

PUBLIC
ANNEX J

**A. Eser, ‘Mental Elements – Mistakes of Fact and Law’ in A
Cassese and others (eds), *The Rome Statute of the International
Criminal Court: A Commentary* (Oxford University Press 2002)**

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MENTAL ELEMENTS—MISTAKE OF FACT AND MISTAKE OF LAW

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The author is greatly indebted to Alexander Schöpsdau for assistance in preparing this contribution and to Brigid Wefelnberg for her linguistic support.

case that it 'negates the mental element' (Article 32(2) sentence 2), is again, repertitious as it was with mistake of fact; even more so it is inconsistent with Article 30(1) which, in requiring the mental element, would be frustrated if, according to the optional clause of Article 32(2) sentence (2) an exclusion of responsibility might not be granted although the mistake of law negated the mental element. Or 'mental element' must be construed with regard to mistake of law in broader terms than merely comprising the 'material' elements of the crime, as proposed in Article 30(1); then, however, the regulation of both the 'mental element' and the various 'mistakes' lose their contours.

As further flaws of this sort could and will indeed be added,⁶ one may wonder how this could have happened. There are mainly two explanations. The one of more political-psychological nature is the general reserve towards excluding criminal responsibility because of errors in general and with regard to international crimes in particular, since in this area we are dealing with offences so grave that it appears difficult to accept that the perpetrator should not have known what he was doing. As we will see particularly in war crimes, however, there are situations in which a soldier does not easily know for sure what is right and what is wrong. The other explanation for the hardly satisfying shape of the ICC articles here in question is a more theoretical one: as the aforementioned political struggle about what errors to tolerate or not was never really solved but rather continued 'behind the scenes' by arguing with partially irreconcilable national propositions of mistake of fact and law,⁷ it was impossible to agree on a consistent concept. Thus, in view of Article 21 of the ICC Statute it will be all the more necessary, though extraordinarily difficult, to construe Articles 30 and 32 of the ICC Statute in a way that is adequately applicable.

II. Development prior to the Rome Statute

Some of the problems described above may perhaps be better understood and, thus, more easily solved for the future if at least some of the earlier positions and steps are examined.

A. Taking Notice of *mens rea*

Keeping in mind that it took quite some time to get general elements of responsibility for international crimes explicitly recognized at all,⁸ it is no wonder that the pronouncement of general rules for the mental element of the crime and its

⁶ As, for instance, the puzzling relation between intent and knowledge in Art. 30 of the ICC Statute; cf. *infra*, IV.B.

⁷ Some of these different approaches will show up later; see *infra*, V.

⁸ For more details as to the development of some sort of 'general part' for a code of international crimes, see Ch. 20 above, at II-III.

eventual negation by an error took even longer. So with regard to 'official' documents by international organs or inter-governmental commissions, it took until the *Report of the Preparatory Committee's* 51st Session of 1996 to come out with general rules on '*Mens rea* Mental Elements of Crime' (article K) and on 'Mistake of Fact [or law]' (article K)⁹ (the contents thereof will be dealt with later).

This does not mean, however, that prior to this remarkable step, the issues of the mental element and the exclusion of responsibility by an error were completely disregarded in the theory and practice of international criminal law. But even insofar as these elements were taken into consideration, it was in a more sporadic manner and/or in non-binding drafts.

The first instance was the jurisprudence of the International Military Tribunal (IMT) of Nuremberg. Although the Charter of the IMT¹⁰ did not contain any hint of mistake of fact or law, the Nuremberg judgments did not reject defences of mistake absolutely, provided that they concerned an 'honest' error.¹¹

B. Propositions of the Mental Element

A second observation concerns the concept of *mens rea* which, though not explicitly mentioned in either the IMT Charter of Nuremberg nor in other conventions on international crimes, may be required by the very nature of the crimes concerned. Thus, when Article 6(a) of the IMT Charter speaks of planning or preparing crimes against peace, such acts can hardly be committed other than intentionally, as is true with regard to the 'taking of hostages' according to the Geneva Conventions of 1949¹² or with 'systematically oppressing' according to the Apartheid Convention of 1973.¹³ Other documents were more outspoken by explicitly requiring a certain state of mind for certain crimes. This is the case with the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind of 1954 requiring for genocidal acts the 'intent to destroy' in whole or in part a protected group or that 'inflictions on the group conditions of

⁹ *Report of the Preparatory Committee*, 51st Sess., pp. 92, 95 f. (in Bassiouni, *supra* note 4, 488, 490 f.).

