

ALBIN ESER

Individual Criminal Responsibility

Mental Elements – Mistake of Fact and Mistake of Law

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INDIVIDUAL CRIMINAL RESPONSIBILITY
MENTAL ELEMENTS – MISTAKE OF FACT
AND MISTAKE OF LAW

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**The Rome Statute of the
International Criminal Court:
A Commentary**

Volume I

EDITORS

ANTONIO CASSESE PAOLA GAETA JOHN R.W.D. JONES

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INDIVIDUAL CRIMINAL RESPONSIBILITY

Albin Eser

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General Principles of International Criminal Law

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I. Scope of Article 25 of the ICC Statute

The title of Article 25 raises greater hopes than it is, in the end, able to fulfil. At first glance it gives the impression that this article contained all essential requirements for the criminal responsibility of an individual and, furthermore, it may enable the delimitation of individual from other forms of responsibility, such as that of the State. At a closer look, however, it appears that Article 25 merely regulates in detail the various forms of perpetration of and participation in an international crime (paragraph 3(a)–(e)) and attempts thereof (paragraph 3(f)). These provisions are situated in the context of other regulations which, on the one hand, establish the jurisdiction of the Court over natural persons (paragraph (1)) and, on the other hand, leave the responsibility of States under international law unaffected while neither clearly including nor excluding their responsibility under the ICC Statute (paragraph (4)). On the whole it seems fair to say that Article 25 by no means contains a comprehensive and definite compilation of all requirements essential for ‘individual criminal responsibility’, as the title of the article suggests. Nevertheless, it is equally fair to say that in this respect, Article 25 is not worse but rather better than earlier drafts of the international criminal code which contained even less explicit rules of international criminal responsibility.¹

¹ Cf. *infra*, at III. As to the drafting history of Art. 25 of the ICC Statute, see W. A. Schabas, ‘General Principles of Criminal Law in the ICC Statute’, 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 409 ff. with references to the various materials, furthermore, P. Saland, ‘International Criminal Law Principles’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 198 ff.

Another feature which should be mentioned is a sort of double structure of the Rome Statute. On the one hand, it contains rules for the establishment of the Court and its jurisdiction, which are of a procedural character. On the other hand, it provides specific definitions of crimes and general requirements of responsibility, which are of a substantive nature. In comparison with earlier developments of international criminal law, it appears that at first the elaboration of 'substantive law' was the main endeavour.² This tendency may be explained by the fact that in the early days, international criminal justice was not yet in close reach. By the same token, the Charter of the International Military Tribunal of Nuremberg (IMT) would leave the elaboration of large parts of procedural law up to the Tribunal itself according to its Rules of Procedure and Evidence.³ Now, with the establishment of the ICC, substantive as well as procedural rules stay side-by-side within the same statute. Although this may be welcome due to its offering an optimum of transparency and legal security, one must be aware that with regard to defences and exemptions from criminal responsibility, it is not always clear whether these elements are of a substantive or procedural nature, the consequences of which may differ. At any rate, the Statute has made progress at least insofar as it considers the 'grounds for excluding criminal responsibility' (Article 31) as not a merely jurisdictional matter, as otherwise it would not make sense to treat persons under 18 as being excluded from 'jurisdiction' (Article 26). And, furthermore, since still leaving the question open as to whether and to what degree the exclusionary grounds of Article 31 as well as other 'defences' are of a substantive or procedural nature, the Rome Statute leaves room for interpretation, for filling gaps with general elements and for structuring the crime according to general principles.

Although this is a task for the future, it seems advisable to see the Rome Statute's article on 'individual criminal responsibility' in the broader light of related provisions before turning to the details of Article 25.

II. Elements For and Lack of a Comprehensive 'General Part' of Criminal Responsibility

The Rome Statute in its Part 3 on 'General Principles of Criminal Law' certainly contains quite a few provisions which represent essential components of a 'General Part' of a criminal code as is traditional in continental Europe and many other countries with similarly modelled penal codes. The respective provisions in

² Thoroughly O. Triffterer, 'Art. 32' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), margin No. 3 ff.

³ *Ibid.*, margin No. 3.

the Rome Statute, however, are neither in number nor shape apt to form a true 'General Part'.⁴ Therefore, the requirements of individual criminal responsibility have to be found partly within and partly outside of Article 25. Without claiming to be complete, at least the following elements and requirements may be listed as essential for individual criminal responsibility.

