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# Joint Criminal Confusion

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## JOINT CRIMINAL CONFUSION

Jens David Ohlin\*

*Article 25 on individual criminal responsibility has generated more conflicting interpretations than any other provision in the Rome Statute. Part of the problem is that it is impossible to construct a coherent and nonredundant interpretation of Article 25(3)(d) on group complicity. Because of unfortunate drafting, both the required contribution and the required mental element are impossible to discern from the inscrutable language. As a result, it is nearly impossible to devise a holistic interpretation of Article 25(3)(d) that fits together with the rest of Article 25 and Article 30 on mental elements. One possible solution is to repair Article 25 with an amendment that replaces Article 25(3)(d) with a clear provision specifically incorporating some joint liability doctrine, albeit a version that excludes the worst excesses of the doctrine known as joint criminal enterprise.*

### I. INTRODUCTION

The most pressing issue facing the Assembly of State Parties is not aggression<sup>1</sup> but the confusing contours of the Rome Statute provisions on group complicity and their relationship to the doctrine of joint criminal enterprise.

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1. The crime of aggression was excluded from the jurisdiction of the ICC until such time as the Assembly of State Parties could agree to and adopt a definition of the crime. Since the passage of the Rome Statute in 1998, the question of aggression has dominated both the diplomatic and scholarly agendas. See, e.g., Troy Lavers, [Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?, 71 Alb. L. Rev. 299 (2008); Giorgio Gaja, The Long Journey Towards Repressing Aggression, in *The Rome Statute of the International Criminal Court: A Commentary* 427 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002) [hereinafter Rome Statute Commentary].

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Since the ICTY Appeals Chamber issued its *Tadić* opinion in 1999,<sup>2</sup> JCE has quickly emerged as the most important mode of liability in modern international criminal law.<sup>3</sup> Indeed, it is charged in almost every indictment at the ICTY.<sup>4</sup> Its status as a part of customary international law is being debated by the Cambodian Extraordinary Chambers, which is considering whether to apply it to crimes committed by the Khmer Rouge. However, the exact relationship between JCE and the Rome Statute's provision on group complicity, Article 25(3)(d), remains a mystery. Does it incorporate JCE, reject it, expand it, contract it, or revise it?<sup>5</sup> Although JCE itself has been exhaustively analyzed in the scholarly literature, few articles have specifically focused on Article 25(3)(d),<sup>6</sup> and even courts have tried to avoid it. Indeed, the ICC Pre-Trial Chamber recently sidestepped the provision entirely and preferred instead to use Article 25(3)(a) and the concept

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2. Prosecutor v. Tadić, Case No. IT-94-I-A, ICTY Appeals Judgment, ¶¶ 226–229 (July 15, 1999).

3. For a defense of the doctrine in light of recent criticisms, see Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109 (2007) [hereinafter Cassese, *Proper Limits*] (noting that JCE has become the “darling” of prosecutors). The comment echoes the famous phrase from Judge Learned Hand that conspiracy was the “darling of the modern prosecutor’s nursery.” See *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

4. Exact statistics have not been compiled, though anecdotal evidence suggests that the vast majority of indictments charged JCE as a mode of liability. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 137 (2005) (referring to JCE as “the nuclear bomb of the international prosecutor’s arsenal”).

5. The provision provides that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime. . . .”

6. Compare Kai Ambos, *Article 25: Individual Criminal Responsibility*, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 743, 754 (Otto Triffterer ed., 2d ed. 2008) (subsidiary liability in the absence of liability for aiding and abetting), with Albin Eser, *Individual Criminal Responsibility*, in *Rome Statute Commentary*, supra note 1, at 767, 802 (complicity in group crimes).

of co-perpetration as a means of prosecuting joint criminality.<sup>7</sup> These deficiencies will be corrected here: Part II will explain why the drafting of Article 25 was conceptually disorganized; Part III will consider the nature of the contribution required for group complicity; Part IV will demonstrate that the required mental element is either unclear or redundant, depending on your interpretation. In the end, Article 25(3)(d) may even stake out liability for complicity that far exceeds the conspiracy liability that its drafters were so intent on avoiding. The irony—and the overall confusion—is intolerable. Article 25(3)(d) is hopelessly tangled because no coherent interpretation of the provision is possible; the only solution is amending the statute and establishing clear liability rules for joint criminal action.

