East African Scholars Journal of Education, Humanities and Literature

OPEN ACCESS

Abbreviated Key Title: East African Scholars J Edu Humanit Lit
ISSN: 2617-443X (Print) & ISSN: 2617-7250 (Online)
Published By East African Scholars Publisher, Kenya

Volume-3 | Issue-4 |Apr-2020 | DOI: 10.36349/EASJEHL.2020.v03i04.008

Research Article

Basic Forms of Inchoate Crime under the Penal Law of Somalia (de lege lata and de lege ferenda problems)

Anton Girginov*

[1]A former State Prosecutor and University Professor, PhD, DSc; International Prosecution Adviser in Mogadishu with the European Union Capacity Building Mission in Somalia

Article History
Received: 04.04.2019
Accepted: 25.04.2019
Published: 29.04.2020

Journal homepage:
https://www.easpublisher.com/easjehl

Quick Response Code

Abstract: There are many cases when an intended crime was not accomplished. Nevertheless, the undertaken activity might often be relevant to penal law. For the purposes of earlier protection of targeted values, it may also entail criminal liability of the actor. In some situations, this actor is allowed to exempt himself from such a liability by performing a specific positive posterior behaviour. The exemption is effected on the basis of specific stimulation provisions.

Keywords: attempt, preparation, criminal association, incitement, voluntary withdrawal.

INTRODUCTION

The national penal law of Somalia is in the process of modernization. Its basic element is the Penal Code of the Somali Republic [PC] was approved by Legislative Decree in December 1962, but came into force on 3 April 1964. This PC has been in force for almost 60 years. Over this period of time significant changes occurred. Penal law theory made remarkable progress. Also, new crimes and complex forms of criminal activities appeared. In response, the international community recommended and many foreign countries introduced a number of new penal provisions to oppose them.

The current situation dictates serious innovation of the Somali PC. This innovation means not only new criminalization of modern harmful or dangerous acts or omissions. It requires also improvement of the traditional legal institutions in the general part of the penal law. The institutions of criminal attempt, preparation and other forms of preliminary criminal activity are no exception.

The modernization of the penal law in Somalia may be effected not only through the improvement of the PC by the Federal Authorities of this country. The Member States in Somalia also take part in this process. They develop Somali penal law for their territories. The Anti-Piracy Law of Puntland constitutes a remarkable example. Along with the PC this Law also contains interesting provisions related to the topic of this research paper.

Attempt

1. The key question posed to any criminal lawyer is: When does punishable conduct (act or omission) exist, especially if the crime is not accomplished because the offender has not "*caused the harmful or dangerous event indicated in the penal law*"? Because as a rule preparation in Somalia is not punished by the Penal Code {PC} [exceptions under Articles 230.1-II, 232 of the PC) is the first act/omission to indicate the existence of punishable conduct – Article 125 of the PC. According to Article 17 of the PC, "*(Crimes Attempted), A crime shall be considered attempted where the act or omission on the part of the offender, unequivocally directed towards causing the event [19 P.C.], has not been entirely completed, or where the event has not resulted [125 P.C.]*". Obviously, the words "has not

been completed" designate the so-called uncompleted attempt whereas the words "where the event has not resulted" designate the so-called completed attempt.

To define attempt the text of Article 17 of the PC resorts to the so-called 'material criterion'. Essentially, this criterion means that the interest/value, protected by the criminalization of the respective act or omission, is in some immediate danger. This danger to the object of the crime has not yet amounted to any direct negative consequences on it. This criterion successfully distinguishes attempt from accomplished crime, at least, in the prevailing number of cases when the legal description of the crime contains a detrimental result, namely: a legal indication of some harmful or dangerous event caused by the offender as a consequence of his act or omission – see Articles 16 and 20 of the PC.

2. However, the bigger problem, usually, is to distinguish between preparation (generally, unpunishable under the PC) and attempt rather than attempt and accomplished crime. If this is valid also for Somalia, the attempt should be delineated more clearly in the text of this Article. Such delineation would be very useful in the cases where preparation is punishable under some special penal law, such as the Puntland Anti-Piracy Law – see Articles 4 and 9. It is hardly sufficient to determine attempt as conduct (act or omission) "*unequivocally directed towards causing the event*" as Article 17 of the PC reads. Unlike the 'manifestation of intent/decision to commit a crime' the preparation is also some overt conduct which is, more or less, directed towards causing the event in question and the word "unequivocally" can hardly distinguish the attempt from the preparatory activities.