¹⁰ *Charter of the International Military Tribunal*, 82 UNTS 280, reprinted in M. C. Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (1997) 183 ff., and in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (2000) Vol. II/1, p. 61.

¹¹ Namely, that the perpetrator 'could honestly conclude that urgent military necessity warranted the decision made': *In re List and Others (Hostage Trial)*, 15 ILR (1948) 632, at 649. For more details with regard to 'honest error', see C. Nill-Theobald, 'Defenses bei Kriegsverbrechen am Beispiel Deutschlands und den USA' (1998) 342 ff.

¹² Cf. Art. 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. A/9030 (1973).

¹³ Cf. Art. 3 of the Geneva Conventions of 1949, reprinted in McDonald and Swaak-Goldman, *supra* note 10, Vol. II/1, pp. 87 ff.

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life' must be carried out 'deliberately'.¹⁴ In a more general form, the Protocol I to the Geneva Conventions of 1977 requires grave breaches of this Protocol to have been committed 'wilfully'.¹⁵ The ILC Draft Code of 1991 merely enlarges the catalogue of provisions requiring a certain state of mind such as, in addition to those already contained in the Draft of 1954, 'wilful' attacks on property of exceptional value and 'wilful' damage to the environment.¹⁶ The same line of merely specifying a certain state of mind was followed by the ICTY and ICTR Statutes by requiring for grave breaches of the Geneva Conventions that killing, causing great suffering, and depriving a prisoner of war of the rights of fair trial be committed 'wilfully',¹⁷ whereas this intent was not explicitly required for genocidal acts¹⁸ while, again differently, destruction of cities not justified by military necessity was a war crime even if only done 'wantonly'.¹⁹ Though it might be true that these provisions had been drafted under the silent proposition that 'guilty intent is a condition for the crime' and whilst it might in the end be merely a question of procedure whether this intent is assumed or must be proven individually,²⁰ two shortcomings cannot be overlooked: firstly that the subjective requirement of a certain state of mind if not explicitly provided for,²¹ appears underestimated and eventually even neglected in practice. Secondly, the sporadic manner of requiring 'wilful', 'deliberate' or even merely 'wantonly' commission of one type of crime but not of others, may lead to the reverse conclusion that for certain crimes no special state of mind is required for even mere negligence may suffice. It was felt that the only way to overcome these uncertainties was to come up with a general rule for the mental element. After the *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995 appeared amenable to this suggestion²² and

¹⁴ Draft Code of Crimes against the Peace and Security of Mankind of 1954 (YILC(1954) Vol. II, p. 151 f.; (1983) Vol. I, p. 4; (1983) Vol. II/2, p. 11; (1984) Vol. I, p. 4 f.; (1984) Vol. II/2, p. 8; (1985) Vol. II/2, p. 8), Art. 2(10)(iii).

¹⁵ Art. 85(4) of the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977, reprinted in Bassiouni, *supra* note 10, 457 ff. and in McDonald and Swaak-Goldmann, *supra* note 10, Vol. II/1, p. 219 ff.

¹⁶ Draft Code of Crimes against the Peace and Security of Mankind of 1991, UN Doc. A/46/10, YILC(1991) Vol. II/1, p. 94 ff.), Art. 22(2)(f) and Art. 26.

¹⁷ Art. 2(a), (c), and (f) of the ICTY Statute. With regard to genocide, the regulation is similar to that of the ILC Draft 1954 (*supra* note 14); cf. Arts. 4 and 2 of the ICTY and ICTR Statute, respectively.

¹⁸ Cf. Arts. 4 and 2 of the ICTY and ICTR Statute, respectively.

¹⁹ Art. 3(b) of the ICTY Statute.