A. Within Article 25 of the ICC Statute

1. Individual Responsibility of Natural Persons

Paragraphs (1) and (2) establish the jurisdiction of the ICC over natural persons and proclaim their individual responsibility. Both provisions thereby confirm that even the 'Law of Peoples' (as 'International Law' is for instance expressed in the German 'Völkerrecht') may impose on the individual direct duties, the violation of which can lead to individual (international) criminal responsibility—a principle which already had been presupposed by the IMT⁵ and more recently by the ICTY.⁶ Less clear than these provisions, which may—as has since become generally recognized—merely have a declaratory function, is paragraph (4) which reiterates an old position in the codification history of international criminal law according to which the individual criminal responsibility of natural persons shall not affect the responsibility of States under international criminal law,⁷ which does not, however, explicitly exclude criminal responsibility of States.⁸

2. Perpetration and Participation

Paragraph (3) describes various forms of perpetration and participation. As these phenomena constitute the central substance of Article 25(3) ICC Statute and will be dealt with in more detail *infra* (at V), a mere survey of the main features suffices here.

⁴ Cf. A. Eser, '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) 43.

⁵ Cf. O. Triffterer, 'Bestandsaufnahme zum Völkerstrafrecht', in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) at 211 ff.; Report of the International Law Commission on the work of its forty-eighth session, May 6 to July 26, 1996, UN GAOR, 51st Sess., Supp. No. 10 (A/51/10) at 19, in addition Art. 1 of the ICTY Statute.

⁶ Cf. Art. 1 of the ICTY Statute and the ICTY Trial Chamber II in *Prosecutor v. Duško Tadić*, IT-94-I-T, 7 May 1997, paras. 663 ff., reprinted in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. II/2. *Documents and Cases* (2000) at 1003, 1129 f.

⁷ Cf. K. Ambos, 'Art. 25', in Triffterer (ed.), *supra* note 2, margin No. 37 with more references.

⁸ For more details see *infra*, IV B. As to the more general legal policy question of whether in face of the systematic type of humanity crimes the traditional concept of individual criminal responsibility should rather be substituted by some kind of collective responsibility, cf. H. Vest, 'Humanitätsverbrechen—Herausforderung für das Individualstrafrecht?', in 113 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2001) 457 ff.; *id.*, *Genozid durch organisatorische Machtapparate* (2002) 301 ff.

In terms of 'perpetration', according to subparagraph (a) an international crime may be committed individually (by one person alone and directly), jointly with another person, or through another person.

In terms of 'participation', subparagraphs (b) and (c) penalize a broad variety of ordering, soliciting, inducing, aiding, abetting, or otherwise assisting the attempt or commission of a crime or the facilitation thereof.

Whereas the preceding forms of perpetration and participation may be called 'classical', i.e. traditional for many jurisdictions,⁹ subparagraphs (d) and (e) provide certain extensions of criminal co-responsibility by a group of persons acting with a 'common purpose', with special requirements for the necessary intention or by specifically penalizing the direct and public incitement to certain crimes, such as genocide.

3. Attempt and Abandonment

In principle, it is certainly laudable that the attempt to commit a crime is not only penalized but defined as well, and that even the exclusion of liability in case of abandonment is provided for (subparagraph (f)). From the conceptual point of view, however, one may wonder why attempt is regulated in the direct neighbourhood of participation, as if it were just another type of it, instead of regulating attempt in its own independent provision as it is good tradition and as had been suggested in earlier drafts.¹⁰

B. Elements of Criminal Responsibility outside of Article 25 of the ICC Statute

1. Legality as the Basis of Criminal Responsibility

There is neither individual nor any other criminal responsibility unless provided for by law. The various sub-principles of this almost universally acknowledged principle of legality is expressed in three different provisions of *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23), and *non-retroactivity ratione personae* (Article 24).

2. Subjective Requirements of Criminal Responsibility

In accordance with the canonic concept of '*actus reus nisi mens sit rea*', it is not the mere unlawful act that bears criminal responsibility, but only if it has been committed in a certain state of mind. Whereas many national criminal codes—at least

⁹ Cf. *infra*, V.C–E.

