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K. Ambos, ‘Article 25’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn, Beck 2008)

Soliciting a crime means, *inter alia*, ‘urging, advising, commanding, or otherwise inciting another to commit a crime’¹³². Similarly, *inducing* entails the ‘enticement or urging of another person to commit a crime’¹³³. Thus, both terms basically refer to a situation where a person is influenced by another to commit a crime¹³⁴. In fact, the French version of the Statute speaks of ‘*sollicite ou encourage*’, thereby using a form of solicitation to express the English term ‘induce’. In substance, in both cases a person is caused to commit a crime¹³⁵. Such ‘causal’ influence is normally of a psychological nature (persuasion), but may also take the form of physical pressure (coercion) within the meaning of *vis compulsiva*¹³⁶. It may also occur in a chain, *i.e.*, a person induces another to induce a third person to commit a crime¹³⁷. In contrast to cases of ‘ordering’, a superior-subordinate relationship is not necessary¹³⁸. In both cases, however, the conduct must have a ‘direct effect on the commission or attempted commission of the crime’¹³⁹.

3. ‘For the purpose of facilitating aids, abets or otherwise assists ...’

Subparagraph (c) codifies any other assistance not covered by subparagraph (b). Generally speaking, participation as defined by subparagraph (b) implies a higher degree of responsibility than in the case of subparagraph (c).

a) ‘aids, abets or otherwise assists ... including providing the means’. ‘Aiding and abetting’ as the weakest form of complicity covers any act, which contributes to the commission or attempted commission of a crime¹⁴⁰. The difficult task is to determine the minimum requirements of this mode of complicity. Article 2 para. 3 (d) of the 1996 Draft Code requires that the aiding and abetting be ‘direct and substantial’; *i.e.*, the contribution should facilitate the commission of a crime in ‘some significant way’¹⁴¹. The ICTY referred to these criteria in the *Tadić* case and held that the act in question must constitute a direct and substantial contribution to the commission of the crime¹⁴². ‘Substantial’ means that the contribution has an effect on the commission; in other words, it must – in one way or

¹³² Black (ed.), *Black’s Law Dictionary* (1999) 1398; American Law Institute, *Model Penal Code and Commentaries* (1985) § 5.02 (1).

¹³³ Black (ed.), *Black’s Law Dictionary* (1999) 779.

¹³⁴ See also *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 243 (even including ‘ordering’) <<http://www.legal-tools.org/doc/5b41bc>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 153 (inducing as exerting influence over another person) <<http://www.legal-tools.org/doc/5686c6/>>.

¹³⁵ Cf. Ambos, *Der Allgemeine Teil* (2004) 481 *et seq.* I do not longer follow the view of the First Edition, that a meaningful terminological distinction between both terms can be made. For an ‘umbrella’ function of soliciting also Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 797 with fn. 117. Different Militello (2007) 5 JICJ 941, 947. See also Werle and Jessberger, *Principles* (2014) 213–4.

¹³⁶ Unlike *vis absoluta*, *vis compulsiva* leaves the person still a certain freedom to act and decide (cf. Jescheck and Weigend, *Strafrecht. Allgemeiner Teil* (1996) 224).

¹³⁷ Cf. Vest, *Genozid durch organisatorische Machtapparate* (2002) 203 *et seq.*, 238.

¹³⁸ In this sense, see also *Prosecutor v. Nchamihigo*, No. ICTR-01-63-A, Judgment, AC, 18 March 2010, para. 188 (‘a position of authority is not a required element under this mode of liability’) <<http://www.legal-tools.org/doc/4b3598/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, para. 902 <<http://www.legal-tools.org/doc/445e4e/>>; *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 159 (‘the requirement of a position of authority... is not a necessary element of “soliciting” or “inducing”’) <<http://www.legal-tools.org/doc/0536d5/>>; Heller, in: Heller and Dubber, *Handbook* (2011) 593, 607.

¹³⁹ *Prosecutor v. Mudacumura*, No. ICC-01/04-01/12-1Red, Decision on the Prosecutor’s Application under Article 58, PTC II, 13 July 2012, para. 63 (regarding ordering) <<http://www.legal-tools.org/doc/ecfae0/>>; *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, paras. 145, 153 <<http://www.legal-tools.org/doc/5686c6/>>; *Prosecutor v. Gbagbo*, No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, PTC I, 12 June 2014, para. 247 <<http://www.legal-tools.org/doc/5b41bc/>>.

¹⁴⁰ Cf. Finnin, *Accessory Modes of Liability* (2012) 73 *et seq.*, 90–1 (‘virtually no limits on the type of act’, 91).

¹⁴¹ 1996 ILC Draft Code, 24 (para. 10).

¹⁴² *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, paras. 674, 688–92 <<http://www.legal-tools.org/doc/0a90ae/>>.

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another – have a causal relationship with the result¹⁴³. However, this does not necessarily require physical presence at the scene of the crime. In *Tadić*, TC II followed a broad concept of complicity based on the English ‘concerned in the killing’ theory¹⁴⁴. In fact, the Chamber did not take the ‘direct and substantial’ criterion very seriously since it included within the concept of aiding and abetting ‘all acts of assistance by words or acts that lend encouragement or support’¹⁴⁵. This position was confirmed by a TC in ‘*Celebici*’¹⁴⁶ and, more recently, in *Naletilic and Martinovic*¹⁴⁷. The AC stressed that the aiding and abetting must have a substantial effect on the main act¹⁴⁸.