²⁰ On speculations of this sort within the ICL on its Draft Code 1991, see O. Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) 223; cf. also A. Eser, in 'The Need for a General Part', in M. C. Bassiouni (ed.), *Commentaries on the ILC's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993) 46 f.

²¹ See also the criticism by T. Weigend, in Bassiouni, *supra* note 20, 113 f.

²² Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GA, 50th Sess., Supp. No. 22, A/50/22 (1995), p. 19, reprinted in Bassiouni, *supra* note 4, 630.

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a non-governmental committee of experts, convening in Siracusa in 1995,²³ supported the need for express regulation,²⁴ the Freiburg Draft of 1996, prepared by a working group of the aforementioned Siracusa Committee, in a general rule on *mens rea*, made two fundamental proposals: first, that 'criminal responsibility [for international crimes] cannot be based on strict liability', and secondly, that 'unless provided for otherwise, [international crimes] are punishable only if committed intentionally'.²⁵ Whereas the principal denouncement of 'strict liability' was seen as perhaps too challenging to common law tradition, and was therefore not integrated into the Updated Siracusa Draft, 'knowledge' was incorporated as a possible alternative to 'intent'.²⁶ Although this alternation between intent and knowledge, as will be shown later, appears conceptually disputable, the efforts to draft general mental requirements proved successful at least insofar as the ILC Draft Code of 1996 required the perpetration of relevant crimes to be committed 'intentionally';²⁷ again oddly, however, aiding and abetting were to be carried out (merely) 'knowingly',²⁸ whereas with regard to the various other forms of complicity the Draft Code remained silent. At any rate, from then on, despite occasional variations, all further inter-governmental drafts by the Preparatory Committee and its working groups contained a general regulation for the mental element(s) of crime, starting with the Report of the Preparatory Committee of 1996²⁹ and ending with the Draft Statute and Draft Final Act of 1998.³⁰

²³ As to the three steps which finally led to the Updated Siracusa Draft (*infra* note 26), see Ch. 20 above, at note 38.

²⁴ See (Unpublished) Draft Statute for an International Criminal Court—Alternative to the ILC Draft—(Siracusa Draft) prepared by a Committee of Experts, Siracusa/Freiburg, July 1995, p. 38 f. See also Eser, in Bassiouni, *supra* note 20, 46 f.

²⁵ Art. 33(f) of Freiburg Draft of February 1996 (by A. Eser, D. Koenig, O. Lagodny, O. Triffterer), originally unpublished, but thereafter integrated into an amendment of the ILC Draft Code of Crimes of 1991, published as annex in O. Triffterer, 'Acts of Violence and International Criminal Law', 4 *Croatian Annual* (2/1997) 872; with regard to *mens rea*, see Art. 3(4), p. 877. Cf. also *infra* note 26, to Ambos.

²⁶ Art. 33-7 of 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa Draft) prepared by a Committee of Experts. Submitted by AIDP et al., Done in Siracusa/Freiburg/Chicago, 15 March 1996. For a critical comparison of Art. 33-7 of the Updated Siracusa Draft and the aforementioned Freiburg Draft cf. K. Ambos, 'Der "Allgemeine Teil" des Völkerstrafrechts' (2002) 941 ff.

²⁷ Art. 2(3)(a) of the Draft Code against the Peace and the Good of Mankind (Report of the ILC, 48th Sess., p. 14 ff., paras. 50 ff., reprinted in McDonald and Swaak-Goldman, *supra* note 10, Vol. II/1, p. 335 ff.).

²⁸ Art. 2(3)(d) of the Draft Code 1996.

²⁹ Art. H in the Report of the Preparatory Committee (Compilation of Proposals), 51st Sess., p. 92, reprinted in Bassiouni, *supra* note 4, 488.

³⁰ Art. 29: *Mens rea* (mental elements) in the Report of the Preparatory Committee (A/CONF. 132/Add.1 (1998) 65, reprinted in Bassiouni, *supra* note 4, 144). Further sessions at which *mens rea* was taken notice of were the 1997 Session in New York (A/AC.249/1997/L.5 (1997) 18, 27, reprinted in Bassiouni, *supra* note 4, 377, 382) and the Inter-Sessional Meeting of 1998 in Zaphrentz (A/AC.249/1998/L.13 (1998) 59 f., reprinted in Bassiouni, *supra* note 4, 249).

