants in the JCE share the same

<sup>35</sup> (*Tadić* Appeal Judgement), para. 227.

<sup>36</sup> (*Vasiljević* Appeal Judgement), paras 97 and 99; *Prosecutor v. Krnojelac*, IT-97-25-A, Trial Judgement, 15 March 2002, (*Krnojelac* Trial Judgement), paras 80-82. The Trial Chamber in the *Brđanin* case interpreted the (*Krnojelac* Appeal Judgement), (paras 95-97) to requiring an agreement between an accused and the principal offenders for the first and the third category of JCE, while not requiring proof that there was a more or less formal agreement between all the participants in the second category of JCE as long as their involvement in a system of ill-treatment has been established (see *Brđanin* Trial Judgement, footnote 691). *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Judgement, 17 October 2003, para. 158; (*Tadić* Appeal Judgement), paras 196-198, 204-205; *Prosecutor v. Radoslav Brđanin*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 44.

<sup>37</sup> (*Tadić* Appeal Judgement), para. 227.

<sup>38</sup> (*Krnojelac* Trial Judgement), para. 80.

<sup>39</sup> (*Ojdanić* Appeal Decision on Motion Challenging Jurisdiction), paras 23, 26.

<sup>40</sup> (*Tadić* Appeal Judgement), para. 227. The Trial Chamber reiterates its finding in the Rule 98bis Decision, para. 26, that “the submission by the Defence that one of the requirements to establish a JCE is to prove the ‘hands-on’ role of an accused is not supported by the jurisprudence of this Tribunal”.

<sup>41</sup> (*Tadić* Appeal Judgement), para. 199.

<sup>42</sup> *Ibid.*

criminal intent.<sup>43</sup> The Trial Chamber accepts that, while a JCE may have a number of different criminal objects, it is not necessary for the Prosecution to establish that every participant agreed to every one of the crimes committed.<sup>44</sup> However, it is necessary for the Prosecution to prove that, between the member of the JCE physically committing the material crime charged and the person held responsible under the JCE for that crime, there was a common plan to commit at least that particular crime.<sup>45</sup> To establish responsibility under the first category of JCE, it needs to be shown that the accused (i) voluntarily participated in one of the aspects of the common plan, and (ii) intended the criminal result, even if not physically perpetrating the crime.<sup>46</sup>

As to the second category of JCE, the so-called "concentration camp" cases, the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy.<sup>47</sup>

Responsibility under the third category of JCE, that is for a crime other than the one agreed upon in the common plan perpetrated by one or more other members of the JCE, arises only if (i) the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness, participated in that enterprise.<sup>48</sup> The first is an objective element of the crime, and does not depend upon the state of mind of

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<sup>43</sup> (*Tadić* Appeal Judgement), para. 196; (*Krnojelac* Appeal Judgement), para. 84. See also Separate Opinion of Judge David Hunt to (*Ojdanić* Appeal Decision on Motion Challenging Jurisdiction), para. 29.

<sup>44</sup> Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 44; Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 ("Nuremberg Judgement"), Vol. XXII, p. 468.

<sup>45</sup> Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 44. If an Accused entered into an agreement with one person to commit a specific crime and with another person to commit another crime, it would be more appropriate to speak about two separate JCEs. Upon request of the Trial Chamber to the parties to address this question, both the Prosecution and the Defence agreed with this conclusion: Prosecution Final Trial Brief, Appendix A, para. 2; Defence Final Trial Brief, pp. 117-118.

<sup>46</sup> (*Tadić* Appeal Judgement), para. 196.

<sup>47</sup> (*Tadić* Appeal Judgement), paras 202-203.

