PUBLIC

ANNEX H

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A. Eser, 'Individual Criminal Responsibility' in A Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002)

able to show that despite his contribution, the perpetrator would have been ready and able (as, for instance, by finding assistance by others) to perform the crime, thus negating the causality of his own contribution. Therefore, either a true causal connection between the assistance to and the commission of the crime cannot be required in principle, as seems to be the position of the ICTY when declaring as erroneous that the assistance should have a causal effect on the crime,[134] or the causal connection has to be construed in a less strict way, such as letting suffice that the aiding and abetting was at least furthering or facilitating the crime or running the risk of it being carried out.[135]

Whether one follows one or the other line of disregarding or softening the requirement of a causal connection, at some point one arrives at the question as to whether the assistance of the aider and abettor should have a certain quality in terms of a '*direct and/or substantial*' contribution to the commission of the crime. This question arises even on the proposition that the commission of the crime must be connected with the assistance of the accomplice by a causal chain; for even if this is given, the causal contribution may be so minor or remote that it appears unjustified to attribute it to the accomplice. This doubt may have caused the Drafters of the Code of Crimes of 1996 to require that the aider and abettor must have 'directly and substantially' assisted in the commission of a crime.[136] And although the formulations of aiding and abetting in the ICTY and ICTR Statutes did not contain this restriction,[137] both the ICTY and the ICTR were prepared to read it into the relevant Statutes.[138] Similarly the formulation of aiding and abetting in the Rome Statute might be interpreted in the same way. Still, hopes should not be raised too high. If, for instance, a contribution has to be considered to be substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed', and if, accordingly, 'all acts of assistance by words or acts that lend encouragement or support' are thereby covered,[139] then this is nothing more than a softening of the 'classical' causality requirement by letting suffice both physical and psychological assistance in furthering the crime.[140] These reservations must not mean that the

[134] ICTY Trial Chamber, *Prosecutor v. Furundžija*, IT-95-17/1-T, 10 December 1998, para. 232.

[135] Rich case law and intensive discussions on these approaches seem particularly present in Germany and Spain: cf., for instance, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 7 ff., and Mir Puig, *supra* note 63, 410 respectively.

[136] Art. 2(3)(d) of Draft Code 1996; cf. *supra*, V.B.2 at note 75.

[137] Cf. *supra*, V.B.3.

[138] Cf. the ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 691, confirmed in the *Čelebići* decision, *Prosecutor v. Delalić et al.*, IT-96-21-T, 16 November 1998, para. 329. Basically on the same lines the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 232, as well as the ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 484, and in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, paras. 199 f.

[139] ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 689.

[140] For a closer analysis of the ICTY/ICTR judgments, see Ambos, in Triffterer, *supra* note 7, Art. 25 margin Nos. 15 ff.

requirement of a 'substantial' contribution is completely futile; for although not providing clear delineations, it can function as a sort of monitor by which, for instance, casual remarks, though perceived by the principal as encouragement, are obviously irrelevant, because easily exchangeable, and can thus be excluded. What this means in practice, however, is hardly definable in an abstract formula but has to be realized in a case-by-case method whereby certain modern theories of (positive and negative) imputation and attribution might be helpful when taken into consideration.[141]

2. Subjective Requirements

Unlike instigation, which is governed by the ordinary requirements of the mental element according to Article 30 of the ICC Statute,[142] complicity by way of aiding, abetting, or otherwise assisting requires two different forms of *mens rea*.

(a) With regard to *facilitating* the commission of the crime, the aider and abettor must act with *'purpose'* (Article 25(3)(c) of the ICC Statute). This means more than the mere knowledge that the accomplice aids the commission of the offence, as would suffice for complicity according to the ICTR and ICTY Statutes,[143] rather he must know as well as wish that his assistance shall facilitate the commission of the crime. Consequently, if a civilian, asked by a soldier to disclose the hiding place of the later victim, is doing so out of fear and with the hope that the victim may have fled, he will not be criminally responsible, even if he is aware that the soldier might find and kill the victim.

(b) With regard to all other elements as his own assistance as well as the principal's crime, the same mental elements are required and sufficient as with instigation. Correspondingly, the aider and abettor must have '*double intent*' both with regard to the intentional commission by the principal and the requisite elements of his assistance.[144] In sum, while the objective requirements of aiding, abetting, and assisting are relatively low, the criminal responsibility of aiders and abettors contains certain restrictions by means of higher subjective requirements.[145]

[141] To the same end, see Ambos, in Triffterer, *supra* note 7, margin No. 18 and A. Serini, 'Individual Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 140. On the various theories of the foundation and exclusion of imputation and attribution, see most recently Th. Lenckner, in Schönke and Schröder (eds.), *supra* note 61, § 13 pre-notes 71–102 and, in particular on participation, Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 27 margin No. 9a, 10a.

[142] Cf. *supra*, V.D.4.

[143] According to Arts. 7 and (1) of the ICTR and ICTY Statutes; cf. the judgments by the ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para. 249; cf. also ICTY Trial Chamber in the *Tadić* case, *supra* note 6, para. 692 and ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 479, and furthermore the critical analysis by Ambos, *supra* note 38, 789 ff.

[144] Cf. *supra*, V.D.4.

[145] This is also the conclusion by Ambos, in Triffterer, *supra* note 7, margin No. 19.