## II. THE MANY FACES OF ARTICLE 25

I have previously argued that Article 25(3)(d) represents a statutory surrogate for joint criminal enterprise.<sup>8</sup> While JCE creates liability for participation in joint endeavors, Article 25 makes no direct mention of joint criminal endeavors but instead establishes liability for individuals who “contribute” to a group acting with a common purpose. As the following analysis will demonstrate, Article 25 effectively stakes out similar ground as both JCE liability and the common law doctrine of conspiracy liability, though if it was crafted by negotiators at Rome to restrict expansive U.S.-style conspiracy liability, it certainly did not succeed on that front.<sup>9</sup> Both

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7. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

8. See Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. Int'l Crim. Just. 69 (2007). See also Thomas Weigend, Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges, 6 J. Int'l Crim. Just. 471, 478 (2008) (noting that Article 25(3)(d) “probably cover[s] at least some forms of JCE”). Even the Tadić court recognized when it originally formulated JCE that a “substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court” and that “this provision upholds the doctrine under discussion.” See Tadić at ¶ 222.

9. Cf. Kai Ambos, Amicus Brief for Pre-Trial Chamber on Joint Criminal Enterprise, in *Criminal Investigation Against Kaing*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Extraordinary Chambers in the Courts of Cambodia, at 15 (Oct. 27, 2008), available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/164/D99\\_3\\_27\\_EN\\_Ambos.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/164/D99_3_27_EN_Ambos.pdf)

Article 25(3)(d) and JCE are alternate theories for establishing complicity in collective criminality. Just as JCE provides vicarious liability for members who conspire together to pursue collective criminal action, Article 25(3)(d) appears to provide derivative liability for accomplices.<sup>10</sup> Unfortunately, though, Article 25(3)(d) is doctrinally incoherent.

The ICC Pre-Trial Chamber has concluded that Article 25(3)(d) “is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY.”<sup>11</sup> The Pre-Trial Chamber referred to this as being a “residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.”<sup>12</sup> In other words, the provision is a catch-all. A similar view is taken by Eser in his contribution to the Rome Statute Commentary, when he concludes that the provision, which he terms “complicity in group crimes,” is

superfluous since the thresholds of aiding and abetting are, according to subparagraph (c), already so low that it is difficult to imagine many cases needing a special provision such as subparagraph (d). On the other hand, with regard to the group factor of this type of complicity, it may still have some symbolic relevance. Clearly, the employment of obviously different mental concepts in this provision can hardly hide the lack of expertise in criminal theory when this provision was developed.<sup>13</sup>

Likewise, Ambos concludes in the Triffterer commentary that Article 25(3)(d), and its genesis in an earlier antiterrorism convention, represents a compromise position regarding the controversial concept of conspiracy,<sup>14</sup>

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[hereinafter Ambos, JCE Amicus Brief]. See also Ohlin, Three Conceptual Problems, *supra* note 8, at 80; George P. Fletcher & Jens David Ohlin, Reclaiming Fundamental Principles of Law in the Darfur Case, 3 J. Int'l Crim. Just. 546 (2005) (JCE is “the statutory surrogate of joint criminal enterprise”).

10. Cf. Ambos, JCE Amicus Brief, *supra* note 9, at 14–15.

11. *Lubanga*, ¶ 335.

12. *Lubanga*, ¶ 337.

13. See Eser, *supra* note 6, at 803.

14. *Id.* at 757. The controversial history of the concept of conspiracy in the law of war is well documented in George P. Fletcher, Amicus Curiae Brief of Specialists in Conspiracy

but the compromise “demonstrates that a provision drafted without regard to basic dogmatic categories will create difficult problems of interpretation for the future ICC.”<sup>15</sup> Given the overwhelming number of doctrinal tensions in Article 25 explored in the following sections of this article, the only available course of action is not interpretation, but revision. Instead of straining to impose a coherent reading on Article 25(3)(d), the better avenue is for the Assembly of State Parties to revise the statute. Revision is the only way that the confusion will be prevented from spreading: the language of Article 25(3)(d) was recently borrowed by the Security Council and inserted into the hastily drafted Statute for the U.N.-backed Special Tribunal for Lebanon.<sup>16</sup> The doctrinal stakes go well beyond the ICC.