In view thereof, it is to be particularly highlighted that, unlike preparation, the attempt is a part of the respective accomplished crime (this is why the latter consumes the former), "*a commencement of the performance"* – Article 53 (1) of the Indonesian PC, "*perpetrating all or part of"* its constitutive acts – Article 16 (1) of the Spanish PC. It, more or less, contains the ingredients of the accomplished crime provided by the legal description of the crime, consumes them being "*a beginning of its execution"* – Article 121-5 of the French PC and Article 34 (1) of the PC of UAE. An attempt is the undertaking of the initial perpetration of the crime; the start of its consummation. It is an activity which, more or less, fulfils the legal description of the respective crime and in particular, the specific *conduct*, the acus reus (the 'executive/perpetrating conduct') of the crime outlined in the legal description – Article 13 (1) of the Polish PC. Unlike attempts, preparation, though also an overt act, does not go that far to begin satisfying the legal indications of the executive conduct of the crime[1].

Thus, attempt exists if the offender's activity has begun satisfying the legal indications of the specific conduct of the respective crime. This is the so-called formal or technical criterion for the existence of attempt[2]. If, however, the executive conduct is outlined too broadly or/and unclearly, e.g. as in the case of murder (Article 434 of the PC), then the material criterion under the present text of the Article 17 comes into service as an auxiliary one. This material criterion, actually, indicates the satisfaction of the 'formal' one. It assists the interpreter of law in finding whether or not a given activity has begun fulfilling the legal description of the specific criminal conduct. The fulfilling of this legal description occurs and therefore, the attempt takes place, whenever the activity produces an immediate danger to the interest (value), protected by the criminalization of the respective act or omission. Otherwise, if such danger has not yet been produced, no attempt takes place[3].

The accomplished crime always consumes the attempt. Hence, there might be no ideal concurrence between them (as per Article 44-I of the PC) even if the legal description of accomplished crime contains no detrimental result, namely: a legal indication of some harmful or dangerous event caused by the offender as a consequence of his act or omission – see Articles 16 and 20 of the PC. This is why such accomplished crimes particularly need to be ascertained and eventually, distinguished from their respective attempts. Again, the reliable criterion might only be the specific *conduct* (the 'executive conduct') of the crime outlined in the legal description: whether or not the conduct in question has been concluded. Only if it is not, the crime would be attempted. Therefore, the legal definition of the uncompleted attempt under Article 17 is too general. It reads that uncompleted attempt exists "*where the act or omission on the part of the offender… has not been entirely completed*". Actually, what should not have been completed is specifically the

[1]Also Fishman, M. (2015). *Defining Attempts*, in Duke Law Journal, Durham, USA, Vol. 65, p. 345.

[2] The attempt is distinguished from preparation also by legally defining it as "taking steps towards the realization of the actus reus", which also includes the *intention* to com it the crime (*France, Germany, Finland, Hungary, the Netherlands, etc*). See Picoli, L. (2007). *Expanding forms of preparation and participation. General report*, in Revue Internationale de Droit Penal, 2007/3-4, Volume 78, p. 405. Available online at: https://www.cairn.info/revue-internationale-de-droit-penal-2007-3-page-405.htm#, accessed on 05 April 2020.

[3] See further details in Girginov, A. (2019). *The General Part of the Somali Penal Code (Existing Problems and Proposals for Solutions)*, in International Journal of Recent Academic Research, India, Sept 2019, Vol. 01, Issue 6, p. 252-3.

'executive conduct' of the crime rather than any other act or omission. If this conduct was completed, this type of crime is accomplished and there is no room left for any attempt at all.

3. The mental element of attempt is not defined by Somali law. Most often, it is argued that the attempt is performed "with the culpability required for commission of the offence", e.g. Article 901 (Criminal Attempt), Paragraph 1 of the draft Somali Penal Code[4]. This means that attempt fulfils all mental (subjective) legal indications of the respective crime outlined in its legal description.

The main and mandatory such indication in the legal description of any crime is the one which outlines the specific type of guilt necessary for the commission of this crime. It is true that the fulfilment of this indication means, inevitably, the existence of guilt. However, the existence of some guilt does not necessarily mean that this mental legal indication, outlining the specific type of guilt, has been fulfilled. If the guilt is different, it, obviously, would not have fulfilled the indication. As a result, the legal description of the specific crime would not be fulfilled either. For instance, the crime of theft is committable only with direct intent. The existence of no other guilt can ever make a theft out of any offence.

Besides, the legal description of the criminal offence may contain another subjective indication which does not envisage a guilty mind at all. Such indications are named 'special' mental (subjective) indications. They envisage other psychological phenomena during the commission of the crime, such as purpose or motive. For example, the commission of carnage [creating a public danger of death or/and physical injury] as a crime against the Somali state under Article 222 of the PC requires not only direct intent but also the existence of a specific purpose, namely: the weakening the state security. The lack of such purpose excludes not only the accomplishment of carnage as a crime against the Somali state. It excludes also the attempt to this crime. The attempted creation of public danger of death or/and physical injury without the purpose in question may constitute only an attempt to the carnage as a crime against the public safety.