<sup>48</sup> Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 30. The *Tadić* Appeals Chamber identified the relevant state of mind in various ways. The first statement was in these terms: "Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk": (*Tadić* Appeal Judgement), para. 204. The relevant state of mind is subsequently summarised in these terms: "What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems)": (*Tadić* Appeal Judgement), para. 220. The third passage summarises the relevant state of mind in these terms: "S...] responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*": (*Tadić* Appeal Judgement), para. 228 (emphasis in original). In this respect, see also Separate Opinion of Judge David Hunt to (*Ojdanić* Appeal Decision on Motion Challenging Jurisdiction), para. 9. See also (*Krnojelac* Appeal Judgement), para. 32.

the accused. The second is the subjective state of mind of the accused which the Prosecution must establish.<sup>49</sup>

## 6. Co-perpetrationship

Trial Chamber II in the *Stakić* case expressed some reservations about the doctrine of JCE<sup>50</sup> and stated that “a more direct reference to ‘commission’ in its traditional sense should be given priority before considering responsibility under the term ‘joint criminal enterprise’.”<sup>51</sup> Thus, in lieu of JCE, the Trial Chamber applied a mode of liability which it termed “co-perpetrationship”, the characteristics of which were explained in the Trial Judgement.<sup>52</sup>

This mode of liability was new to the jurisprudence of the ICTY and the Appeals Chamber, upon a careful and thorough review of the relevant sections of the Trial Judgement found that this mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of the ICTY. Consequently, it invalidated the relevant parts of the Trial Judgement.<sup>53</sup>

## 7. Aiding and abetting

An accused will incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) where it is demonstrated that the accused carried out an act that consisted of practical assistance, encouragement or moral support to the principal offender of the crime.<sup>54</sup> The acts of the principal offender that the accused is alleged to have aided and abetted must be established.<sup>55</sup> The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.<sup>56</sup> The assistance may consist of an act or omission, and it may occur before, during, or after the act of the principal offender.<sup>57</sup> An individual’s position of superior authority does not suffice to conclude from his mere presence at the scene of the crime that he

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<sup>49</sup> Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 31: “The state of mind of the accused to be established by the Prosecution differs according to whether the crime charged (a) was *within* the object of the joint criminal enterprise, or (b) went *beyond* its object, but was nevertheless a natural and foreseeable consequence of that enterprise. If the crime charged fell within the object of the joint criminal enterprise, the Prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went beyond the object of the joint criminal enterprise, the Prosecution need only establish that the accused was aware that the further crime was a possible consequence of the execution of that joint criminal enterprise and that, with that awareness, he or she wilfully participated in and furthered that enterprise”.

<sup>50</sup> (*Stakić* Trial Judgement), para. 441.

<sup>51</sup> (*Stakić* Trial Judgement), para. 438.

<sup>52</sup> (*Stakić* Trial Judgement), paras 468-498.

<sup>53</sup> *Prosecutor v. Stakić*, IT-97-24, Appeals Judgement, 22 March 2006, para. 62.

<sup>54</sup> (*Tadić* Appeal Judgement), para. 229; *Prosecutor v. Aleksovski*, IT-95-14/1, Appeal Judgement, 24 March 2000, (*Aleksovski* Appeal Judgement), paras 163-164; *Prosecutor v. Mucić et al.*, IT-96-21, Appeal Judgement, 20 February 2001, (*Čelebići* Appeal Judgement), para. 352; (*Vasiljević* Appeal Judgement), para. 102.

<sup>55</sup> (*Aleksovski* Appeal Judgement), para. 165. The Appeals Chamber held that the principal offender may not even be aware of the accomplice’s contribution: (*Tadić* Appeal Judgement), para. 229.

<sup>56</sup> (*Vasiljević* Appeal Judgement), para. 102.

<sup>57</sup> (*Blaškić* Appeal Judgement), para. 48.



encouraged or supported the crime. However, the presence of a superior can be perceived as an important *indicium* of encouragement or support.<sup>58</sup> An accused may be convicted for having aided and abetted a crime which requires specific intent even where the principal offender has not been tried or identified.<sup>59</sup>

The *mens rea* of aiding and abetting consists of knowledge – in the sense of awareness – that the acts performed by the aider and abettor assist in the commission of a crime by the principal offender.<sup>60</sup> It is not necessary that the aider and abettor has knowledge of the precise crime that was intended or that was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.<sup>61</sup>

In addition, the aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.<sup>62</sup>

The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability *vis-à-vis* that of an accused acting pursuant to a JCE who does share the intent of the principal offender.<sup>63</sup>

## 8. Superior criminal responsibility

The Appeals Chamber of the ICTY has held that “[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.”<sup>64</sup> This applies both in the context of international as well as internal armed conflicts.<sup>65</sup> The jurisprudence of the Tribunal has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

1. the existence of a superior-subordinate relationship between the superior (the accused ) and the perpetrator of the crime;
2. the accused knew or had reason to know that the crime was about to be or had been committed; and

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<sup>58</sup> *Prosecutor v. Aleksovski*, IT-95-14/1, Trial Judgement, 25 June 1999, (*Aleksovski* Trial Judgement), para. 65. In (*Akayesu* Trial Judgement), the Trial Chamber found a mayor guilty of abetting by considering his passive presence next to the scene of the crime in connection with his prior encouraging behaviour: (*Akayesu* Trial Judgement), para. 693.