- 22 In *Furundžija* the ICTY took a more sophisticated view¹⁴⁹. The TC distinguished between the nature of assistance and its effect on the act of the principal (main perpetrator). Regarding the former it stated that the assistance need not be ‘tangible’ but that ‘moral support and encouragement’ is sufficient. Mere presence at the scene of the crime suffices if it has ‘a significant legitimizing or encouraging effect on the principals’. The term ‘direct’ – used by the ILC – in qualifying the proximity of the assistance is ‘misleading’ since it implies that the assistance needs to be ‘tangible’¹⁵⁰. Regarding the effect of the assistance the Chamber does not consider a causal relationship in the sense of the *conditio sine qua non* formula necessary but holds that the acts of assistance must ‘make a significant difference to the commission of the criminal act by the principal’. Thus, it is, for example, sufficient that a person continues to interrogate the victim while it is being raped by another person¹⁵¹. The ‘significant’-requirement, however, implies that it would not be sufficient if the accomplice has only ‘a role in a system without influence’¹⁵². With regard to the Rome Statute, the Chamber explicitly states that it is ‘less restrictive’ than the ILC Draft Code 1996 since it does not limit aiding and abetting – as article 2 para. 3 (d) Draft Code does – to assistance which ‘facilitate[s] in some significant way’, or ‘directly and substantially’ assists the perpetrator. Rather, subparagraph (c) contemplates ‘assistance either in physical form or in the form of moral support. ... “abet” includes mere exhortation or encouragement’¹⁵³. In sum, aiding and abetting requires ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’¹⁵⁴. The AC endorsed this view¹⁵⁵.

¹⁴³ *Ibid.*, para. 688. On the substantial effect as a ‘form of causation’ see also Stewart (2012) 25 *LJIL*165, 203.

¹⁴⁴ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 687: ‘... not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced’ <<http://www.legal-tools.org/doc/0a90ae/>>. For the ‘concerned in the killing’ doctrine, see: (1948) 15 *LRTWC* 49-51; also: *Prosecutor v. Tadić*, No. IT-94-1-A, Judgment, AC, 15 July 1999, para. 691 <<http://www.legal-tools.org/doc/8efc3a/>>.

¹⁴⁵ *Ibid.*, para. 689.

¹⁴⁶ *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 325-9 <<http://www.legal-tools.org/doc/6b4a33/>>.

¹⁴⁷ *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 726 <<http://www.legal-tools.org/doc/f2cfef/>>, see also *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726 <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁴⁸ *Prosecutor v. Delalić et al.*, No. IT-96-21-A, Judgment, AC, 20 February 2001, para. 352 <<http://www.legal-tools.org/doc/051554/>>. As to the concrete case the Chamber held that the position as a camp guard is not *per se* sufficient (para. 364).

¹⁴⁹ *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 190-249 <<http://www.legal-tools.org/doc/e6081b/>>.

¹⁵⁰ *Ibid.*, paras. 199, 232.

¹⁵¹ *Ibid.*, paras. 273-4; confirmed by the AC in *Prosecutor v. Furundžija*, No. IT-95-17/1 A, Judgment, AC, 21 July 2000, para. 126 <<http://www.legal-tools.org/doc/660d3f/>> and *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfef/>>.

¹⁵² *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 217, 233-4 <<http://www.legal-tools.org/doc/e6081b/>>.

¹⁵³ *Ibid.*, para. 231.

¹⁵⁴ *Ibid.*, paras. 235, 249.

¹⁵⁵ *Prosecutor v. Furundžija*, No. IT-95-17/1 A, Judgment, AC, 21 July 2000, paras. 117 *et seq.* <<http://www.legal-tools.org/doc/660d3f/>>.

The subsequent case law of the ICTY has confirmed the broad concept of aiding and abetting developed in *Tadić*, *Celibici* and *Furundžija*¹⁵⁶. The *Aleksovski* TC required an 'effect important' on the main act¹⁵⁷ and allowed the act of support to be given at any time¹⁵⁸. In *Prosecutor v. Strugar*¹⁵⁹ the TC declined to enter convictions against *Pavle Strugar* for aiding and abetting on the grounds that there was no settled jurisprudence on whether, and in what circumstances, an omission may constitute the *actus reus* of aiding and abetting. Further, it found that *Strugar's* failure to carry out an investigation into the offences committed and punish the perpetrators thereof occurred well after the commission of the offences and thus could not have had a requisite direct and substantial effect on them¹⁶⁰. As to the issue of a causal relationship between the aiding and the final criminal result, the TCs in *Aleksovski*, *Blaškić*, *Krnjelac*, *Vasiljević*, and *Naletilić and Martinović* followed *Furundžija* renouncing this requirement¹⁶¹. Presence at the scene of the crime would (only) be sufficient if the accused had an '*autorité incontestée*' that encouraged the direct perpetrator to commit the crime¹⁶². At a minimum, the presence of a superior constitutes a 'probative indication' in