### III. CONTRIBUTIONS TO GROUP ENDEAVORS

Article 25’s reference to “contributions” is confusing to say the least. Some scholars have interpreted this language as creating a form of complicity liability wholly different from JCE liability.<sup>17</sup> For example, Cassese argues that Article 25(3)(d) regulates contributions to a common criminal endeavor by a member who stands *outside* the criminal group, while JCE itself

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and International Law in Support of Petitioner, 2006 WL 53979 (arguing that conspiracy is not a triable offense under the laws of war), filed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

15. See Ambos, *supra* note 6, at 759. The use of the word “dogmatic,” or *dogmatisch* in German, refers to criminal law theory.

16. See S.C. Res. 1757 art. 3(1)(b), U.N. Doc. S/RES/1757 (May 30, 2007), creating the Statute for the Special Tribunal for Lebanon.

17. See Antonio Cassese, *International Criminal Law* 213 (2d ed. 2008) (“the gist of Article 25(3)(d) is the regulation not of JCE but rather of a different mode of responsibility”). This represents a departure from his earlier view. Compare with Cassese, *Proper Limits*, *supra* note 3, at 132; *Prosecutor v. Tadić*, Case No. IT-94-I-A, ICTY Appeals Judgment, ¶ 222 (July 15, 1999). Other scholars also took the same or similar views. See William A. Schabas, *An Introduction to the International Criminal Court* 211 (3d ed. 2007); Ohlin, *Three Conceptual Problems*, *supra* note 8, at x; Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 *J. Int’l Crim. Just.* 159, 172 (2007) (“the only form of participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute”). However, Cassese’s most recent view is supported in part by Eser’s analysis in the *Rome Statute Commentary*. See Eser, *supra* note 6, at 803 (noting that the “group factor of this type of complicity . . . may still have some symbolic relevance”).

regulates *internal* participation in a joint criminal plan.<sup>18</sup> Under this view, the difference between the two categories comes down to membership. Cassese's view is arguably supported by structural similarities between Article 25(3)(d) and domestic complicity provisions criminalizing aiding, abetting, inducing, or facilitating a crime.<sup>19</sup> In such situations, the accomplice arguably renders aid to—but does not join—the criminal plan.<sup>20</sup>

Unfortunately, accomplice liability in many domestic jurisdictions, and certainly in the U.S., is not predicated on a factual determination that the accomplice is not a member of the criminal group. Of course, the *reverse* is certainly true: conspiracy liability or liability as a principal requires a factual determination that the defendant is a member of the criminal group. However, it is a logical fallacy to take this truth and deduce that membership precludes accomplice liability. Accomplice liability is certainly not predicated on a determination that the defendant is not a member of the criminal group.<sup>21</sup> Indeed, on some theories of accomplice liability, defendants are prosecuted precisely because they are considered participants in a criminal endeavor with a unity of purpose or a commonality of objective.<sup>22</sup> Indeed, in many cases prosecutors will charge defendants as accomplices even though they were members of the criminal group, especially if the jurisdiction makes accomplices vicariously liable for the foreseeable actions of the principal perpetrators.<sup>23</sup>

Furthermore, Article 25(3)(d) makes no mention of an “outside” or “external” element for the contribution in question. Specifically, the provision provides liability for a person who “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose,” followed by the requirement that the contribution be made “with the aim of furthering the criminal activity or criminal purpose

18. See Cassese, *International Criminal Law*, supra note 17, at 213.

19. See, e.g., 18 U.S.C. § 2.

20. For example, 18 U.S.C. § 2(b) penalizes an individual who “willfully causes an act to be done which if directly performed by him or another would be an offense,” thus suggesting at first glance that the act is performed by another, not by the accomplice.

21. Indeed, note that 18 U.S.C. § 2(b) allows accomplice liability for performing acts *indirectly*; there is no requirement of outside status in either federal or state statutes, the Model Penal Code, or the case law.