¹⁰ Cf. Schabas, *supra* note 1, 413; 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) at 43 f.; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II. Compilation of Proposals, UN GA, 51st Sess., Supp. No. 22 (A/51/22, 1996) at 93 f.

with regard to certain crimes such as homicide or bodily injury—would be satisfied with negligence, the Rome Statute requires *intent* as the mental element (Article 30). This, however, is not without exception, as commanders and other superiors may be held responsible for crimes of subordinates if they ‘should have known’ that their forces were committing or about to commit such a crime (Article 28(a)(i)), thus expanding responsibility, implicitly, into the realm of *negligence*¹¹

As main grounds by which *mens rea* may be negated, the Rome Statute recognizes not only *mistake of fact*, but also—under certain conditions—*mistake of law* (Article 32) as well.¹² Another subjective requirement of criminal responsibility, although ‘hidden’ in an ‘exclusion of jurisdiction’ over persons under the age of 18 (Article 26), is the *capacity* of the perpetrator to appreciate the unlawfulness or nature of his conduct and/or to act in accordance with the requirements of law.¹³

3. Grounds for Excluding Criminal Responsibility

The establishment of criminal responsibility does not solely depend on the presence of positive requirements, such as an act and a certain state of mind, but also on the absence of negating obstacles, as for instance incapacity due to mental disease or self-defence. Such ‘defences’, as in a rather unspecified manner the common law tradition would comprehend various grounds of excluding criminal responsibility, can be found mainly, but by no means exhaustively, in Article 31 of the ICC Statute. Without clearly distinguishing between ‘justifications’, ‘excuses’, or other grounds for excluding punishability, as developed in continental European theory and partly even recognized in the penal code,¹⁴ Article 31 recognizes—under certain conditions—four grounds for excluding criminal responsibility: mental incapacity, intoxication, self-defence and defence of property, and duress.¹⁵ This list, however, is not complete, as certain exclusions can also be found outside of Article 31, in particular *mistake of fact or law* (Article 32), *minor age* under 18 years (Article 26), *abandonment* of an attempt (Article 25(3)(f)) and *superior orders* (Article 33).

Somewhat countervailing to these defences are those legal figures which at first glance might also be invoked as grounds for excluding punishability, but which are, in fact, explicitly derogated in the area of international criminal law: one is the

¹¹ For more details, see Ch. 21 below (to Art. 28)

¹² For more details, see Ch. 23 below (to Arts. 30 and 32)

¹³ Cf. A. Eser, ‘Art. 31’, in Triffterer (ed.), *supra* note 2, margin No. 7. On the reasons why the requirement of a minimum age for criminal capacity was not expressed as a substantive requirement in terms of a prerequisite of culpability (as, for instance, according to German Strafgesetzbuch and Art. 19 Spanish Código Penal) but rather as a jurisdictional matter, cf. Saland, *supra* note 1, 200 ff.

¹⁴ For more details, see Ch. 24.1 below and A. Eser, ‘Justification and Excuse. A Key Issue in the Concept of Crime’, in A. Eser and G. P. Fletcher (eds.), *Justification and Excuse: Comparative Perspectives* (1987) Vol. I, p. 19 f.

¹⁵ For more details, see Ch. 24 below, Art. 31

official capacity (such as a Head of State or Government), which is neither a ground for excluding nor for mitigating criminal responsibility (Article 27), the other is—contrary to many national laws—the non-applicability of any *statute of limitations* (Article 29).

C. Missing Elements of Criminal Responsibility

Although the Rome Statute—in comparison to any predecessors—contains a quite impressive list of positive and negative elements of criminal responsibility,¹⁶ the missing list of elements which one would expect in the ‘general part’ of a national penal code is no less impressive. This is particularly true with regard to the commission of a crime by omission,¹⁷ although the special responsibility of commanders for crimes of subordinates (Article 28) at least partially covers this field; equally remarkable is the silence of the Rome Statute with regard to certain grounds of justification, such as consent of the victim, conflict of interest, general and/or military necessity, and—as special phenomena of public international law—the problem of immunity of diplomats, reprisals, and the *tu quoque* argument.¹⁸ A more general deficit is the lack of any rules of merger in case of concurrent crimes.¹⁹

D. Tacitly Presupposed General Requirements of Criminal Responsibility

As became clear from the preceding list of positive, negative, and missing elements of criminal responsibility, the Rome Statute was neither anxious to regulate all necessary elements of criminal responsibility explicitly nor did it endeavour to structure them along a certain doctrine, but was rather content with regulating at most those requirements which were deemed particularly essential or in need of clarification. This is true, for instance, with regard to the principal requirement of intent or for the exclusion of official capacity, as criminal liability might otherwise be extended to mere negligence, and State officials might try to evade criminal responsibility. This abstinence of the Rome Statute from a comprehensive ‘general part’ does not mean, however, that the general requirements of criminal responsibility had been developed without any ‘hidden agenda’. Although this is not the place to ascertain what—common or different—doctrine the individual drafters had in mind when developing and approving certain regulations, they

¹⁶ Cf. *infra*, III.