C. Opening the Door to Mistake of Fact and Mistake of Law

Whereas the need to regulate on the mental element of crimes was recognized rather late, the issues of *mistake of fact* and *mistake of law* were debated much earlier. Since the Nuremberg judgments, as mentioned above, at least occasionally had accepted defences of error,³¹ UN-supported committees started as early as in the 1950s to tackle this issue, though for more than three decades without visible success.³² Once more it needed the efforts of non-governmental groups such as the International Law Association (ILA) and the Association Internationale de Droit Pénal (AIDP) to get things moving. What later on would become the core of the Rome Statute's regulation of mistake of fact and *mistake of law* in Article 32, can be found as early as in A Draft International Criminal Code of 1980 in recognizing mistake of law or of fact as a defence, 'if it negates the mental element... provided that said mistake is not inconsistent with the nature of the crime or its elements'.³³ Thereafter the ILC, in revising its Draft Code of 1954, which had not yet taken notice of errors, made a significant step by recognizing 'exceptions to the principle of responsibility' and thereby also referring to 'error of law or of fact' in its Draft Code of 1987.³⁴ By a somewhat strange statutory technique, however, the ILC Draft did not positively recognize mistake as a ground for relieving criminal responsibility, but rather precluded this effect in general by accepting mistake only for the exceptional case that under the given circumstances the mistake was 'unavoidable' for the perpetrator. Since this regulation appeared less than satisfying and no better solutions seemed available, the ILC Draft Code of 1991 refrained from further mentioning mistake of fact and *mistake of law* at all, thus leaving it up to its general Article 14 on 'defences and extenuating circumstances' according to which 'the competent court shall determine the admissibility of defences under the general principles of law', thus, at least tacitly leaving the door open for errors of fact and law as potential defences in single cases.³⁵

Although this indecisiveness of the ILC on essential issue was sharply criticized by academics,³⁶ the ILC in its Draft Code of 1996 upheld its position of leaving it to the Court whether to admit a defence, including mistake, or not.³⁷ In the meantime the ICTY and ICTR Statutes of 1993/1994 were even more reluctant, com-

³¹ Cf. *supra* II.A at note 10 f.

³² For details on this and the following, see Triffterer (ed.), *supra* note 4, Art. 32, margin Nos. 3 ff.

³³ Art. IX(7) of A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (by M. C. Bassiouni 1980, reprinted 1987, p. 110). As to the negation of the mental element by the mistake, the American Model Penal Code § 2.04(1)(a) seems to have been the guiding example.

³⁴ Art. 9(d), *YILC* (1987) Vol. II/1, p. 7 f.

³⁵ Cf. *YILC* (1991) Vol. II/2, pp. 95, 100 f.

³⁶ Aside from my own criticism (Eser, in Bassiouni, *supra* note 20, 48 ff.) see also Robinson (in Bassiouni, *supra* note 20, 200 f.).

³⁷ Art. 14 of the Draft Code of 1996.

pletely refraining from any general clause on defences or other extenuating circumstances, thus, leaving it up to the Tribunals whether to pay attention to defences of mistake, as it might have done in the *Erdemović* case.³⁸ At any rate, it had again taken the impetus of non-governmental initiatives to put the problems of mistake of fact and law onto the legislative table. After the Siracusa Draft of 1995 had identified mistake of fact and mistake of law as issues to be regulated,³⁹ the Freiburg Draft of 1996, by clearly distinguishing between factual and legal errors as well as requiring reasonable belief in not acting unlawfully, provided two rules by which not only mistakes with regard to the definitional elements of the crime and its prohibition but also mistakes with regard to justifying circumstances and provisions would have been covered.⁴⁰ Although the Updated Siracusa Draft appears to preserve the same pattern by literally adopting paragraph 2 on mistake of law from the Freiburg Draft, it deviates significantly by starting its paragraph 2 with an equation of mistake of law and fact by equally requiring that the mistake 'negates the mental element' and by degrading the reasonable belief of the perpetrator to a mere proviso.⁴¹