4. Finally, it is important to know that most of the deliberate crimes are committable not only with a direct intent but also with an indirect intent as well. Hence, the sufficient culpability required for their commission as regards the guilty mind might be indirect intent also. Nevertheless, not all foreign countries accept that an attempt may be performed with indirect intent. Some countries assume, including in the legal definition of attempt, that it is performable only with direct intent, e.g. Article 34 of the Armenian PC, Article 18 (1) of the Bulgarian PC, Article 24 (30 of the Kazakh PC, Article 27 of the Moldovan PC, etc. These PC expressly require for the existence of any attempt that the offender is aware and desires the completion of the perpetration and the occurrence of the harmful or dangerous event indicated in the legal description of the crime. Otherwise, if s/he desires another event only and, though also aware, is indifferent to the occurrence of the harmful or dangerous event indicated in the legal description of the crime, the actor would display indirect intent (Lat.: *Dolus Eventualis*) and his/her conduct cannot constitute any attempt to this crime. Therefore, under the penal law of the aforementioned countries, the indirect intent is proof that no attempt has been performed.

Obviously, in such countries, attempts are ascertained better, if one knows when no attempt has been performed because the intent of the offender was only indirect. In turn, the cases of indirect intent are detected easier if this of kind guilt is defined by penal law. In view thereof, if the Somali authorities follow the example of the mentioned foreign countries by accepting that no attempt is possible if the intent is indirect only, this might be another argument in support of the defining also the indirect intent in the PC of Somalia.

Presently, Article 24 (1) of the PC reads that "*A crime:*
a. *is with criminal intent, where the harmful or dangerous event which is the result of the act or omission is foreseen and desired by the offender as a consequence of his act or omission, and where the law makes the crime dependent upon such event [f. ex.: art. 434 P.C.];*

b. *is preterintentional or beyond the intent, where the harmful or dangerous event arising from the act or omission is more serious than the one desired by the offender [f. ex.: art. 441 P.C.]*".

Only *dolus directus* (the direct intent, commission with purpose) has been defined: in letter "a" of the text. *Dolus eventualis* (the indirect intent, committed knowingly) is missing. It is neither in letter "b", as the description there of "preterintentional (beyond any intent)" does not fit in any way what is meant by indirect intent, nor in letter "c", as its

[4] E.g. Robinson, P. (2017). *Draft Report of the Somali Criminal Law Recodification Initiative*, Criminal Law Research Group**,** *UNIVERSITY OF PENNSYLVANIA* in Public Law and Legal Theory Research Paper Series Research Paper No. 17-13, p. 43.

text envisages imprudence (recklessness), which is quite different, and negligence. Obviously, this gap should be filled in with a definition of indirect intent.

This intent, on the one hand, occurs where the offender does not desire the negative consequences ["the harmful or dangerous event"] of his/her act or omission as it is the case with the direct intent. On the other hand, indirect intent differs from imprudence (recklessness) as well. It is true that the two sorts of guilt (or the two *mens rea* forms/the two guilty minds) look alike. The common peculiarity of both, the indirect intent and the imprudence, is that the offender does not want the probable negative consequences of his/her act or omission although he knows that they are likely to occur.

However, when it comes to the indirect intent, the offender, in contrast to the case with the imprudence, is not against the occurrence of the negative consequences of his/her act or omission. Actually, s/he is indifferent to them, agrees with their occurrence as a probable additional (or side) result to what s/he wants to achieve through his/her conduct. In the case of indirect intent, the offender realizes that the probable additional or side result is not excluded in his individual situation. The offender wants a specific outcome but knows that his action could also result in another outcome: some detrimental consequence(s). Nevertheless, s/he chooses to proceed with this conduct leading to the desired outcome. For example, somebody wants to shoot a particular person in a crowded restaurant. The perpetrator would be aware that in shooting a particular person, s/he also runs a very real risk that other people in the restaurant are likely to be harmed, but, nevertheless, proceeds to shoot. If someone else dies as a result of the shots being fired, the court will find that the perpetrator had the indirect intent and will convict that person for murder (i.e. although the accused did not have the intention to kill that particular individual). The offender, therefore, is aware of the concrete probability of the occurrence of specific negative consequence(s) as an additional (side) result of his/her planned conduct but being indifferent to it, proceeds with his/her activity.

The imprudence (recklessness) has quite a different meaning. Hence, it cannot cover indirect intent. The imprudent (reckless) offender [the road traffic offences are the typical examples] is not any indifferent to the negative consequences of his/her act or omission. Actually, he is against their occurrence. The sole reason to perform his/her act or omission, which eventually led to them, was his/her conviction that they, though possible, would not occur in his/her individual situation. The offender was in his mind unfoundedly sure that (thanks to his/her own abilities or another excluding factor, the reliability of which was grossly overestimated) the likely negative consequence(s) would successfully be prevented from occurring. This is why, contrary to the case with indirect intention, the offender is not aware of the concrete probability of their occurrence.

4. According to Article 19 (Desistance and Repenting and Acting Upon Repentance), Paragraph 1 of the PC, **"***Where the offender voluntarily desists from the act, he shall not be liable to punishment for the acts performed before desisting, unless such acts themselves constitute an offence*". This paragraph defines the voluntary withdrawal from the uncompleted attempts.