<sup>59</sup> *Prosecutor v. Krstić*, IT-98-33, Appeal Judgement, 19 April 2004, para. 143.

<sup>60</sup> (*Vasiljević* Appeal Judgement), para. 102; (*Blaškić* Appeal Judgement), para. 49.

<sup>61</sup> (*Blaškić* Appeal Judgement), para. 50.

<sup>62</sup> (*Aleksovski* Appeal Judgement), para. 162.

<sup>63</sup> *Prosecutor v. Vasiljević*, IT-98-32-A, Trial Judgement, 29 November 2002, para. 71.

<sup>64</sup> (*Čelebići* Appeal Judgement), para. 195.

<sup>65</sup> *Prosecutor v. Enver Hadžihasanović, et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 13 and 31; see also, *Prosecutor v. Enver Hadžihasanovic, Mehmed Alagic and Amir Kubura*, Case No. IT-01-47-PT , Decision on Joint Challenge to Jurisdiction, 12 November 2002, paras 178-179.

3. the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.<sup>66</sup>

The existence of a superior-subordinate relationship is characterised by a formal or informal hierarchical relationship between the superior and subordinate.<sup>67</sup> The hierarchical relationship may exist by virtue of a person's *de jure* or *de facto* position of authority.<sup>68</sup> The superior-subordinate relationship need not have been formalised or necessarily determined by formal status alone.<sup>69</sup> Both direct and indirect relationships of subordination within the hierarchy are possible<sup>70</sup> whilst the superior's effective control over the persons committing the offence must be established.<sup>71</sup> Effective control is defined as the material ability to prevent or punish the commission of the offence.<sup>72</sup> Substantial influence over subordinates that does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising superior criminal responsibility.<sup>73</sup> A superior vested with *de jure* authority who does not actually have effective control over his or her subordinates would not incur criminal responsibility pursuant to the doctrine of superior responsibility, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences might incur criminal responsibility.<sup>74</sup>

In all circumstances, and especially when an accused is alleged to have been a member of collective bodies with authority shared among various members, "it is appropriate to assess on a case-by-case basis the power or authority actually devolved on an accused,"<sup>75</sup> taking into account the cumulative effect of the accused's various functions.<sup>76</sup>

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<sup>66</sup> (*Čelebići* Appeal Judgement), paras 189-198, 225-226, 238-239, 256, 263.

<sup>67</sup> (*Čelebići* Appeal Judgement), para. 303. See also ICRC Commentary on Additional Protocol I, para. 3544. Under the jurisprudence of the Tribunal, circumstantial evidence of "actual knowledge" has been found to include the number, type and scope of the illegal acts; the period over which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time: (*Čelebići* Trial Judgement), para. 386 (citing Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), (U.N. Document S/1994/674), p. 17). Considering geographical and temporal circumstances, this means that the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of them. On the other hand, if the crimes were committed next to the superior's duty-station this suffices as an important *indicium* that the superior had knowledge of the crimes, and even more so if the crimes were repeatedly committed: (*Aleksovski* Trial Judgement), para. 80.

<sup>68</sup> According to the (*Čelebići* Appeal Judgement), para. 193, a formal letter of commission or appointment is not necessary. A *de facto* superior must "wield substantially similar powers of control over subordinates" as a *de jure* superior: *Ibid.*, para. 197. See also (*Aleksovski* Appeal Judgement), para. 76.

<sup>69</sup> (*Čelebići* Trial Judgement), para. 370.

<sup>70</sup> (*Čelebići* Appeal Judgement), para. 252.

<sup>71</sup> (*Čelebići* Appeal Judgement), para. 197.

<sup>72</sup> (*Čelebići* Trial Judgement), para. 378, affirmed in (*Čelebići* Appeal Judgement), para. 256.