Whereas the *ad hoc* Committee in 1995 had not yet taken explicit notice of mistake of fact or mistake of law,⁴² the non-governmental demands for regulations on mistake of fact or mistake of law seem to have exerted sufficient influence to have this issue taken up officially and not to see it dropped any longer. Still, however, wide-ranging differences in proposals (as evidenced in the compilation by the Preparatory Committee of 1996,⁴³) led to basically two opposing approaches in further discussions: whereas a more general option would recognize both mistake of fact or of law as a defence 'if not inconsistent with the nature of the alleged

³⁸ Cf. K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 *Criminal Law Forum* (1999) 29 f. to ICTY Appeals Chamber Case No. IT-96-22.

³⁹ See Siracusa Draft, *supra* note 25, 39.

⁴⁰ Art. 33n: Mistake of Fact or Law of the Freiburg Draft (in substance identical with the Proposed Amendments to the ILC Draft Code of 1991 Art. 14(d), reprinted in Triffterer, 4 *Croatian Annual* (2/1977) 881) reads as follows:

(1) If the person would not be held guilty of the crime if the circumstances were as he reasonably believed, he is not punishable.

(2) The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about applicable law. If he could have avoided his mistake of law, the punishment may be reduced.

⁴¹ Thus, while para. 2 of Art. 33-15 of the Updated Siracusa Draft is identical with the Freiburg Draft, para. 1 reads as follows:

'A mistake of law or mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.' For a critical comparison of the mistake regulations of the Freiburg Draft (Art. 33n) and the Updated Siracusa Draft (Art. 33-15) cf. Ambos, *supra* note 26, 941 ff.

⁴² Cf. *Report of the Ad Hoc Committee*, *supra* II.B at note 22, 19 (in Bassiouni, *supra* note 4, 490 f.).

⁴³ *Report of the Preparatory Committee*, 51st Sess., p. 95 f. (in Bassiouni, *supra* note 4, 490 f.).

crime' and even if avoidable would still leave room for mitigation of punishment, the other option would accept mistake of fact only 'if it negates the mental element' and would reject mistake of law in principle.⁴⁴

When looking back from the final result in the Rome Statute's Article 32, the latter, stronger option was obviously victorious by precluding mistake of law as far as possible and, in addition, by equating mistake of fact or mistake of law in requiring the negation of the mental element, as proposed in the Updated Siracusa Draft.⁴⁵ Whereas the first decision on a narrow scope of mistake of law is political in nature and, thus, the politicians are responsible for it, the equation issue is of a more doctrinal nature and thus open for conceptual criticism. At any rate, however, when keeping in mind that, even in its final draft of April 1998, the Preparatory Committee felt urged to note that there were still widely divergent views on this article,⁴⁶ we cannot but wonder that a consensus was reached at all.

III. Variety of Mental States in the Rome Statute

As a provision of Part 3 on 'General Principles of Criminal Law', Article 30 of the ICC Statute establishes requirements for the mental element valid for all crimes of that Statute. As indicated by its opening words 'unless otherwise provided', however, Article 30 is not the only place within the Statute where mental elements can be found although it is the main one. Thus, while Article 30 merely states the general requirements and basic concepts of 'intent' and 'knowledge', other mental states or variations with regard to the degree of subjective responsibility may be found elsewhere in the Statute, for instance within the specific definition of crimes or general principles of criminal law.⁴⁷

A. Mental Requirements Less Strong than Intention: Negligence—Wantonness—Recklessness

On the one hand, the requirements of *mens rea* can remain below the threshold of intent. Since, for instance, according to Article 28(1)(a) of the ICC Statute a commander is deemed responsible not only if he knew but also if he 'should have known' that a subordinate was committing or about to commit a relevant crime,

⁴⁴ For details see, *Decisions Taken by the Preparatory Committee at its Session held in New York from 11 to 21 February 1997*, Art. K, p. 18, 28 (in Bassiouni, *supra* note 4, 377/383), *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen*, Art. 24(K), p. 59 f. (in Bassiouni, *ibid.*, 249), *Report of the Preparatory Committee, Draft Statute and Draft Final Act 1998*, Art. 30, p. 65 f. (in Bassiouni, *ibid.*, 145). For further details of the various drafts, see *supra* note 4, margin Nos. 9 f.