Again, the text of this Paragraph is too general. What shall the offender desist from is specifically the 'executive conduct' of the crime rather than any act, in general. Also, some omission may constitute the 'executive conduct' but unjustifiable, no voluntary withdrawal of the offender from is has been contemplated in the quoted text of Article 19 (1). Such voluntary withdrawal is possible. To this end it so sufficient that the offender undertakes on his/her free will the opposite activity, namely: performs an act which is contrary to the omission. Obviously, this withdrawal should be also included in the text of Article 19 (1) of the PC.

Besides, desist, used to describe the voluntary withdrawal physical (objective) conduct of the offender, may mean both to interrupt and to suspend. However, no suspension constitutes a voluntary withdrawal. This withdrawal is everywhere based on a decision of the offender against his/her own crime; as a result, s/he undertakes an opposite activity which cannot include any suspension. A suspension would solely mean postponing the perpetration of the crime to wait for the occurrence of some better conditions for its finalization. Therefore, it is recommendable that the text of Article 19 (1) of the PC begins as follows: **"***Where the offender voluntarily interrupts the perpetration of his offence, he shall not be liable to…*".

5. Lastly, Paragraph 2 of the same Article concerns the completed attempts, possible only when the legal description of the crime contains a detrimental result. The text of this Paragraph reads as follows: "*Where the offender, after completing the act, voluntarily prevents the event, he shall be liable to the punishment prescribed in respect of the attempted crime, reduced by one-third to one half [Art. 40 f) P.C.]*". This offender's behaviour, following the attempt, is also positive. However, it does not exempt him/her from criminal liability for the attempt, although the end, after all, is the same: the respective harmful or dangerous event caused by the offender as a consequence of his/her act or omission is prevented from occurring.

It is noteworthy, though, that in many foreign countries this positive behaviour of the offender after the attempt also exempts him from criminal liability for his/her attempt. They have found that the prevention of the negative consequences is more important than the punishment on the offender and it is more realistic and more likely to make him/her prevent them if s/he is not punished at all.

A strange inversion exists in the PC. There are cases where, exceptionally, the PC contemplates voluntary withdrawals from accomplished crimes. Such are the voluntary withdrawals from giving false evidence, wrong expert opinion or incorrect interpretation (Article 295 of the PC) and from counterfeiting currency, stamps or similar items (Article 356 of the PC). All these withdrawals of the offender entail his/her exemption from criminal liability for the accomplished crimes. At the same time, no voluntary withdrawal from completed attempt exists, even on an exceptional basis, under Somali penal law. **Per argumentum a fortiori**, there should be some cases, at least, where voluntary withdrawals from completed attempt are also possible.

PREPARATION

1. The preparation is not just an overt act which manifests a person's decision to commit a crime, an explication of his/her decision[5]. The preparation, on the one hand, does not constitute, in any of its part, a commencement of the perpetration but, on the other hand, it is such explication of the person's decision to commit a specific crime which also creates favourable conditions for its perpetration. The created conditions are designed to facilitate the actor's future conduct of perpetration of the specifically intended crime rather than another person's conduct, for example, as in the case of providing training for piracy under Article 5-I of the Puntland Anti-piracy Law where the potential crimes of piracy are not specified either[6].

Preparatory acts are punishable on an exceptional basis: by virtue of explicit penal provision. No preparation might be punished without law; the imposition of any criminal punishment without a penal provision would grossly violate the fundamental penal law principle of nullum crimen sine lege (Latin: *No crime without Law*, the principle of legality in criminal justice) – Article 35.13 of the Provisional Constitution of Somalia, Article 39 (2) of the Transitional Constitution of Puntland and Article 1-I of the PC.

Like the assistance to crime [surprisingly, the PC does not describe the modes of participation in crime], the preparation (punishable or not) influences in a positive way the perpetration of the crime but does not constitute any of its perpetration acts because it is an activity with does not satisfy any of the legal indications pertaining to the 'executive conduct' of the specific crime. Both the assistance and the perpetration are divided into two types: physical and intellectual. The physical type include acts such removal of obstacles to the commission of the crime or procurement/supply of means for its commission while the intellectual one includes, for example, agreements enabling the commission of the crime.