¹⁷ For more details, see *infra*, VII

¹⁸ Monitoring this missing list is not to say that all these instances should be recognized as ‘defences’, instead of remaining silent on these matters, however, the Rome Statute could have clarified the exclusion of perhaps doubtful ‘defences’, such as, for instance, consent of the victim as inappropriate in the context of an international crime. For further details to ‘defences’ worth being at least dealt with, cf. A. Eser, ‘Defences’, in *War Crime Trials*, 24 *IYHR* (1994) 217 ff., *id.*, in Triffterer (ed.), *supra* note 2, margin No. 10 ff.

¹⁹ Cf. Ch. 11.6 above.

had a certain understanding of criminal responsibility and certain indispensable requirements. One seems to have been the requirement of an *actus reus* in terms of a *wilful act* and *mens rea* in a sort of *culpability*, as the drafters would otherwise not have been able to recognize mistake of law or duress as grounds for excluding criminal responsibility.

III. Comparison with National and Customary International Criminal Law

After realizing that the Rome Statute, though it regulates some (more or less) principal, positive requirements for, and negative exemptions from criminal responsibility, is still far from a comprehensive 'General Part';²⁰ it is not yet in the same developmental stage and shape as are most national criminal codifications.

This is at least true with regard to national penal codes which follow the continental European tradition, though even there there may be differences of elaboration and systematization of the crime.²¹ Taking this into account and the fact that the preceding list of explicitly recognized, tacitly presupposed, and evidently missing elements of criminal responsibility make up all of what normally would belong to a modern penal code, it would not make much sense here to engage in a detailed comparison of the elements and structure of the crime in the Rome Statute with those in international criminal codes, not least because such a comparison, if thoroughly carried out, would have to comprise the entire penal code(s). Instead of such a general and necessarily abstract survey, it appears preferable to make special references to national law(s) where appropriate.

With regard to international criminal law and previous draft codes, however, it will be interesting to see to what extent and in which way the requirements of criminal responsibility had already been recognized before the Rome Statute came into being. Just to mention the main steps, the first instrument providing general requirements for individual responsibility in a binding manner was the Charter of the International Military Tribunal (IMT) in Nuremberg:²² aside from establishing individual responsibility for certain crimes against peace, war crimes, and crimes against humanity (Article 6), it partially covered the early stages of planning and preparation and certain types of complicity, declared the official position of defendants, including Heads of State or other government officials, as not free-

²⁰ Cf. *supra*, II.

²¹ For more details, see *infra*, within IV–VII.

²² *Charter of the International Military Tribunal*, 82 UNTS 280, reprinted in M. C. Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (1997) at 183 ff., and in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 61.

ing them from responsibility (Article 7), and recognized superior orders, if at all, as mitigating circumstances at most (Article 8).²³

In summing up the principal statements and requirements in the IMT Charter of Nuremberg and in the judgment of the Tribunal, the International Law Commission (ILC) promulgated the so-called *Seven Nürnberg Principles of International Law*²⁴ which basically reinforced the requirements of the aforementioned IMT Charter, though with some modifications and generalizations: while in case of superior orders the defendant may be released from responsibility if there was no moral choice possible to him (Principle IV), complicity in the commission of one of the relevant crimes is now declared a crime under international law in a general way (Principle VII).

In complying with its mandate from the UN General Assembly to further develop the Nuremberg Principles, the ILC in 1954 presented its first Draft Code of Offences against the Peace and Security of Mankind.²⁵ Though still rather short, it supplemented the already known Code of Offences with some general rules, such as on conspiracy, direct incitement to commit an offence, complicity in the commission of an offence, and attempt (Article 2(13)). Even these additions, however, merely complemented the special offences, rather than providing any sort of 'general part'.