⁴⁵ And from there probably to be traced back to the Bassiouni Draft of 1980/87; see *supra* note 33.

⁴⁶ Preparatory Committee, *Draft Final Act*, *supra* note 44, 67 (in Bassiouni, *supra* note 4, 145).

⁴⁷ Cf. D. K. Piragoff, 'Art. 30', in Triffterer, *supra* note 4, margin Nos. 2 f.

his responsibility may be based on mere negligence rather than full intent. In a similar way, the mental level of responsibility is lowered with certain grave breaches of the Geneva Conventions in that it suffices that the extensive destruction and appropriation of property, not justified by military necessity, is carried out merely 'wantonly' (Article 8(2)(a)(iv) of the ICC Statute) as 'wantonness' comes closer to 'recklessness' than to intent.⁴⁸ The same is true of a commander's responsibility for failure to exercise control properly by 'consciously disregarding information' on the subordinates committing a crime.⁴⁹ Still less strong than intent, another variation can consist of the combination of partially higher, partially lower mental requirements as in the case of crimes against humanity which require a certain criminal act, such as murder, enslavement, torture or rape, which each on its own part must be part of a widespread or systematic attack directed at any civilian population: whereas the core crime (as murder, etc.) must be committed 'with intent and knowledge' according to the general requirements of Article 30(1) of the ICC Statute, with regard to it possibly being involved with a widespread or systematic attack it suffices that the perpetrator has 'knowledge of the attack' (Article 7(1) of the ICC Statute).

B. Stricter Requirements than Intention: Wilful—Purposeful—Treacherous

Contrary to the aforementioned lowering of mental requirements, other provisions in the Rome Statute require stronger subjective graduations than provided for in Article 30 of the ICC Statute. This is particularly the case with certain war crimes, such as killing or causing great suffering or depriving a prisoner of war of the rights of fair and regular trial, which must be committed 'wilfully'⁵⁰ or the wounding of individuals belonging to the hostile nation or army or a competent adversary which must be performed 'treacherously'.⁵¹ With particular emphasis on the aim envisaged by the perpetrator, certain forms of complicity such as aiding and abetting or in any other way contributing to a group crime must be determined by a certain 'purpose' such as facilitating the commission of the crime or furthering a criminal activity of the group, respectively.⁵² This picture becomes even more confusing when you consider that the Rome Statute in close proximity to crimes requiring 'wilful' commission speaks of 'intention' or even omits any special reference to the mental requirement as, for example, in war crimes.⁵³

⁴⁸ Cf. J. Allain and J. R. W. D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind', 8 *EJIL* (1997) 100, at 106; Ambos, *supra* note 38, 21.

⁴⁹ Art. 28(b)(i) ICC Statute; cf. Piragoff, in Triffterer, *supra* note 47, margin No. 14.

⁵⁰ Art. 8(2)(a)(i), (iii), (vi) ICC Statute.

⁵¹ Art. 8(2)(b)(xi) and (c)(ix) ICC Statute.

⁵² Art. 25(3)(c) and (d)(i) ICC Statute; cf. Ch. 20 above, V.E and F.

⁵³ Cf. e.g. Art. 8(2)(a)(i), (iii), (vi), on the one hand, and (2)(b)(i) to (iv), on the other, and again different (2)(a) (iv), (v), (vii) and (viii) and (b)(v) to (viii) ICC Statute.