22. See, e.g., *People v. Russell*, 91 N.Y.2d 280 (N.Y. 1998).

23. This produces a similarly expansive liability scheme as Pinkerton conspiracy liability. See, e.g., *People v. Luparello*, 187 Cal. App. 3d 410 (Ct. App. 1987).

of the group” or “be made in the knowledge of the intention of the group to commit the crime.” Given that there is no mention of inside or outside status at all, one should be hesitant before reading it into the statute. Cassese distills the element from the overall structure of Article 25,<sup>24</sup> as well as the similar category of “external participation in mafia crimes” found in Italian penal law.<sup>25</sup> But perhaps the best evidence for the “outside contribution” view comes from the suggestion that the language for Article 25(3)(d) was allegedly borrowed from Article 2(3) of the 1997 International Convention on the Suppression of Terrorist Bombing, which was opened for signature in 1998 at around the same time that the Rome Statute was finalized.<sup>26</sup> Article 2(3) of the Convention provided liability for a person who “[i]n any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”<sup>27</sup>

Scholars who favor this interpretation have a very particular motivation. First, the *Tadić* court famously interpreted JCE as falling under the ICTY Statute’s provision on commission.<sup>28</sup> Consequently, if Article 25(3)(d) does not codify JCE, then the ICC would be free to import the

24. See Cassese, *International Criminal Law*, supra note 17, at 213 (perhaps assuming that contributions by definition come from non-members).

25. See *id.* at 213 n.37 (discussing *concorso esterno in associazione mafiosa*).

26. For a discussion of the drafting history at Rome, see Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 *Nw. U. J. Int’l Hum. Rts.* 304, 313 (2008). Diplomats involved in the negotiations at Rome confirm that the Terrorism Convention was the inspiration for the text of the Article 25(3)(d) compromise, though also acknowledging that the text was taken “with slight modifications.” See Per Saland, *International Criminal Law Principles*, in *The International Criminal Court: The Making of the Rome Statute 189, 199* (Roy Lee ed., 1999).

27. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164 art. 2(3)(c) at 389, U.N. GAOR, 52nd Sess., Supp. No. 49, U.N. Doc. A/52/49 (Jan. 8, 1998). Also, the ICTY Appeals Chamber noted in *Tadić* that the drafting history of the Terrorism Convention “does not shed any light on the reasons behind the adoption of this text.” See *Prosecutor v. Tadić*, Case No. IT-94-1-A, ICTY Appeals Judgment, ¶ 221 (July 15, 1999).

28. See *Tadić* at ¶ 188. The controversy surrounding the *Tadić* opinion’s structural reading of Article 7(1) of the ICTY Statute is critically discussed in Ohlin, *Three Conceptual Problems*, supra note 17, at 71–74.

*Tadić* version of the doctrine through the Rome Statute's provision on commission, Article 25(3)(a), in much the same way that the ICTY Appeals Chamber imported the judicially recognized doctrine of JCE through an interpretation of the ICTY Statute's use of the term "committed." (Or they might simply import the doctrine by recognizing its existence in customary international law.) However, if in the alternative, the court determines that Article 25(3)(d) does indeed codify liability for joint criminal endeavors, then the relevance of *Tadić* as a precedent and the rest of the ICTY's JCE jurisprudence recedes into the background.<sup>29</sup> The ICC would then be required to engage in a first-order analysis of the liability provisions contained in Article 25(3)(d), which might conceivably lead to a different result than the version of JCE identified by the ICTY in *Tadić*.<sup>30</sup>

To remain doctrinally consistent, if we were to determine that Article 25(3)(d) does *not* codify JCE, one would have to admit that JCE is unavailable as a mode of liability at the ICC (because it is by definition absent from the statutory scheme).<sup>31</sup> However, Cassese argues that the Rome

29. See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), ¶ 322 & passim. For a critical discussion of the interpretative relationship between the ICC's analysis of the Rome Statute and the ICTY jurisprudence on JCE, see Héctor Olásolo, Developments in the Distinction Between Principal and Accessorial Liability in Light of the First Case-Law of the International Criminal Court, in *The Emerging Practice of the International Criminal Court* (Carsten Stahn & Göran Sluiter eds., 2009).

30. Indeed, the Pre-Trial Chamber in *Lubanga* concluded that Article 25(3)(d) codifies a residual form of liability "which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made." Nonetheless, the PTC referred to article 25(3)(d) as being "closely akin" to the concept of JCE. See *Lubanga*, ¶ 335.