<sup>73</sup> (*Čelebići* Appeal Judgement), para. 266.

<sup>74</sup> (*Čelebići* Appeal Judgement), para. 197.

<sup>75</sup> *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Appeal Judgement, 3 July 2003 (*Bagilishema* Appeal Judgement), para. 51, endorsing the finding in the *Prosecutor v. Musema*, ICTR-96-13-A, Trial Judgement, 27 January 2000, para. 135.

<sup>76</sup> (*Stakić* Trial Judgement), para. 494.

As regards the mental element of superior responsibility, it must be established that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.<sup>77</sup> It must be proved that the superior had: (i) actual knowledge, established through either direct or circumstantial evidence, that his subordinates were about to commit or had committed crimes within the jurisdiction of the Tribunal, *or* (ii) constructive knowledge, meaning that the superior had in his or her possession information that would at least put him or her on notice of the present and real risk of such offences, such information alerting him or her to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by his or her subordinates.<sup>78</sup> Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.<sup>79</sup>

Finally, it must be established that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his or her subordinates. The measures required of the superior are limited to those within his power, that is, those measures that are within his material possibility.<sup>80</sup> The superiors' duty to prevent and punish their subordinates' crimes includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.<sup>81</sup> A superior is not obliged to perform the impossible.<sup>82</sup> However, he has a duty to exercise the measures reasonably possible under the circumstances,<sup>83</sup> including those that may be beyond his formal powers.<sup>84</sup> What constitutes such measures is not a matter of substantive law but of evidence.<sup>85</sup> The failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be remedied simply by subsequently punishing the subordinate for the commission of the offence.<sup>86</sup>

Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Hence, it is not necessary that the commander's failure to act caused the commission of the crime.<sup>87</sup>

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<sup>77</sup> (*Čelebići* Appeal Judgement), para. 239.

<sup>78</sup> (*Čelebići* Appeal Judgement), paras 223, 241.

<sup>79</sup> (*Čelebići* Appeal Judgement), para. 226.

<sup>80</sup> (*Čelebići* Trial Judgement), para. 395.

<sup>81</sup> (*Kordić* Trial Judgement), para. 446.

<sup>82</sup> (*Čelebići* Trial Judgement), para. 395.

<sup>83</sup> (*Krnjelac* Trial Judgement), para. 95.

<sup>84</sup> (*Čelebići* Trial Judgement), para. 395.

<sup>85</sup> (*Blaškić* Appeal Judgement), para. 72. For example, it is a superior's degree of effective control - his material ability - that may guide a Trial Chamber in determining whether he reasonably took the measures required either to prevent the commission of a crime or to punish the perpetrator thereof. Under some circumstances, a superior may discharge his obligation to prevent or punish by reporting the matter to the competent authorities, (*Blaškić* Trial Judgement), para. 335.

<sup>86</sup> (*Blaškić* Appeal Judgement), paras 78-85.

<sup>87</sup> (*Čelebići* Trial Judgement), para. 398; (*Kordić* Trial Judgement), para. 447.

## 9. Relationship between Article 7(1) and Article 7(3) of the Statute of the ICTY

While there have been cases where a conviction has been entered for the same count pursuant to both Article 7(1) and Article 7(3),<sup>88</sup> there have been others where a Trial Chamber exercised its discretion to enter a conviction under only one of these heads of responsibility, even when it was satisfied that the legal requirements for entering a conviction pursuant to the second head of responsibility were fulfilled.<sup>89</sup> In such cases, the Trial Chamber entered a conviction under the head of responsibility that it believed better characterised the criminal conduct of the accused.<sup>90</sup>

The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute.<sup>91</sup> Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.<sup>92</sup>

## II. ICC

Article 25 of the ICC Statute regulates in detail the various forms of perpetration and participation in an international crime (para 3(a)-(e)) and attempts thereof (para 3(f)). It leaves the responsibility of States unaffected (para 4). It states as follows:

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:

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<sup>88</sup> (*Kordić* Trial Judgement), paras 830-831, 836-837, 842-843 with respect to Mario Čerkez.

<sup>89</sup> (*Krstić* Trial Judgement), para. 652, (*Krnojelac* Trial Judgement), para. 496.