Before denouncing this confusing diversity as sheer thoughtlessness, if not mis-conceived arbitrariness, one must realize that the international crimes covered by the Rome Statute are mostly drawn from existing international treaties which concerned themselves less with criminal doctrinal consistency than with the imperatives of international negotiations and were thus not always careful in their use of criminal law terminology.⁵⁴ Instead of eliminating this diversity by removing the various mental references from the specific crimes and by substituting them with a consistent general requirement and terminology as may be observed with some national penal codes such as Austria (§§ 5–7), France (Article 121–3), Germany (§§ 15, 18), or Poland (Article 8), it was probably a wise decision to leave the specific crime definitions as they were developed within the original treaties; otherwise the Rome Statute would have run the risk of missing the meaning of certain violations of Conventions if taken out of their international context. On this line of reasoning, however, it would have been even wiser if the Preparatory Committee had also refrained from defining 'intent' and 'knowledge' (in Article 30 of the ICC Statute) whilst leaving 'wilful' and 'purpose' undefined. This has opened the door to speculation whether 'wilfully causing great suffering' in war crimes is different from 'intentionally causing great suffering' by crimes against humanity, and both again different from (mentally not specified) 'causing serious bodily harm' by genocide,⁵⁵ and thus whether the latter requires 'intent' and 'knowledge' according to the general rule of Article 30(1) of the ICC Statute. In such a diverse configuration, selective definitions such as those provided for intent and knowledge can operate as unpredictable obstacles, making consistent construction of divergent provisions more difficult rather than easier.⁵⁶

C. Specific Intent

Some provisions are characterized by their requiring that the crime be committed with a certain aim as, for instance, in the case of genocidal acts 'with intent to destroy a protected group'⁵⁷ or in the case of aiding and abetting 'for the purpose of facilitating' the commission of the main crime.⁵⁸ In these cases, the general 'intent and knowledge' of Article 30(1) of the ICC Statute must be accompanied by a special intent (*dolus specialis*). This combination of a 'general intent' (with

⁵⁴ Cf. E. M. Wise, 'General Principles of Criminal Law', in L. Sadat Wexler and M. C. Bassiouni (eds.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15–July 17 1998* (1998), 52.

⁵⁵ Cf. Art. 8(2)(a)(iii), Art. 7(1)(k) and Art. 6(c) ICC Statute, respectively.

⁵⁶ In this respect, it would have been preferable as proposed in the Model Draft Statute (by Sadat Wexler and Bassiouni, Art. 29), to merely regulate the basic mental elements while abstaining from defining intent and knowledge; see Wise, *supra* note 54, 50 ff.

⁵⁷ Art. 6 ICC Statute; for details cf. W. A. Schabas, *Genocide in International Law* (2000) 213 ff.; see also with regard to crimes against humanity the requirement of a certain 'intention' in Art. 7(2)(h) and (i) ICC Statute.

⁵⁸ Art. 25(3)(c) ICC Statute.

regard to the basic act and its regular consequences and circumstances) and a 'specific intent' (with regard to an additional aim)⁵⁹ is clearly exemplified in the case of complicity in group crimes in which the relevant contribution must be made 'intentionally' and, in addition, 'with the aim of furthering the criminal activity of the group'.⁶⁰ In order to avoid uncertainties, it had been contemplated making mention of both types of intent;⁶¹ the Preparatory Committee, however, deemed it not necessary to explicitly mention both forms of 'intent' in the present Article 30 of the ICC Statute as 'any specific intent should be included as one of the elements of the definition of the crime'.⁶²

On closer inspection, however, it is questionable in some cases whether crime definitions with the explicit element of 'intentionally' or 'with intent' merely mean 'intent' in its general form or in terms of a specific intent. A clear answer is rarely found solely from the wording as such; more important is therefore the context in which 'intent' is required. If it appears to be used in broader terms, it merely determines the general requirements of the mental element. If, however, it is to express a certain purpose or a specific goal of the perpetrator, a specific intent is at stake.⁶³ Although there might be doctrinal differences between both, as evidenced in the rich as well as divergent literature in certain countries,⁶⁴ no fitting formula has been found which could be easily handled. At any rate, one remarkable difference seems to be the following: whereas with special intent particular emphasis is put on the volitional element, thus excluding mere *dolus eventualis*,⁶⁵ general intent is characterized by Article 30 of the ICC Statute as requiring 'knowledge' as well, thus strengthening the cognitive element. This means, for instance, in case of aiding and abetting, that, according to Article 25(3)(c) of the ICC Statute, the aider