At the same time, preparation and assistance are very different. Generally, the preparation is performed by the person who thinks to perpetrate the crime, whereas the assistant is a person who never takes any part in the perpetration of the crime; he only supports its perpetration. Further on, the preparation always ends up before the commencement of the 'executive conduct' of the specific crime, whereas the assistance may last until the conclusion of this 'executive conduct'. In the end, preparation is subsidiary to assistance as well as any other participation in the committed crime. The two can never from any real concurrence (as per Article 44-II of the PC). This is why, if some person agrees in advance

[5] It is a general proposition in the legal systems of all countries that criminal provisions find no application in the case of ideas, thoughts or emotions which do not result to an action or omission. This is true, irrespective of the intensity of the ideas; for example, the thought to murder my neighbour for maintaining an adulterous liaison with my wife is indifferent to the criminal legislator for as long as I do not, actually, commit the murder. Thoughts become of interest to the criminal legislator only after the offence has been perpetrated. This could be explained by taking into consideration that the application of criminal law commences the moment the results of one's actions or omissions have consequences for or are felt by society. According to the centuries-old maxim, „no one is punishable solely for his thoughts" (Latin: *'cogitationis poenam nemo patitur'*). See Anagnostopoulos, I & K. Magliveras. (2000). *Criminal Law in Greece*, in International Encyclopaedia of Laws / Criminal Law Series, Kluwer Law International, The Hague, p. 30.

[6] The creation of conditions for the perpetration of an unspecified crime by another person is also exceptionally criminalized. Pursuant to Article 546 (Sale or Delivery of Keys or Pick-Locks to an Unknown Person) of the PC, "*Whoever manufactures keys of any description, at the request of a person other than the owner or possessor of the place or object for which the keys are intended, or of an agent of the said persons, or, in the exercise of the craft of blacksmith, or other similar craft, delivers or sells to any person what so ever pick-locks or other instruments suitable for opening or forcing locks, shall be punished with imprisonment [98 P.C.] up to six months and with fine [99 P.C.] from Sh.So. 100 to 1,000.*"

with the perpetrator to harbour him/her after the commission of the crime, this person is usually qualified only as an assistant to the committed crime, e.g. Article 32.5 of the Azeri PC and Article 33 (5) of the Russian PC[7]. The posterior fact that s/he has kept his/her promise by harbouring the perpetrator is considered an aggravating circumstance in meeting out his punishment.

2. Articles 4 and 9 of the Puntland Anti-piracy Law provide good examples of punishable preparation. Thus, Article 4 [Preparation for piracy] of this Law reads as follows:

"*Whoever by supplying or making available the means to commit, removing the impediments to the commission, planning or organizing with another person the commission as well as by other activities that create conditions for the direct commission of a criminal offence defined under Article 3 intentionally prepares the offence, shall be punished with imprisonment from 1 to 5 years*".

It is noteworthy that the possibility of joint preparation of the crime "*with another person*" is expressly envisaged in the text of this Article. Nevertheless, Article 9 [Agreement to commit piracy] of the same Law simultaneously stipulates that

"*Whoever agrees with one or more other persons to commit any of the criminal offences defined under Article 3 to 5 whereas the agreement is followed by a substantial preparatory step towards the commission of the offence performed by any of those persons, shall be punished as provided for the criminal offence*".

Thus, the planning and organizing, each of them necessarily includes not only the agreement reached for the commission of the respective crime. Seemingly, they include also some further preparatory step towards the commission of the offence. Often, this preparatory step may be qualified as essential given the lack of any definition as to what the word "essential" means.

This practical inseparability of the two preparatory activities (Articles 4 and 9) called for different legislative solutions. On the one hand, all legal texts on such substantial steps towards the commission of the offence are codified into a single legal institution. In most foreign countries, one consolidated provision on punishable preparation exists[8]. On the other hand, the participation in agreements, such as the one under Article 9 of the Law, are criminalized as the so-called "criminal association" or "simple conspiracy" as no act in furtherance of the plan is necessary for its completion. The participation in an association alone is sufficient for the criminal liability of any participant in it. Moreover, participation in a criminal association is a preliminary criminal activity which constitutes a specific accomplished crime rather than any preparation. Unlike preparation and the agreement under Article 9 the Puntland Anti-piracy Law, in particular, the criminal association is not limited to the creation of conditions for the commission of a single crime. The criminal association requires also a multiplicity of the target offences: the participants must have agreed to commit more than one crime. Therefore, the existence of a separate legal provision on preliminary criminal activities, such as the quoted Article 9, makes sense but only if the provision envisages this special form of accomplished criminality, namely: a special criminal association where the target offences are piracy offences. It would be similar to the special criminal association for the commission of political crimes - Article 233 PC.

3. If Article 9 of the Law designates a criminal association it cannot be regarded as partly covering Article 4 [Preparation …] of the same Law as the two provisions would envisage different preliminary criminal activities. It is worth highlighting that preparation and criminal association are different not only because the former targets a single crime while the latter is for a multiplicity of crimes. In addition, the participants in preparation might be only two while in the criminal association they are more, usually. Thus, according to Article 322 [Association for the Purpose of Committing Crimes] of the PC,

"*1.* *Where three or more persons associate for the purpose of committing more than one crime [158 P.C.], those who promote, constitute or organise the association shall be punished, for that act alone, with imprisonment [98 P.C.] from three to seven years.*
2. *The punishment for the sole act of participating in the association shall be imprisonment [96 P.C.] from one to five years.*
3. *The leaders shall be liable to the same punishment as prescribed for the promoters...*"

[7] See Ненов, И. (1972). *Наказателно право на Народна Република България*, Наука и Изкуство, София, стр. 401-2.
[8] E.g. Article 19 (2) of the Angolan PC, Article 17 (1) of the Bulgarian PC, Article 22 (1) of the Chinese PC, Section 11 (1) of the Hungarian PC, Section 13 (1) of the Slovak PC, Article 25 (1) of the Uzbek PC, etc.