<sup>90</sup> (*Krnojelac* Trial Judgement), paras 173, 316, 496.

<sup>91</sup> (*Stakić* Trial Judgement), paras 465-467.

<sup>92</sup> (*Čelebići* Appeal Judgement), para. 745; (*Blaškić* Appeal Judgement), paras 89, 91.

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

The following sections briefly examine the applicable modes of liability as defined in the ICC Statute. As the ICC has not yet ruled on the content of the modes of liability, the below is a mere academic interpretation of the relevant provisions.

## 1. Committing

The concept of perpetration enshrined in Article 25(3)(a) distinguishes between direct or immediate participation (“as an individual”), co-perpetration (“jointly with another person”), and intermediary perpetration (“through another person”).<sup>93</sup> All three forms of perpetration require proof that the accused intended the criminal result and that he or she was aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his or her conduct.

Perpetration “as an individual” can be understood that the perpetrator acts on his or her own without relying on or using another person. Direct perpetration also covers the case where there are other parties to the crime who are merely rendering accessory contributions to the commission by the direct perpetrator.<sup>94</sup>

Co-perpetration or perpetration “jointly with another person” is characterized by a functional division of the criminal tasks between the different co-perpetrators, who all share the same criminal intent.<sup>95</sup> The jurisprudence of the ICC will determine whether or not the contribution of each of the co-perpetrators needs to be a *conditio sine qua non* for the commission of the crimes. In other words, the *actus reus* of co-perpetration may be interpreted narrowly, in the sense that each co-perpetrator has to physically carry out the

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<sup>93</sup> Albin Eser, “Individual Criminal Responsibility” in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press 2002, 767-822, (Eser), 771 and Kai Ambos, “Individual Criminal Responsibility” in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verlagsgesellschaft 1999, 475-492, (Ambos), 478f.

<sup>94</sup> (Ambos), 479 and (Eser), 789.

<sup>95</sup> (Ambos), 479 and (Eser), 790.

objective element of the crime, or it may be interpreted broadly, in the sense that it is sufficient that one of the co-perpetrators carried out the objective element of the crime and the others, having provided assistance in furthering the crime, may be held responsible for the crime.

Intermediary perpetration or perpetration “through another person” is characterized by the predominance of a direct perpetrator who uses the person that physically carries out the crime as his or her instrument. Whereas this human tool is typically an innocent agent, the indirect perpetrator – as a kind of master mind – employs higher knowledge or superior willpower to have the crime executed. It requires more than inducing or soliciting a person to commit a crime, as otherwise this mode of perpetration would hardly be discernible from instigation in the terms of Article 25(3)(b) of the ICC Statute.<sup>96</sup> The *actus reus* consist in conduct aimed at instrumentalizing another person to commit a crime, by use of force, the exploitation of an error or any other handicap of the tool’s side or in some other way. To establish criminal responsibility for intermediary perpetration, it is immaterial whether the person physically carrying out the crime is criminally responsible for the crime.<sup>97</sup>

## 2. Instigating

The mode of liability of instigation summarizes what is also referred to as the “accessory before the fact”. In the terms of the ICC Statute Article 25(3)(b) refers to “ordering”, “soliciting” or “inducing” the commission of a crime. As a mode of participation distinct from perpetration, instigation must remain in a certain relationship to the principal crime.<sup>98</sup> The principle of the criminal responsibility of a superior for purposes of this subparagraph applies only to those situations in which the subordinate actually carries out or at least attempts to carry out the order to commit the crime, as indicated by the phrase “which in fact occurs or is attempted”.

The mode of “ordering” a crime presupposes a superior-subordinate relationship between the accused and the physical perpetrator of the crime. The content of this mode of liability may be construed along the lines of the jurisprudence of the ICTY.<sup>99</sup> The International Law Commission has stated that “(t)he superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative.”<sup>100</sup>

“Soliciting” means to command, authorize, urge, incite, request or advise another person to commit a crime.<sup>101</sup> There may be cases where it is difficult to draw a distinctive line between the mode of “ordering” and “soliciting”.

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<sup>96</sup> (Ambos), 479 and (Eser), 793f.