¹⁵⁶ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 60 *et seq.* <<http://www.legal-tools.org/doc/52d982/>>; *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 245 <<http://www.legal-tools.org/doc/e1ae55/>>; *Prosecutor v. Kunarac et al.*, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, TC, 22 February 2001, paras. 391–3 <<http://www.legal-tools.org/doc/fd881d/>>; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, TC, 26 February 2001, paras. 395 *et seq.* <<http://www.legal-tools.org/doc/d4fedd/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, paras. 88 *et seq.* <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Limaj et al.*, No. IT-03-66-T, Judgment, TC, 30 November 2005, para. 516 <<http://www.legal-tools.org/doc/4e469a/>>; confirmed by *Prosecutor v. Limaj et al.*, No. IT-03-66-A, Judgment, AC, 27 September 2007, paras. 90 *et seq.* <<http://www.legal-tools.org/doc/6d43bf/>>; *Prosecutor v. Mrksić et al.*, No. IT-95-13/1-T, Judgment, TC, 27 September 2007, paras. 551 *et seq.* <<http://www.legal-tools.org/doc/32111c/>>; *Prosecutor v. Haradinaj et al.*, No. IT-04-84-T, Judgment, TC, 3 April 2008, para. 145 <<http://www.legal-tools.org/doc/025913/>>; *Prosecutor v. Oric*, No. IT-03-68-A, Judgment, AC, 3 July 2008, para. 43 <<http://www.legal-tools.org/doc/e053a4/>>; *Prosecutor v. Mrksić et al.*, No. IT-95-13/1, Judgment, AC, 5 May 2009, paras. 48, 81, 146, 159 <<http://www.legal-tools.org/doc/40bc41/>>; *Prosecutor v. Popović et al.*, No. IT-05-88-T, Judgment, TC, 10 June 2010, paras. 1014, 1018 <<http://www.legal-tools.org/doc/481867/>>; *Prosecutor v. Djordjević*, No. IT-05-87/1-T, Judgment, TC, 23 February 2011, paras. 1873–4 <<http://www.legal-tools.org/doc/653651/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1960 *et seq.* <<http://www.legal-tools.org/doc/86922c/>>; *Prosecutor v. Lukić and Lukić*, No. IT-98-32/1-T, Judgment, TC, 20 July 2009, para. 901 <<http://www.legal-tools.org/doc/af5ad0/>>; *Prosecutor v. Perišić*, No. IT-04-81-T, Judgment, TC, 6 September 2011, para. 126 <<http://www.legal-tools.org/doc/f3b23d/>>; *Prosecutor v. Tolimir*, No. IT-05-88/2-T, Judgment, TC, 12 December 2012, paras. 907–8 <<http://www.legal-tools.org/doc/445e4e/>>. Regarding the ICTR see *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, Judgment, AC, 28 November 2007, para. 482 <<http://www.legal-tools.org/doc/4ad5eb/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 470 <<http://www.legal-tools.org/doc/fa02aa/>>. With regard to the SCSL, *Prosecutor v. Taylor*, No. SCSL-03-01-T, Judgment, TC, 18 May 2012, para. 6904 <<http://www.legal-tools.org/doc/8075e7/>> (for an analysis Ambos and Njikam (2013) 11 *JICJ* 789, 792 *et seq.*, 799 *et seq.*; *Prosecutor v. Taylor*, No. SCSL-03-01-A, Judgment, AC, 26 September 2013, paras. 362 *et seq.*, 401 <<http://www.legal-tools.org/doc/3e7be5/>>).

¹⁵⁷ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 60–1 <<http://www.legal-tools.org/doc/52d982/>>.

¹⁵⁸ *Ibid.*, para. 62. See also *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>.

¹⁵⁹ *Prosecutor v. Strugar*, No. IT-01-42-T, Judgment, TC, 31 January 2005 <<http://www.legal-tools.org/doc/927ba5/>>.

¹⁶⁰ Cf. Hinek (2006) 19 *LeidenJIL* 477.

¹⁶¹ *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, para. 61 <<http://www.legal-tools.org/doc/52d982/>>; *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 88 <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfef/>>; *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, TC, 29 November 2002, para. 70 <<http://www.legal-tools.org/doc/8035f9/>>; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, para. 48 <<http://www.legal-tools.org/doc/88d8e6/>>; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726 <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁶² *Prosecutor v. Aleksovski*, No. IT-95-14/1-T, Judgment, TC, 25 June 1999, paras. 63 *et seq.* (65) <<http://www.legal-tools.org/doc/52d982/>>; similarly *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 89: 'significant legitimising or encouraging effect' <<http://www.legal-tools.org/doc/1a994b/>>; also *Prosecutor v. Vasiljević*, No. IT-98-32-T, Judgment, TC, 29 November 2002, para. 70 <<http://www.legal-tool->

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this respect¹⁶³. Most recently, the debate about ‘specific direction’ as a constitutive element of aiding or abetting¹⁶⁴ brought again the question of a reasonable limitation of this form of liability to the fore. While it is controversial whether specific direction has always been, either as part of the *actus reus* or of the *mens rea*, an element of aiding and abetting in the ICTY/ICTR case law¹⁶⁵, it serves as an important qualifier in establishing a culpable link between the assistance provided by the accomplice and the crimes of the principal perpetrators¹⁶⁶. In this sense, specific direction may also be invoked to more precisely determine the relevant assistance or contribution in the context of the discussion about neutral acts, especially with regard to Article 25(3)(d)¹⁶⁷.