Besides, the preparation requires certain concretization of the target crime. If, for example, the preparatory activity is for some robbery, the actor must specify the victim and the item(s) to be taken from him by compulsion. By contrast, the target offences of any criminal association are agreed on, in general, as types of offences. They are not concretized. If one or more of them are, these activities would constitute one or more preparations in real concurrence under Article 44-II of the PC if punishable. Such activities shall be excluded from the criminal association.

Secondly, unlike the participation in a criminal association, the preparation, even the punishable one, is not any accomplished crime. This is why neither attempted preparation nor preparation for preparation is relevant. Only the completed preparation, including the actual creation of one or more conditions for the commission of the intended crime, may carry criminal punishment. Therefore, the legal description of the punishable offence (its ***corpus delicti***) always contains this detrimental result: the creation of conditions for the commission of the intended crime. By contrast, participation in a criminal association constitutes an accomplished crime. This means that, at least, attempted participation in it is possible and relevant to penal law.

Thirdly, preparation is not an accomplished crime. This is why its role is auxiliary; it is relevant only if the intended crime is not committed. Otherwise, if the intended crime is committed, the offender is held responsible for it only. Preparation becomes irrelevant as it is subsidiary to the accomplished crime. Hence, preparation and the respective accomplished crime do not form any real concurrence as per Article 44-II of the PC. The relation of subsidiarity between the two excludes the real concurrence. This exclusion, however, does not occur in the case of the criminal association because it is an accomplished crime and its role cannot be auxiliary. If a participant in the association commits any target offence, s/he would be held responsible for both crimes. There exists no relation of subsidiarity between the two to exclude the real concurrence between them.

Fourthly, wherever penal law simultaneously stimulates voluntary withdrawals from both participation in a criminal association and from the punishable preparation as well, the legal requirements for the withdrawals from them are different. The voluntary withdrawal from a criminal association requires some active postcriminal behaviour. This is valid for all accomplished crimes from which voluntary withdrawal is possible on an exceptional basis, e.g. in the case of provision of false evidence the witness must "*disclose what is true*" afterwards to exempt himself from criminal liability – Article 295 of the PC[9]. The same approach is applicable to criminal associations as they also represent accomplished crimes. For example, in the case of the criminal association for the commission of political crimes under Article 233 PC voluntary withdrawal of a participant takes place only if prior to his/her arrest or institution of criminal proceedings, he dissolves or in any manner brings about the dissolution of the association – see Article 235 of the PC. Thus, the offender neutralizes an existing source of danger outside him that he has created: the criminal association in question.

Nothing similar, however, is valid for the punishable perpetration. As in the case with the uncompleted attempt, passive attitude is sufficient for the execution of a voluntary withdrawal from participation: the offender shall not further undertake any act towards the implementation of the 'executive conduct' of the specific crime. If an uncompleted attempt was performed, the offender shall not implement the remaining part of the 'executive conduct' only but if the offender has performed solely preparation, he shall not do anything that may commence the implementation of any part the 'executive conduct'. As the actor is still the only source of danger to society, he can neutralize himself in this way.

4. Similarly to Article 19 of the PC, Article 6 (2, 3) the Puntland Anti-piracy Law stimulates the offender's positive behaviour after the attempt incl. his/her voluntary withdrawal from it by prescribing possible reduction of the punishment even its waiver by the competent court. In any case, if the offender voluntary withdraws from his/her uncompleted attempt by terminating the perpetration, he shall not be punished at all.

Per argumentum a fortiori, the offender, who has committed some punishable preparation, shall not be punished if he does not commence the perpetration of the intended offence in any way. Nevertheless, there is no such stimulating provision in the Puntland Anti-piracy Law, let alone in the PC with regard to the exceptional cases of punishable preparation under Articles 230.1-II, 232. This is contrary to the widespread legislative experience in the world. In foreign countries where preparation is punishable, penal law stimulates voluntary withdrawal from it. To this end, as explained, the actor must neutralize himself as the single, so far, source of danger to society. Certainly, he must be driven by his/her free will. Voluntary withdrawal should be available only in cases where the actor is aware of the real possibility of committing the intended crime but s/he freely and finally (completely and irrevocably) decides not to start it at all. As in the case of voluntary withdrawal from the incomplete attempt under Article 19 (1) of the PC, the withdrawing actor must

[9] Also Article 356 of the PC: "*Whoever, having committed any of the acts referred to in the preceding articles, succeeds in preventing the counterfeiting, alteration, manufacture or circulation of the items specified in the said articles, before the authorities obtain information thereof, shall not be liable to punishment.*"

"*believe that there is still time to desist and renounce*"[10]. Otherwise, if this person is compelled to abandon his/her intention due to some objective impossibility of committing the crime, then no room exists for any voluntary withdrawal. Thus, there might be no voluntary withdrawal from preparation for burglary if the tools designed to break in were ineffective, the storage doors were too strong, obstacles appeared in the form of eyewitnesses or police, etc. In all these situations, there is a failed perpetration rather than any voluntary withdrawal.