31. This result would be mandated by the requirement that the criminal law requires advanced legislative enactments, or *nullum crimen sine lege scripta*. For a discussion of the maxim, see Michael Bohlander, *Principles of German Criminal Law* 18 (2009). Of course, common law countries, with a history of prosecuting individuals for common law crimes, have shown far less fidelity to this maxim. The maxim's status within international criminal law is both controversial and continually contested because the discipline draws from both civil and common law traditions. Furthermore, the discipline is only now going through a process of rigorous penal codification (in the form of the Rome Statute), following a lengthy historical period of wartime prosecutions for violations of the laws of war that were either uncodified or lightly codified. See, e.g., Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (Lieber Code) (1863).

Statute implicitly permits JCE as a mode of liability because Article 25(3)(a) allows for liability if an individual “commits such a crime” as an individual or “jointly with another.”<sup>32</sup> It is unclear how this could encompass JCE since it appears to refer to co-perpetration. Furthermore, the ICC Pre-Trial Chamber has recently taken the position that with regard to co-perpetration and Article 25, the Rome Statute requires action “with intent” as a required mental element under the Statute.<sup>33</sup> In light of this, JCE III (vicarious liability for criminal acts of others that fall outside the scope of the criminal agreement) should be inconsistent with the Statute’s intent requirement.<sup>34</sup> The only way around this argument is to seize upon the language in Article 30 of the Rome Statute that the mental requirement of acting with intent is the default requirement “unless otherwise provided.” This is clearly a reference to the rest of the Rome Statute, so that the provision means that the required mental element is acting with intention unless otherwise provided by the Rome Statute. Others have concluded that the phrase “unless otherwise provided” also creates an exception for other mental states provided for in customary international law.<sup>35</sup> This view, while doctrinally sophisticated, is dangerous because it cuts against the significant purpose and rationale for creating a codified international penal statute in the first instance, where reliance on customary law or common law crimes is eliminated (due to a concern regarding the principle of legality).<sup>36</sup> If one allows the importation of different or lower requirements for the mental element from customary international law, then the whole point of crafting Article 30 in the first place disappears. The more consistent argument, if indeed Article 25(3)(d) does not codify

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32. See Cassese, *International Criminal Law*, supra note 17, at 212 (citing article 25(1), although probably intending to cite article 25(3)).

33. The Pre-Trial Chamber concluded that the mental state of *dolus eventualis* would meet this requirement but not “[w]here the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions. . . .” See *Lubanga*, ¶ 355.

34. *Id.* However, the PTC could conceivably reach the opposite result if they view JCE III as a form of *dolus eventualis*.

35. See, e.g., Gerhard Werle & Florian Jessberger, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 *J. Int’l Crim. Just.* 35, 43 (2005) (noting the controversial nature of this position).

36. See Bohlander, supra note 31, at 18; Fletcher & Ohlin, supra note 9, at 539 (“fundamental concerns . . . lead us vigorously to oppose the reliance on CIL as means of inculcation in criminal prosecutions, whether in domestic courts or international courts”).

JCE, is to admit that JCE is currently unavailable as a mode of liability before the ICC.

The “outside contributor” interpretation of Article 25(3)(d), promising at first glance, is ultimately unconvincing for a number of reasons. First, the relevant language in the International Convention on the Suppression of Terrorist Bombing is directly preceded by a provision, Article 2(3)(b), that states that a person is liable if he “[o]rganizes or directs *others* to commit an offence as set forth in paragraph 1 or 2” (emphasis added), which thus casts a particular light on the language in Article 2(3)(c) of the Convention that provides for liability if a person “[i]n any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose.”<sup>37</sup> It is therefore clear in the context of this treaty’s text that the contribution comes from an external source outside of the criminal group. No such analogous provision exists in the Rome Statute statutory scheme.<sup>38</sup>