- 24 The ICTR defined aiding in *Akayesu* as ‘giving assistance to someone’ and abetting as involving ‘facilitating the commission of an act by being sympathetic thereto’¹⁶⁸. The separate definitions of aiding and abetting do not mean, however, that individual responsibility within the meaning of article 6 para. 1 ICTR Statute is only incurred if both forms of participation – aiding and abetting – have been realized; aiding or abetting is sufficient¹⁶⁹. Subsequent case law, however, does not distinguish between aiding and abetting but requires for both, taking the same approach as the ICTY, any form of physical or moral support which contributes substantially to the commission of a crime¹⁷⁰. Similarly, the ICC PTC in *Blé Goudé* does not

s.org/doc/8035f9/; *Prosecutor v. Blagojević and Jokić*, No. IT-02-60-T, Judgment, TC, 17 January 2005, para. 726, fn. 2177: ‘Mere presence’ at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender’ <<http://www.legal-tools.org/doc/7483f2/>>.

¹⁶³ *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>; conc. *Prosecutor v. Naletilić and Martinović*, No. IT-98-34-T, Judgment, TC, 31 March 2003, para. 63 <<http://www.legal-tools.org/doc/f2cfef/>>; *Prosecutor v. Gotovina et al.*, No. IT-06-90-T, Judgment Vol. II, TC, 15 April 2011, para. 1960 <<http://www.legal-tools.org/doc/86922c/>>. In *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, TC, 3 March 2000, para. 284 <<http://www.legal-tools.org/doc/e1ae55/>>, the AC explicitly left open the possibility that ‘in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting (para. 47)’.

¹⁶⁴ *Prosecutor v. Perišić*, No. IT-04-81-A, Judgment, AC, 28 February 2013, para. 36 <<http://www.legal-tools.org/doc/f006ba/>> (‘no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly’); para. 73 (‘... where an accused individual’s assistance is remote from the actions of principal perpetrators, specific direction must be explicitly established’). Conc. *Stanišić and Simatović*, No. IT-03-69-T, Judgment Vol. II, TC, 30 May 2013, para. 1264. <<http://www.legal-tools.org/doc/698c43/>>; *Prosecutor v. Ndhimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>. *Contra* *Prosecutor v. Perišić*, No. IT-04-81-T, Judgment, TC, 6 September 2011, para. 126 <<http://www.legal-tools.org/doc/f3b23d/>>; conc. *Taylor*, No. SCSL-03-01-T, Judgment, TC, 18 May 2012, para. 484 with fn. 1141 <<http://www.legal-tools.org/doc/8075e7/>>; *Taylor*, No. SCSL-03-01-A, Judgment, AC, 26 September 2013, paras. 475 *et seq.* <<http://www.legal-tools.org/doc/3e7be5/>>; *Sainović et al.*, No. IT-05-87-A, Judgment, AC, 23 January 2014, paras 1617–51 <<http://www.legal-tools.org/doc/81ac8c/>>; *Popović et al.*, No. IT-05-88-A, Judgment, AC, 30 January 2015, para. 1758 (welcoming this decision Bartels (2015) *EJIL: Talk!*); *Khieu and Nuon*, No. 002/19-09-2007/ECCC/TC, Judgment, TC, 7 August 2014, para. 710 <<http://www.legal-tools.org/doc/4888de/>>. For a discussion see Ambos and Njikam (2013) 11 *JICJ* 789, 804–8; Jones *et al.*, *Milestones* (2013); Coco and Gal (2014) 12 *JICJ* 345, 357 *et seq.*

¹⁶⁵ Cf. Ambos and Njikam (2013) 11 *JICJ* 789, 806 with further references.

¹⁶⁶ Crit. of the concept being too imprecise Vest (2014) 132 *SchZStR* 61, 82 *et seq.*

¹⁶⁷ See notes 187 and 217 and main text.

¹⁶⁸ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>. For an analysis of the ICTR’s complicity concept with regard to genocide see Obote-Odora (2002) 2 *ICLRev* 301, 375, in particular on the distinction between aiding and abetting 391–2, 400.

¹⁶⁹ Similarly already Triffterer, in: Hankel and Stubby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 229.

¹⁷⁰ *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, TC, 6 December 1999, para. 43 <<http://www.legal-tools.org/doc/f0dbbb/>>; *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, paras. 125–6 <<http://www.legal-tools.org/doc/1fc6ed/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 385 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 597 <<http://www.legal-tools.org/doc/4ac346/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, paras. 32 *et seq.* <<http://www.legal-tools.org/doc/694dd8/>>; *Prosecutor v. Karera*, No. ICTR-01-74-T, Judgment and Sentence, TC, 7 December 2007, para. 548 <<http://www.legal-tools.org/doc/7bc57f/>>; *Prosecutor v. Mpambara*, No. ICTR-

distinguish between the different forms of subparagraph (c), and only requires ‘for this form of responsibility ... that the person provides assistance to the commission of a crime and that, in engaging in this conduct, he or she intends to facilitate the commission of the crime’¹⁷¹. Thus, the contribution need neither ‘always’ be ‘tangible’¹⁷² nor need it be indispensable (in the sense of a *conditio sine qua non*)¹⁷³. Although it is not necessary that the aider or abettor be present during the commission¹⁷⁴, presence may indicate moral support, especially if the accused possesses a degree of authority entailing ‘a clear signal of official tolerance’¹⁷⁵. Aiding and abetting may also consist in an omission¹⁷⁶; in such cases it may be interpreted as moral support by encouraging¹⁷⁷.