As a general rule, the passiveness of the actor is sufficient. He shall undertake any act towards the implementation of the 'executive conduct' of the specific crime. Yet, an exception to this rule of passiveness may exist taking into consideration that the underlying idea/the rationale of all voluntary withdrawals is the neutralization of the existing dangers to society which the actor has created. Recognition of voluntary withdrawal can hardly be justified if the danger created is not removed. This consideration is most relevant to the punishable preparation, which has been performed jointly. In such cases, the withdrawing participant is not the only source of existing danger created as a result of this preparation. The other participant or participants in the preparation also constitute such a danger as they have not changed their minds and are likely to commit the intended/prepared crime. This is why, given the exceptional nature of the actor's exemption from criminal liability on the grounds of his/her voluntary withdrawal and the deriving necessity to construe this privilege strictly rather than expensively, the particular voluntary withdrawal in the aforementioned situation should require preventing all other participants in the preparation from committing the crime. This is the only way to secure the protection of the values which are likely to be endangered or even harmed if the perpetration of the crime commences.

The same approach is applicable to voluntary withdrawal from the uncompleted attempt. Generally, passive behaviour is sufficient for the execution of this withdrawal. However, if the attempt was committed jointly, the withdrawing offender needs to stop also the other co-perpetrators from implementing the remaining part of the 'executive conduct' – see, for example, Article 35 (3) (i) of the Croatian PC and Section 24 (2) (i) of the German PC.

5. In general, neither the attempted incitement nor the reached agreement to commit some crime carries any punishment under Somali law – see Article 76 of the PC[11]. However, there are some exceptions.

The Puntland Anti-piracy Law criminalizes also the act of simple/attempted incitement to crime. According to Article 7 [Incitement to Piracy] of the Law, "*Whoever intentionally incites another person to commit any of the criminal offence under Articles 3 to 5 shall be punished as for attempt to commit that offence.*"

The PC contains a similar provision. It criminalizes incitement to some political offences. Thus, Paragraph 1 of Article 320 (Instigation to Commit Any of the Crimes Referred to in Chapters I and II) of the PC reads:

"*Whoever instigates a person to commit any of the crimes, not with culpa [24 P.C.], referred to in Chapters I and II of this Part, in respect of which the law prescribes the punishment of death [94 P.C.] imprisonment for life [95 P.C.] or imprisonment [96 P.C.], shall be punished, if the instigation is not favourably received, or if it is favourably received but the crime is not committed, with imprisonment [98 P.C.] from one to eight years.*"

The second part of this text may raise some concerns about its justifiability. The problem is that if the instigation is favourably received this would, actually, constitute an agreement to commit the mentioned crimes and the reaching of such an agreement has been criminalized by Paragraph 1 of Article 232 (Political Conspiracy by Agreement) of the same PC:

„*Where two or more persons agree [76 P.C.] to commit any of the crimes referred to in article 230, whoever is a party to such agreement shall be punished, if the crime is not committed, with imprisonment [96 P.C.] from one to six years. The punishment shall be increased [118 P.C.] in the case of the promoters.*"

To avoid unnecessary overlap the penal law and the court practice in many countries accept that any punishable agreement to commit a crime consumes the punishable incitement to the same crime. This is why the provision criminalizing the incitement is applicable only if the one for agreement is not because this incitement has not been favourably received. It is a case where, unlike the situation with the agreement reached, no condition for the perpetration of the crime has been created. In view thereof, it would be recommendable that the scope of Article 320 of the PC is reduced to envisage only this case when the incitement is not favourably received as contemplated, for example, by

[10] From Alexander, L. & K.D. Kessler. (1997). *Mens Rea and Inchoate Crimes*, in Journal of Criminal Law and Criminology, Chicago, Summer 1997, Vol. 87, Issue 4, p. 1139.

[11] According also to Article27 (2) (ii) of the Ethiopian PC, "*A mere attempt to instigate or assist in a crime does not come within the provisions of the law unless it is expressly provided to the contrary*".

Article 249 (Instigation to Corruption) of the PC[12]. The other case, when the incitement was favourably received and therefore, an agreement is reached, should stay only within the application scope of Article 232 of the PC. This is, actually, a case of preparation as the agreement constitutes a specific favourable condition for the perpetration of the crime.