<sup>97</sup> See Article 25(3)(a). The deficiency on the tool’s side includes lack of jurisdiction over persons under 18 (Article 26), incapacity due to a mental disease or intoxication (Article 31(1)(a) and (b)), justification by self-defence or excuse by duress (Article 31(1)(c) and (d)), mistake of fact or law (Article 32) or any other ground of excluding criminal responsibility (Article 31(3)) and perhaps the case that the instrumentalized person lacked the quality of a superior (Article 28(b)(i)). See also (Eser), 794f.

<sup>98</sup> ICC Statute, Article 25(3)(b). (Eser), 795.

<sup>99</sup> See above.

<sup>100</sup> Report of International Law Commission on the Work of its Forty-Eighth Session, 6 May - 26 July 1996, U.N. GAOR, 51 Sess, Supp. No. 10, U.N. Doc. A/51/10, (Report of the ILC 1996), page 20, paragraph 8.

<sup>101</sup> (Ambos), 480f; (Eser), 796.

“Inducing” a crime means to affect, cause, influence an act or course of conduct, lead by persuasion or reasoning.<sup>102</sup> Again, there may be cases where it is difficult to distinguish this mode of liability from the other modes of accessory before the fact. Inducing may be conceived as an umbrella term, covering soliciting which, in turn, has a stronger and more specific meaning than inducing”. Unlike the case of “ordering” a superior-subordinate relationship is not necessary for the mode of “inducing”.<sup>103</sup>

### 3. Aiding, abetting or otherwise assisting

This provision covers the classical field of complicity by assistance. In contrast to the wording of the Statutes of the ICTY and the ICTR<sup>104</sup>, the ICC Statute uses the language “aids, abets or otherwise assists” in the attempt or accomplishment of a crime, including “providing the means for its commission”. Consequently aiding and abetting are not an indistinguishable unity but each of them has its own meaning. Moreover, aiding and abetting are just two ways of other possible forms of ‘assistance’.<sup>105</sup> As far as the *mens rea* element is concerned, this mode of liability has two different forms. With regard to facilitating the commission of the crime, the aider and abettor must act with ‘purpose’. This requires not only the mere knowledge that the accomplice aids and abets the principal perpetrator; he or she must also wish that the assistance shall facilitate the commission of a crime.<sup>106</sup> Aiding, abetting or otherwise assisting as defined by Article 25(3)(c) of the ICC Statute implies a lower degree of responsibility than in the case of instigating,<sup>107</sup>

### 4. Complicity in group crimes

Article 25(3)(d) presents a compromise with earlier “conspiracy” provisions which since Nuremberg<sup>108</sup> have been controversial. Subparagraph (d) appears to provide the lowest objective threshold for participation under article 25 by using the notion “in any other way contributes to [...] a crime”.<sup>109</sup>

Unlike article 25(3)(c), subparagraph (d) requires that the contribution of the accessory must be provided to “a crime by a group of persons acting with a common purpose”. With a fairly low objective requirement, a correction is made through the subjective level. The contribution to the group crime must be intentional *and* shall be made in one of the two alternative ways: it must either “be made with the aim of furthering the criminal activity or criminal purpose of the group”<sup>110</sup> or “be made in the knowledge of the intention of the group

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<sup>102</sup> (Ambos), 480f; (Eser), 796.

<sup>103</sup> (Ambos), 480f. Notwithstanding that (Eser), 796 makes a reference to Ambos and appear to agree, he argues that inducing is a “stronger method of instigating” than soliciting.

<sup>104</sup> In Article 7(1) and 6(1) of the ICTY and ICTR Statutes the language “aided and abetted” is used.

<sup>105</sup> (Ambos), 481 and (Eser), 798.

<sup>106</sup> ICC Statute, Article 25(3)(c). See also (Eser), 801.

<sup>107</sup> ICC Statute, Article 25(3)(b).

<sup>108</sup> Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London 8 August 1945, 82 UNTS 279, article 6.

<sup>109</sup> (Ambos), 484 and (Eser), 802.