01-65-T, Judgment, TC, 11 September 2006, para. 16 <<http://www.legal-tools.org/doc/ce61de/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 471 <<http://www.legal-tools.org/doc/fa02aa/>>; *Prosecutor v. Seromba*, No. ICTR-2001-66-A, Judgment, AC, 12 March 2008, para. 530 <<http://www.legal-tools.org/doc/b4df9d/>>; *Prosecutor v. Renzaho*, No. ICTR-97-31-T, Judgment, TC, 14 July 2009, para. 742 <<http://www.legal-tools.org/doc/9bbd8a/>>; *Prosecutor v. Bagaragaza*, No. ICTR-2005-86-S, Sentencing Judgment, TC, 17 November 2009, para. 22 <<http://www.legal-tools.org/doc/3d2d48/>>; *Prosecutor v. Munyakazi*, No. ICTR-97-36A-T, Judgment and Sentence, TC, 5 July 2010, para. 417 <<http://www.legal-tools.org/doc/9b9ee3/>>; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-A, Judgment, AC, 20 October 2010, paras. 74, 86 <<http://www.legal-tools.org/doc/fad693/>>; *Prosecutor v. Kanyarukiga*, No. ICTR-02-78-T, Judgment and Sentence, TC, 1 November 2010, para. 621 <<http://www.legal-tools.org/doc/415384/>>; *Prosecutor v. Ntwukulilyayo*, No. ICTR-05-82-A, Judgment, AC, 14 December 2011, para. 214 <<http://www.legal-tools.org/doc/42d81d/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, TC, 30 December 2011, paras. 824–32 <<http://www.legal-tools.org/doc/d8e4f2/>>; *Prosecutor v. Karemera and Ngirumpatse*, No. ICTR-98-44-T, Judgment and Sentence, TC, 2 February 2012, paras. 1429–30 <<http://www.legal-tools.org/doc/5b9068/>>; *Prosecutor v. Nzabonimana*, No. ICTR-98-44D-T, Judgment and Sentence, TC, 31 May 2012, para. 1697 <<http://www.legal-tools.org/doc/00cb8e/>>; *Prosecutor v. Nizeyimana*, No. ICTR-2000-55C-T, Judgment and Sentence, TC, 19 June 2012, para. 1466 <<http://www.legal-tools.org/doc/f8cdd9/>>; *Prosecutor v. Ngirabatware*, No. ICTR-99-54-T, Judgment and Sentence, TC, 12 December 2012, para. 1294 <<http://www.legal-tools.org/doc/393335/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>; *Prosecutor v. Ndindiliyimana et al.*, No. ICTR-00-56-A, Judgment, AC, 11 February 2014, paras. 370 *et seq.* <<http://www.legal-tools.org/doc/4c5065/>>.

¹⁷¹ *Prosecutor v. Blé Goudé*, No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges, PTC, 11 December 2014, para. 167 <<http://www.legal-tools.org/doc/0536d5/>>.

¹⁷² *Prosecutor v. Kayishema and Ruzindana*, No. ICTR 95-1-T, Judgment, TC, 21 May 1995, para. 200 <<http://www.legal-tools.org/doc/0811c9/>>.

¹⁷³ *Ibid.*, para. 201; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>.

¹⁷⁴ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Musema*, No. ICTR-96-13-T, Judgment, TC, 27 January 2000, para. 125 <<http://www.legal-tools.org/doc/1fc6ed/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, para. 33 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 385 <<http://www.legal-tools.org/doc/7e668a/>>.

¹⁷⁵ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 484 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, TC, 7 June 2001, paras. 34–5 <<http://www.legal-tools.org/doc/6164a4/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 386 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Brđjanin*, No. IT-99-36-A, Judgment, AC, 3 April 2007, para. 273 <<http://www.legal-tools.org/doc/782cef/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, TC, 30 December 2011, paras. 824–32 <<http://www.legal-tools.org/doc/d8e4f2/>>; cf. Cryer, in: *id. et al., Introduction to ICL* (2014) 353, 372.

¹⁷⁶ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 548: ‘... may consist in failing to act or refraining from action’ (unlike complicity in genocide) <<http://www.legal-tools.org/en/doc/b8d7bd/>>; see also *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 597: ‘The act of assistance may consist of an act or an omission’ <<http://www.legal-tools.org/doc/4ac346/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>; *Prosecutor v. Mpambara*, No. ICTR-01-65-T, Judgment, TC, 11 September 2006, para. 22 <<http://www.legal-tools.org/doc/ce61de/>>; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-T, Judgment and Sentence, TC, 12 September 2006, para. 470 <<http://www.legal-tools.org/doc/fa02aa/>>; *Prosecutor v. Ndahimana*, No. ICTR-01-68-A, Judgment, AC, 16 December 2013, para. 147 <<http://www.legal-tools.org/doc/7034a5/>>.