6. The agreement to commit a given crime is a typical form of intellectual preparation. If voluntary withdrawal from preparation is contemplated, the actor would be exempted from criminal liability for his/her participation in the preparation even if s/he was the inciter (promoter). If the incitement is also criminalized, as in the case of Article 320 of the PC, the problem to be solved would be as to whether this withdrawing actor shall stay responsible for his/her incitement, at least. Thus, if a participant, whose incitement was favourably received, performs, as per Article 235 in conjunction with Article 232 of the PC, the voluntary withdrawal from the preparation in the form of the reached agreement to commit one of the crimes specified there, shall s/he be held responsible for the consumed excitement under Article 320 of the PC?

Usually, the exemption from liability for the consuming criminal conduct opens the way to the liability for the consumed one. This occurs, for example, is the situation where the consuming conduct is some attempt. According to Paragraph 1 of Article 19 (Desistance and Repenting and Acting Upon Repentance), **"***Where the offender voluntarily desists from the act, he shall not be liable to punishment for the acts performed before desisting, unless such acts themselves constitute an offence*".

However, the situation is quite specific and different, actually, if the consumed punishable act is an incitement to the same crime which was targeted by the consuming punishable preparation. In this situation, the voluntary withdrawal from the preparation by stopping every participant in the preparation from committing the crime eliminates all possible sources of existing dangers, especially the incitement, which was committed by the withdrawing actor and lead to the agreement. Because the value that might be endangered or harmed is the same, the elimination of the bigger, the consuming danger, which is the preparation in the form of agreement, inevitable excludes the smaller, the consumed danger, which is the motivating incitement. Hence, the preservation of criminal liability for the consumed act makes sense if the value which it may endanger or harm is different from the one which is the object of the consuming act. For example, the preparation for murder was committed by stealing a tool that might be used for the commission of the intended crime of murder. The object of the theft is the property of its owner whereas the object of the intended murder, including the preparation to it, is the life of the potential victim. This is why the elimination of the danger to the life of the potential victim by voluntary withdrawal from the preparation for his/her murder cannot exclude the negative influence on the property of its owner whose item was stolen. Hence, there would be no justification for exempting the offender from responsibility for this underlying theft also.

This situation is opposite to the one, where the withdrawing participant in a punishable preparation does not prevent the other participants in the same preparation from committing the intended crime. Since he does not stop them, this offender shall not benefit from any exemption of his/her responsibility because the danger caused to the object of the intended crime continues existing. **Per argumentum a contrario**, if the danger to the object is eliminated in full, as in the aforementioned case with the agreement and the incitement, the offender should be exempted from any criminal liability, especially the one for the consumed act that causes the smaller danger, namely: the incitement.

CONCLUSION

The Somali legal framework for inchoate crimes is in need of modernization. First of all, the legal essence of the criminal attempt should be defined better by clarifying in the Penal Code that the attempt is performable with direct intent and commences the fulfilment of the legal indications constituting the executive conduct of the specific crime.

Where the preparation is punishable, the actor should be stimulated to perform voluntary withdrawal from his/her preparatory activities by exempting him/her from the criminal liability for them. If some punishable incitement to the same crime is an underlying act, the actor should not be held responsible for it either.

[12] Its Paragraph 1 reads: "*Whoever offers or promises money or another benefit, as award not due, to a public officer [240a P.C.] or a person entrusted with a public service [240b P.C.], in order to induce him to perform an act pertaining to his office or service, shall be liable, where the offer or promise is not accepted, to the punishment prescribed in the first paragraph of article245, reduced by one-third*".

No voluntary withdrawal should be acceptable in cases when the punishable conduct (attempt or preparation) has been jointly committed and the withdrawing participant in it does not successfully prevent the other participant(s) from accomplishing the intended crime.

REFERENCES

1. Alexander, L., & Kessler, K.D. (1997). Mens Rea and Inchoate Crimes. in *Journal of Criminal Law and Criminology, Chicago, Summer, 87* (4), p. 1139.
2. Anagnostopoulos, I., & Magliveras, K. (2000). Criminal Law in Greece, in International Encyclopaedia of Laws / Criminal Law Series, Kluwer Law International, *The Hague,* p. 30.
3. Fishman, M. (2015). Defining Attempts, in *Duke Law Journal, Durham, USA, 65*, p. 345.
4. Girginov, A. (2019). The General Part of the Somali Penal Code (Existing Problems and Proposals for Solutions), in *International Journal of Recent Academic Research, 01* (6), 252-253.
5. Picotti, L. (2007). Expanding forms of preparation and participation. *Revue internationale de droit pénal*, *78*(3), 405-452.
6. Robinson, P. H. (2017). Draft Report of the Somali Criminal Law Recodification Initiative. *U of Penn Law School, Public Law Research Paper*, (17-13).
7. Ненов, И. (1972). Наказателно право на Народна Република България, *Наука и Изкуство, София, стр.* 401-402.