<sup>110</sup> ICC Statute, Article 25(3)(d)(i).

to commit the crime”<sup>111</sup>. In addition the *mens rea* requirement of Article 30 of the ICC Statute are applicable which corresponds with the subjective requirements of aiding and abetting.<sup>112</sup>

## 5. Incitement to genocide

Article 25(3)(e) of the ICC Statute criminalizes direct and public incitement of others to commit genocide. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>113</sup> and the ICTY and ICTR Statutes.<sup>114</sup> Genocide is the only international crime to which public incitement has been criminalized. The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof.<sup>115</sup>

To incite ‘publicly’ means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large particularly by technological means of mass communication, such as by radio or television.<sup>116</sup> To incite ‘directly’ means that a person is specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.<sup>117</sup> This incitement comes very close to, if not even substantially covered by, instigation according to article 25(3)(b), thus losing much of its own significance.<sup>118</sup> The difference between ordinary form instigation, e.g. instigation on the one hand and incitement to genocide on the other, lies in the fact that the former is specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general.<sup>119</sup> There is one important difference between incitement to genocide and the forms of complicity under subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, i.e. genocide.<sup>120</sup> As such, incitement to commit genocide is an inchoate crime.

## 6. Complicity after commission

In certain legal systems, for example the German, it is common that contributions are punishable also after its completion.<sup>121</sup> The International Law Commission drafted a compromise according to which “complicity should be regarded as aiding, abetting or means provided *ex post facto*, if they had been agreed on prior to the perpetration of the crime.”<sup>122</sup> As the ICC Statute did not address this question, it must be assumed that the State Parties were not prepared to accept this position.<sup>123</sup>

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<sup>111</sup> ICC Statute, Article 25(3)(d)(ii).

<sup>112</sup> (Eser), 803.

<sup>113</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

<sup>114</sup> Paragraph 3(b) of Article 4 of the ICTY Statute and Article 2 of the ICTR Statute, respectively.

<sup>115</sup> (Eser), 804.

<sup>116</sup> (Report of the ILC 1996), page 22, paragraph 16.

<sup>117</sup> (Report of the ILC 1996), page 22, paragraph 16.

<sup>118</sup> (Eser), 805.

<sup>119</sup> (Ambos), 486.

<sup>120</sup> (Ambos), 487.

<sup>121</sup> (Eser), 806.

<sup>122</sup> Yearbook of the International Law Commission, Volume II Part Two, A/CN.4/SER.A/1991/Add.1 (Part 2), 98. See also, (Report of the ILC 1996), page 21, paragraph 12.

<sup>123</sup> M.C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley, New York 1998, (Bassiouni), 141 footnote 4. Contrary to the Rome



## 7. Attempt and abandonment

Article 25(3)(f) provides for the criminal responsibility of an individual who attempts to commit a crime within the jurisdiction of the Court if a person commits an act to carry out his or her intention and fails to successfully complete the crime only because of some independent factor which prevents him or her from doing so. The phrase ‘does not occur’ recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrator's will.<sup>124</sup>

On the other hand, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not criminally responsible. The provision does not clarify at what stage of the commission abandonment is still admissible or under which circumstances the abandonment is voluntarily. This problem is left for the Court.<sup>125</sup> However, some guidance may be sought in the phrase “by taking action commencing the execution of a crime” which is used to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime.<sup>126</sup>

## 8. Omission and command responsibility

The different modes of liability under Article 25(3) are complemented by a specific rule on command and superior criminal responsibility. Article 28 establishes responsibility for omission for certain categories, namely military commanders, persons acting as a military commander and other superiors.<sup>127</sup>

Article 28(a) establishes that “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 control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) 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 (ii) 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.”<sup>128</sup>

Other superiors are, according to Article 28(b), 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

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Statute the ICTY expressly accepted in (*Tadić* Trial Judgment), 692 complicity *ex post facto* if the accessory participated through “supporting the actual commission before, during, or after the incident.” See also (Eser), 807 and (Ambos), 491f.

<sup>124</sup> (Report of the ILC 1996), page 22, paragraph 17.

<sup>125</sup> (Ambos), 488f and (Eser), 807f.

<sup>126</sup> (Report of the ILC 1996), page 22, paragraph 17.

<sup>127</sup> ICC Statute, Article 28(b).

<sup>128</sup> ICC Statute, Article 28(a).

subordinates, where: (i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) 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.<sup>129</sup>

Both of the aforementioned types of command responsibility are similar to the law and jurisprudence of the ICTY. They all require a hierarchical relationship, a mental element, and failure on behalf of the accused to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.

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<sup>129</sup> ICC Statute, Article 28(b).