¹⁷⁷ *Prosecutor v. Kayishema and Ruzindana*, No. ICTR 95-1-T, Judgment, TC, 21 May 1995, para. 200 <<http://www.legal-tools.org/doc/0811c9/>> referring to *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC,

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- 25 Summing up this case law, aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, *i. e.*, that constitutes a causal contribution to the main act¹⁷⁸. Thus, the only limiting element is the *substantial effect* or the *specific direction* requirement. This case law, in particular these two requirements, should also be taken into account when defining the *actus reus* of subparagraph (c) of Article 25 (3)¹⁷⁹. The lack of an explicit reference to these requirements in the text of the provision cannot be interpreted as a conscious departure from this standard¹⁸⁰ for Articles 7 (1) ICTY and 6 (1) ICTR Statute do not contain this reference either. The concept of assistance as expressed by the words ‘aids, abets or otherwise assists’ in subpara. (c) or ‘otherwise aided and abetted’ in the ICTY/ICTR Statutes is a general concept in criminal law and thus must be interpreted consistently. Clearly, the ‘ad hoc tribunal jurisprudence can be of assistance’¹⁸¹ in defining such universal concepts notwithstanding the differences in the details of the respective provisions.
- 26 Of course, both standards need to be clarified further in the future case law. The substantiality standard is far from precise, and the case law has not contributed to its clarification, instead leaving the decision to each individual case. If one takes the principle of legality seriously, *i. e.*, the requirements of legal certainty and foreseeability (*nullum crimen sine lege*)¹⁸², a general theory of imputation in international criminal law must be developed in order, *inter alia*, to determine, on an abstract level, when an effect is ‘substantial’ and, thus, when aiding and abetting should entail criminal responsibility¹⁸³. From a theoretical perspective, this is ultimately a normative question, which can best be answered by taking into account the modern theories of attribution¹⁸⁴. Accordingly, to incur criminal responsibility the aider and abettor must, with her contribution, create and increase the risk that the crime will be committed and thereby fundamental legal interests violated (*Risikoerhöhung*)¹⁸⁵. The risk must be realized through the commission of the (main) crime (*Risikorealisation*) or, in other words, the risk-creation or increase must be causal for the commis-

10 December 1998 <<http://www.legal-tools.org/doc/e6081b/>>; *Prosecutor v. Bisengimana*, No. ICTR-00-60-T, Judgment and Sentence, TC, 13 April 2006, para. 34 <<http://www.legal-tools.org/doc/694dd8/>>.

¹⁷⁸ See already mn. 21.

¹⁷⁹ I hereby reaffirm my earlier view in mn. 22 of the second edition (‘... “otherwise assist” would also require a substantial effect on the commission ...’), give up the view expressed in mn. 23 (‘... the word “facilitating” confirms that a direct and substantial assistance is not necessary ...’) and adopt the view argued before the *Mbarushimana* PTC (see *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 281 with reference in fn. 663) <<http://www.legal-tools.org/doc/63028f/>>). For the same view Werle and Jessberger, *Principles* (2014) 216–8; *id.* (2007) 5 *JICJ* 953, 969 (‘... reasonable to interpret the actus reus of assistance in this way.’); Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 calling this standard a ‘sort of a monitor’; Vest, *Völkerrechtsverbrecher verfolgen* (2011) 199 (referring to the gravity threshold of Article 17 and arguing that the ‘substantial effect’ might not necessarily influence the outcome, but the way of execution of the crime).

¹⁸⁰ For this view see Schabas, *Introduction to the ICC* (2011) 228.

¹⁸¹ *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 280 <<http://www.legal-tools.org/doc/63028f/>>.

¹⁸² See for the interpretation of article 7 ECHR in this respect *Sunday Times v. UK*, Series A 30 Judgment of 26 April 1979, para. 49; *S.W. v. UK*, Series A 335-b, 27 October 1995, para. 36; *C.R. v. UK*, Series A 335-c, 27 October 1995, para. 34 and most recently *Streletz, Kessler, Krenz v. Germany*, Judgment of 22 March 2001, paras. 77 *et seq.*, 105.

¹⁸³ Stewart (2012) 25 *LeidenJIL* 165, 204 votes for a combination of causation and normative contribution in order to create a ‘defensible notion of complicity’.

¹⁸⁴ See, generally, Roxin, *Strafrecht Allgemeiner Teil I* (2006) para. 11; Jakobs, *Strafrecht Allgemeiner Teil* (1993) 185 *et seq.* Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 with fn. 141; Vest, *Völkerrechtsverbrecher verfolgen* (2011) 200 *et seq.*

¹⁸⁵ The theory of risk increase has been applied by the *Bemba* Confirmation Decision in the context of command responsibility, holding the superior liable because his failure to intervene increased the risk with regard to the commission of the crimes: *Prosecutor v. Bemba Gombo*, No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges, PTC II, 15 June 2009, para. 425 <<http://www.legal-tools.org/en/doc/07965c/>>; conc. *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 174 <<http://www.legal-tools.org/doc/5686c6/>>. See also Ambos (2009) 22 *LeidenJIL* 715, 721–2 and *id.*, *Treatise on ICL I* (2013) 164 *et seq.* See also Vest, *Völkerrechtsverbrecher verfolgen* (2011) 253.