The “outside contributor” interpretation of Article 25(3)(d) is also problematic because the Rome Statute already has a provision in Article 25(3)(b) for facilitating, aiding and abetting, or assisting in the commission of an offense. This provision arguably covers all cases of accomplice complicity, thus making Article 25(3)(d) dangerously redundant. In an attempt to interpret away the redundancy, Cassese argues that 25(3)(c) applies only to those who aid and abet a single perpetrator, while 25(3)(d) covers individuals who aid and abet a “plurality of persons.”<sup>39</sup> This reading is laudable in that it reads into the Rome Statute a desire on the part of the negotiators to craft specific provisions that deal with the inherently (and distinctively) collective nature of many international crimes. Although I have long argued for the collective nature of international crimes and the development of criminal law doctrines tailored to penalize them in conformance with the principle of individual culpability, there is questionable evidence of similar motivations on the part of the Rome Statute’s drafters. Indeed, the interpretation runs afoul of a basic structural reading of Article 25 as a

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37. International Convention for the Suppression of Terrorist Bombings, *supra* note 27, art. 2(3)(b).

38. See Rome Stat. art. 25(3)(c) (“for the purpose of facilitating . . .”).

39. See Cassese, *International Criminal Law*, *supra* note 17, at 213. The view is supported by Eser, *supra* note 6, at 802 (complicity for group crimes requires a group of at least three persons).

whole.<sup>40</sup> Is there any evidence that the parties to the Rome Statute purposely insisted on one provision inculcating individuals who aid and abet single perpetrators and a separate provision inculcating individuals who aid and abet multiple perpetrators? If this were the case, one would think that the former provision would be limited by its terms to single perpetrators. But Article 25(3)(c)'s provision on aiding and abetting, *by its own terms*, is certainly broad enough to cover aiding and abetting a plurality of persons, since nowhere by its terms is it limited to aiding and abetting a single individual.<sup>41</sup> If the framers of the Rome Statute had drafted a section that covered aiding and abetting generally, why would they feel it necessary to make a second, redundant provision dealing with aiding and abetting common criminal endeavors, and then codify no provision criminalizing *direct* participation in a common criminal endeavor? The supposed motivation remains elusive. Indeed, the result is doctrinally incoherent. Accomplice liability is, by definition, derivative liability, in the sense that it presupposes the existence of a primary offense. But under the reading of Article 25(3)(d) being considered, there is no primary offense of direct participation in a group crime, only derivative liability for contributing as an outside accomplice. The only solution to this problem is to find this primary offense in the Article 25(3)(a) notion of committing an offense "jointly with another." This is unsatisfactory since it requires that we equate committing a crime "jointly with another" as being equivalent to "a crime by a group of persons acting with a common purpose." If the drafters meant these two phrases to be equivalent, then why were entirely different phrases used? This violates the basic canon of interpretation that differences in phraseology usually exist for a reason, i.e., they are indicative of a shift in meaning and should not be explained away as mere caprice. Perhaps this explains the scholarly consensus that Article 25(3)(d) betrays the drafters' basic ignorance of criminal law theory.<sup>42</sup>

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40. The reading might be plausible if we were comparing one provision on aiding and abetting as a form of derivative liability with a second provision on *participation* in joint criminal endeavors. But that is not the comparison here. We are comparing one general provision on complicity with a second, more specific, provision on complicity.

41. This is made clear by, for example, Eser, *supra* note 6, at 802–03 (noting that the assistance level required for liability "is even more difficult to circumscribe than the assistance in subparagraph (c)").

42. See *supra* notes 13–15 and related text.

#### IV. THE MENTAL REQUIREMENT FOR GROUP COMPLICITY

It is doubtful that any reasonably coherent interpretation of Article 25(3)(d) is possible, perhaps because the overall structure of Article 25 was incompletely theorized by its drafters and was the product of negotiated compromises and drafting by committee. To take just the most obvious structural problem, Article 25(3)(d) on group complicity includes complex standards of knowledge or purpose for group complicity, allowing for liability for contributions that are intentional and are made with knowledge of the group's criminality. But no standards are offered for the standard complicity categories of aiding and abetting in Article 25(3)(b). The problem is not simply that *different* standards are offered in subsection (b). That might be confusing enough—the asymmetry would require a doctrinal reason—but the problem is that the complicity of subsection (b) articulates *no standards at all*. One is presumably left to guess that the standards of Article 25(3)(d) on group complicity do not apply to subsection (b)—i.e., that the silence is indicative of *something*. But the problem is that in their absence there is no clear direction on which standards to apply—they might be narrower than 25(3)(d) or they might be far wider.