⁵⁹ As to this terminology, one must be aware that 'general' and 'specific' or 'special intent' are far from a worldwide common understanding and may even differ within the same legal system: whereas in France, for instance, some authors seem to follow the same line as here, thus extending in particular '*dolus generalis*' to the definitional result of the crime (as e.g. in case of murder to the death of victim), the French majority would restrict the '*dolus generalis*' to the act as such, thus being forced to comprise the result of the act as '*dolus specialis*' and to catch additional aims as '*dolus aggravatus*' (cf. C. Elliott, 'The French Law of Intent and its Influence on the Development of International Criminal Law', 11 *Criminal Law Forum* (2000) 35–46 with further references). Cf. also *infra*, IV.D.2 at note 122.

⁶⁰ Art. 25(3)(d) ICC Statute; cf. Ch. 20 above, V.F.2.

⁶¹ Art. H in Report of the Preparatory Committee, 51st Sess., Vol. II, p. 92 (in Bassiouni, *supra* note 4, 488).

⁶² Report of the Preparatory Committee, 51st Sess., Vol. I, p. 45, para. 199 (in Bassiouni, *supra* note 4, 415 f.); cf. also Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.; W. A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 420. As with the various interpretations of 'intent' in Art. 6 ICC Statute, cf. Piragoff, in Triffterer, *supra* note 47, margin No. 23.

⁶³ Cf. K. Ambos, 'Art. 25', in Triffterer, *supra* note 4, margin Nos. 22 f.

⁶⁴ As for instance in Italy, see L. Picotti, *Il dolo specifico* (1993) with many comparative references.

⁶⁵ Cf. *infra*, IV.B and IV.I.

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in terms of 'general intent' must have knowledge of the main crime to be committed, whereas with regard to the special intent of facilitating the commission of the crime, the aider and abettor must not only know but even wish that his assistance shall have this effect.⁶⁶ In a similar way, it would suffice for the general intent of genocidal killing according to Article 6(a) of the ICC Statute that the perpetrator, though not striving for the death of his victim, would approve of this result whereas his special 'intent to destroy' in whole or in part the protected group must want to effect this outcome.⁶⁷

IV. The Mental Element according to Article 30 of the ICC Statute

A. Underlying Basic Concepts

Before going into details, it seems advisable to emphasize some basic features which are not explicitly stated but nevertheless implicitly underly Article 30 (in connection with Article 32 of the ICC Statute).

1. The Exclusion of 'strict liability'

Although 'strict' liability in terms of founding criminal responsibility on the fulfilment of the objective elements of the crime is not explicitly excluded, the requirement of a mental element in Article 30 of the ICC Statute makes clear that the crime must also be subjectively attributable to the perpetrator, even if the crime definitions in Articles 6 to 8 do not explicitly require a certain state of mind. In this respect, Article 30 in requiring the commission of a crime 'with intent and knowledge' functions as a general and supplementary rule for criminal responsibility according to the Rome Statute. What is more, this is not only true for the perpetration of the crimes of Articles 6 to 8 of the ICC Statute, but applies also to the various forms of perpetration and participation of Article 25(3) of the ICC Statute. This is because Article 25(3), when it doesn't require a special (and then remarkably stronger) state of mind at all,⁶⁸ does not distinguish between perpetration and participation and, thus, presupposes intention and knowledge according to the general rule of Article 30 of the ICC Statute.⁶⁹

Although a general one, this requirement is not absolute, as it is conditioned by the restriction of 'unless otherwise provided'. Thus, by leaving the door open for

⁶⁶ Cf. Ch. 20 above, IV.E.2.

⁶⁷ Cf. W. A. Schabas, 'Art. 6', in Triffterer, *supra* note 4, Art. 6, margin No. 4.

⁶⁸ As in Art. 25(3)(c) and (d) ICC Statute.

⁶⁹ In the same sense Piragoff, in Triffterer, *supra* note 47, margin Nos. 7, 10. As to certain peculiarities with regard to complicity, cf. *infra*, IV.J.