sion of this crime (*kausale Risikosteigerung*). Finally, the risk created or increased must be disapproved by the legal order, *i. e.*, it must be a forbidden risk (*Risikomißbilligung*)¹⁸⁶. This approach gains particular importance in identifying liability for the so-called ‘neutral’ acts, *i. e.*, contributions which are not *per se* criminal, *e. g.*, delivering weapons to a conflict zone or providing food to a detention camp¹⁸⁷. – On the delimitation between co-perpetration and aiding and abetting see mn. 48.

b) ‘For the purpose of facilitating’. This wording introduces a subjective threshold which goes beyond the ordinary *mens rea* requirement within the meaning of article 30¹⁸⁸. It is borrowed from the Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, it is clear that ‘purpose’ generally implies a specific subjective requirement stricter than mere knowledge¹⁸⁹. The formula, therefore, sets aside the – above quoted – jurisprudence of the ICTY and ICTR, since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offence¹⁹⁰. Additionally, knowledge may be inferred from all relevant circumstances¹⁹¹, *i. e.*, it may be proven by circumstantial evidence¹⁹².

In sum, the formulation confirms the general assessment that subparagraph (c) provides for a higher subjective than objective threshold (in any case higher than the ordinary *mens*

¹⁸⁶ For a detailed discussion see Ambos, *Der Allgemeine Teil* (2004) 619 *et seq.*, 663-4.

¹⁸⁷ See for the problem of neutral acts in macrocriminal contexts Rackow, *Neutrale Handlungen* (2007) 551 *et seq.* In the *Van Anraat case*, the defendant was convicted for delivering mustard gas to the Iraqi regime, see for a good analysis, especially regarding the issue of imputation van der Wilt (2008) 6 *JICJ* 557, 563 *et seq.* The problem has also been recognized by *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 277 <<http://www.legal-tools.org/doc/63028f/>>. Crit. *vis-à-vis* Art. 25 to cover neutral acts Burchard (2010) 8 *JICJ* 919, 935. In general see Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 26 mn. 218 *et seq.* and Ambos (2000) 32 *JA* 721-25. According to *Prosecutor v. Perisic*, No. IT-04-81-A, Judgment, AC, 28 February 2013, para. 44 acts that can be both lawful and unlawful constitute aiding and abetting when ‘a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators’ can be established <<http://www.legal-tools.org/doc/f006ba/>>; regarding neutral acts and Art. 25 (3)(d) Ambos, in: Stahn (ed.), *Law and Practice* (2015) 604 *et seq.*

¹⁸⁸ See Piragoff and Robinson, article 30, mn. 9 *et seq.* and 17 *et seq.* (in this volume); generally about the mental element in international criminal law, cf. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 889; Ambos, in: Vohrah *et al.* (eds.), *Man’s Inhumanity* (2003) 11, 12 *et seq.*; *id.*, *Der Allgemeine Teil* (2004) 757 *et seq.*; *id.*, *Treatise on ICL I* (2013) 266 *et seq.*; Triffterer, in: Hinkel and Stuby (eds.), *Strafgerichte gegen Menschenverbrechen* (1995) 169, 221-4; Goy (2012) 12 *ICLRev* 1, 63; Stuckenberg (2014) 12 *JICJ* 311 *et seq.*

¹⁸⁹ American Law Institute, *Model Penal Code and Commentaries* (1985) § 2.06. Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801. Satzger, *Internationales Strafrecht* (2013) § 15 mn. 62; Schabas, *The ICC* (2010) 436 wants to infer the purpose from abetting conduct, but not from mere physical support.

¹⁹⁰ Cf. *Prosecutor v. Mbarushimana*, No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, PTC I, 16 December 2011, para. 281 <<http://www.legal-tools.org/doc/63028f/>>. *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 692 <<http://www.legal-tools.org/doc/0a90ae/>>; *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, paras. 326, 328 <<http://www.legal-tools.org/doc/6b4a33/>>; *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 236-49 (236, 245-6, 249 <<http://www.legal-tools.org/doc/e6081b/>>; *Prosecutor v. Krnojelac*, No. IT-97-25-T, Judgment, TC, 15 March 2002, para. 90 <<http://www.legal-tools.org/doc/1a994b/>>; *Prosecutor v. Vasiljević*, No. IT-98-32-A, Judgment, AC, 25 February 2004, para. 102 <<http://www.legal-tools.org/doc/e35d81/>>; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, AC, 29 July 2004, para. 49 <<http://www.legal-tools.org/doc/88d8e6/>>; *Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, paras. 476-9 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Semanza*, No. ICTR-97-20-T, Judgment, TC, 15 May 2003, para. 388 <<http://www.legal-tools.org/doc/7e668a/>>; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 599 <<http://www.legal-tools.org/doc/4ac346/>>.

¹⁹¹ *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 676 <<http://www.legal-tools.org/doc/0a90ae/>>; *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, para. 328 <<http://www.legal-tools.org/doc/6b4a33/>>; *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, TC, 2 September 1998, para. 478 <<http://www.legal-tools.org/en/doc/b8d7bd/>>; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment, TC, 22 January 2004, para. 600 <<http://www.legal-tools.org/doc/4ac346/>>.

¹⁹² Cf. *Prosecutor v. Tadić*, No. IT-94-1-T, Judgment, TC, 7 May 1997, para. 689: ‘if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing ...’ <<http://www.legal-tools.org/doc/0a90ae/>>; *Prosecutor v. Delalić et al.*, No. IT-96-21-T, Judgment, TC, 16 November 1998, para. 386 with regard to command responsibility: ‘... such knowledge cannot be presumed but must be established by way of circumstantial evidence’ <<http://www.legal-tools.org/doc/6b4a33/>>.