Further complicating matters is the explicit reference in Article 25(3)(d) that the contributions must be intentional. This can be interpreted narrowly or broadly. If we interpret it narrowly, it only means that the bare action performed by the complicitous defendant was the product of an intentional decision, i.e., not an accident (as in strict liability). The problem with this interpretation is that Article 30 of the Rome Statute says that the default mental element for the Statute is intent and knowledge, “unless otherwise provided.” Article 30 therefore establishes a clear directive: the other articles need only express a mental element when they want to depart from the default rule.<sup>43</sup> Why then does Article 25(3)(d) include a mental element—“intentional”—that is within the default rule? Article 25(3)(d) should only offer a mental element if it seeks to depart from the default rule. Normally, one might say that, looking at the four corners of

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43. Indeed, Article 30 specifically defines intent, in cases of conduct, as “that person means to engage in the conduct.”

Article 25, the fact that subsection (d) includes an express mental element would seem to suggest that that mental element does not apply to the rest of Article 25. But if we take that presumption and run with it, we run smack into the prohibition of the Article 30 default rule that tells us to assume a requirement of intent and knowledge. Article 25(3)(d) and Article 30 pull us in opposite directions.

If, on the other hand, we interpret broadly Article 25(3)(d)'s requirement that the contribution be "intentional," we run into a problem again. The broad reading suggests that "intentional" refers to the nature of the contribution, i.e., the defendant intends to help the principals, as opposed to a situation where the defendant performs an action that he should reasonably foresee might advance the cause of the principals (even though he does not intend it to do so).<sup>44</sup> However, this reading again runs into the Article 30 default rule, which defines intent in cases of consequences to mean that the person "means to cause that consequence or is aware that it will occur in the ordinary course of events." Once again, the mental element requirement of Article 25(3)(d) would appear to provide for a mental element that is already within the statutory default rule, thus rendering its explicit inclusion utterly mysterious.

There are still other mysteries to Article 25(3)(d) that are fully internal and do not relate to its inscrutable relationship to the other provisions of the Rome Statute. Consider, for example, that subsection (i) allows liability if the contribution is made with the aim of furthering the criminal activity or purpose of the group, while subsection (ii) allows liability if the accomplice has knowledge of the group's intention to commit their crime. The first subsection is utterly redundant because there can never be a situation where an individual wants to further the criminal activity of the group but lacks knowledge of that activity.<sup>45</sup> Having the desire to further the criminal activity presupposes, logically, knowledge of that criminal activity. Consequently, there can be no cases where a prosecution rests solely on subsection (i). It is utterly unnecessary given the inclusion of the far broader provision on knowledge in subsection (ii).

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44. This standard for aiding and abetting is sufficient to establish liability for complicity in some jurisdictions.

45. See Ambos, *supra* note 9, at 14.

## V. CONCLUSION

The development of the international jurisprudence of group complicity in the last fifteen years has combined great and historic advances with unfortunate missteps; with each advancement we have also witnessed retrogradation. Given that Article 25 is so rife with internal tension, the only sensible solution is for the Assembly of State Parties to recraft Article 25(3)(d)—drafting from scratch rather than drafting by committee—and simply state which doctrine of complicity they are codifying. I have argued elsewhere that if the Assembly of State Parties were to explicitly codify JCE or a similar conspiracy doctrine into the Rome Statute, they should incorporate separate categories for co-perpetrating a JCE and aiding and abetting a JCE, thus establishing a hierarchy of relative culpability among participants in a joint criminal endeavor.<sup>46</sup> They should also explicitly exclude vicarious liability for acts that fall outside the scope of the criminal plan. But even if the Assembly rejects these specific proposals, almost anything would be more coherent than the current Article 25(3)(d). If the Assembly of State Parties were to renegotiate a new Article 25*bis*, many of these dilemmas might be addressed. Concerns about the crime of aggression will no doubt be higher on the diplomatic agenda, but correctly recrafting the modes of liability is more urgent, since by virtue of their location in the General Part they implicate potentially every prosecution before this permanent court on whose shoulders we have placed the entire weight of our noblest ambitions.

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46. See Jens David Ohlin, Commentary on Prosecutor v. Stakić [The Co-Perpetrator Model of Joint Criminal Enterprise], 14 *Annotated Leading Cases of International Criminal Tribunals* 739 (2008).