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rea requirement according to article 30)¹⁹³. However, it must be noted that the stronger purpose requirement only refers to the act of facilitation, not to the main crime ('such a crime'); insofar the assistant only needs to possess the mental element required by that crime¹⁹⁴. This follows from a literal interpretation and the doctrinal requirement of a double mental element in acts of secondary participation (complicity) – with regard to the actual act of participation and with regard to the main crime – which has been long recognized in criminal law doctrine¹⁹⁵. For questions of delimitation see *infra* mn. 45.

4. 'In any other way contributes' to the (attempted) commission ... 'by a group ... acting with a common purpose'

- 28 a) General. The whole subparagraph (d) is an almost literal copy of a 1998 Anti-terrorism convention¹⁹⁶ and presents a compromise with earlier 'conspiracy' provisions¹⁹⁷, which since Nuremberg have been controversial¹⁹⁸. The 1991 ILC Draft Code held punishable an individual who 'conspires in' the commission of a crime, thereby converting conspiracy into a form of 'participation in a common plan for the commission of a crime against the peace and security of mankind'¹⁹⁹. The 1996 Draft Code extends to a person who 'directly participates in planning or conspiring to commit such a crime which in fact occurs'²⁰⁰. Thus, it restricts liability compared to the traditional conspiracy provisions in that it requires a direct participation – already discussed above – and an effective commission of the crime. Subparagraph (d) takes this more restrictive approach even further, eliminating the term conspiracy altogether and requiring at least a contribution to a collective attempt of a crime²⁰¹. The special feature of subparagraph (d) undoubtedly lies in the reference to 'a crime by a group of persons acting with a common purpose'. This ensuing disparity as compared to subparagraph (c) has been elaborated by the ICTY in *Furundžija*, stating that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as 'two separate categories of liability for criminal participation'²⁰²

¹⁹³ Conc. Eser, in: Cassese *et al.* (eds.), *The Rome Statute of the ICC* (2002) 767, 801 with fn. 145; for a different view Vest (2010) 8 *JICJ* 851, 862 arguing that the purpose standard can be subsumed under article 30 since 'intent' must be interpreted as encompassing this standard. Critical of this requirement as an overly high threshold, which eventually may lead to 'serious underpunishment', see Stewart (2012) 25 *LeidenJIL* 165, 197.

¹⁹⁴ See for a good discussion advancing this 'new interpretation' (although it is not that new) see Stewart, <<http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>>, especially the reference to Weigend's entry, <<http://jamesgstewart.com/how-to-interpret-complicity-in-the-icc-statute/>> (both last visited 31 Jan. 2015).

¹⁹⁵ See only Roxin, *Strafrecht Allgemeiner Teil II* (2003) § 26 mn. 130 *et seq.*, 267 *et seq.*

¹⁹⁶ International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1998), Annex (37 ILM 249 (1998)), article 2 para. 3 (c).

¹⁹⁷ For example: Preparatory Committee Draft, article 23 para. 7 (e) (ii). See Ambos (2007) 5 *JICJ* 159, 168 with further references.

¹⁹⁸ See, for example, Pella (1950) 2 *YbILC* 278–362, 357; Graven (1950) 76 *RCADI* 433–605, 502–3; Jescheck (1954) 66 *ZStW* 193–217, 213; Rayfuse (1997) 8 *CLF* 43, 52; Cassese *et al.*, *ICL* (2013) 201–3; Hale and Cline (2014) 25 *CLF* 261, 265 *et seq.* See also the statement of the German delegate O. Katholnigg at the Diplomatic Conference for the Adoption of the 1988 Drug Convention (*United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records* (1988) para. 52: 'common law concept unknown in civil law systems'). The concept was, however, in principle recognized by the ILC Special Rapporteur Thiam ((1990) 2 *YbILC*, Part 1, 16, para. 66) and also exists today in civil law jurisdictions in a similar form (see, e.g., § 30 para. 2 alt. 3 of the German *Strafgesetzbuch*).

¹⁹⁹ 2 *YbILC*, Part 2, p. 99 (commentary to article 3) (1991).

²⁰⁰ 1996 ILC Draft Code, article 2 para. 3 (e).

²⁰¹ For the drafting history *cf.* Saland, in: Lee (ed.), *The ICC* (1999) 189, 199 *et seq.* According to Heyer, *Beihilfestrafbarkeit* (2013) 450 *et seq.* the distinctive characteristic of Art. 25 (3)(d) is that attribution is based on the common purpose, *i.e.* one of the core crimes (and not the individual act). *Cf.* also Park, *Beteiligungsform* (2015 forthcoming) who interprets subparagraph (d) as a special form of accessorial liability which focuses on the contribution to the general criminal activity of a collective entity.

²⁰² *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, TC, 10 December 1998, paras. 216, 249 <<http://www.legal-tools.org/doc/e6081b/>>; recently *Prosecutor v. Djordjević*, No. IT-05-87/1-A, Judgment, AC, 27 January 2014, paras 56 *et seq.* and 829 *et seq.* <<http://www.legal-tools.org/doc/e6fa92/>>.