With regard to the latter respect, more progress was made with the ILC's Draft Code of Crimes against the Peace and Security of Mankind of 1991.²⁶ After stating the main principles of responsibility and punishment in a sort of core provision (Article 3), including general rules on participation and attempt,²⁷ the Draft Code confirms the responsibility of a State under international law for an act or omission attributable to it (Article 5), excludes statutory limitations (Article 7), proclaims the principle of non-retroactivity (Article 10), proscribes the responsibility of superiors for failure to prevent subordinates from committing an international offence (Article 12), and, last but not least, opens the door for defences

²³ As to the question of whether and to what degree the IMT Charter of Nuremberg merely expressed already existing international law rather than making new law, cf. ICTY Trial Chamber *Tadić* case (*supra* note 6), paras. 663 ff.; cf. also Triffterer, *supra* note 5, 211 ff.; Report of the ILC, 48th Sess., *supra* note 5, 19. With regard to the jurisprudence by and after the Nuremberg and Tokyo Tribunals, cf. K. Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis—From Nuremberg to The Hague', in McDonald and Swaak-Goldman, *supra* note 6, Vol. I, p. 7 ff.

²⁴ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal*, 2 *YILC* (1950) 374–378, reprinted in Bassiouni, *supra* note 22, 210 ff. and in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 191.

²⁵ *YILC* (1954), Vol. II, p. 151 f.; (1983), Vol. II, p. 4; (1983), Vol. II/2, p. 11; (1984), Vol. I, p. 4 f.; (1984), Vol. II/2, p. 8; (1985), *supra* note 6, Vol. I/2, p. 8.

²⁶ *YILC* (1991), Vol. II/1, pp. 94–97.

²⁷ Cf. *infra*, V.B.2.

and extenuating circumstances, as the competent court may deem appropriate (Article 14).

Compared to this Draft Code of 1991, the Statutes of the International Tribunals for former Yugoslavia (ICTY)²⁸ and Rwanda (ICTR)²⁹ evidently fall short of the state of consensus reached meantime in the international community both among experts and public opinion. In paying more attention to questions of jurisdiction, composition of the court, and procedural rules, the substantive parts of these Statutes make do with proclaiming the special crimes under the jurisdiction of these Tribunals,³⁰ restricting the jurisdiction over natural persons³¹ and, by an altogether new technique, pulling the already known and perhaps slightly modified general rules together in a provision on 'individual criminal responsibility'.³² This restraint of the ICTY and ICTR Statutes had to be made up for, of course, by judge-made law of the Tribunals as in fact occurred.³³

In 1996, the ILC, presumably not without the influence of private efforts of codification to be explained later, came out with a thoroughly revised Draft Code of Crimes against the Peace and Security of Mankind.³⁴ With regard to substantive rules and requirements, this Draft Code complements, and to a certain degree modifies the conditions of 'individual responsibility' (Article 2), in particular by explicitly requiring intent, penalizing both the active ordering of a crime and a superior's failure to prevent it, defines instigation as well as aiding and abetting in a rather broad way, reformulates the definition of attempt, though not yet explicitly recognizing discharge for abandonment. With regard to defences and extenuating circumstances (Articles 14, 15), however, the Draft Code of 1996 made no progress beyond that of 1991.

This rather slow and narrow approach to a more comprehensive code of international criminal law on the diplomatic and similarly official level is understandable to a certain degree if one takes into account that government committees or similar publicly mandated commissions such as the ILC are expected to move along consensual lines. This is, at most, conducive to achieving the best possible compromises rather than to establishing truly solid and impartial law. In light of this, private initiatives were of vital importance. This is, among others, particularly true of academic efforts by and within the Association International de Droit

²⁸ UN Doc. S/25704, 3 May 1993 reprinted in Bassiouni, *supra* note 22, 251 ff. and in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 301.

²⁹ SCRes. 955 (1994) Annex, 8 November 1994, reprinted in Bassiouni, *supra* note 22, 258 ff. and McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 311.

³⁰ Arts. 2–5 of the ICTY and Arts. 2–4 of the ICTR Statutes, respectively.

³¹ Art. 6 and 5 of the ICTY and ICTR Statutes, respectively.

³² Art. 7 and 6 of the ICTY and ICTR Statutes, respectively.

³³ As to relevant cases, cf. the references *supra* at note 6 and *infra* at notes 123, 134, 138.

³⁴ Report of the ILC, 48th Session, *supra* note 5, 14 ff., paras. 50 ff., reprinted in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 335 ff.

Pénal (AIDP) and the International Law Association (ILA). From many other activities and publications worth mentioning,³⁵ only two initiatives, as presented in the form of Draft Codes, may be named here. First, a Draft International Criminal Code and Draft Statute for an International Criminal Tribunal,³⁶ which already contained a rather comprehensive 'General Part' with provisions for instigation, participation, attempt, and omission (Article IV), for objective and subjective elements such as causation (Article VI) as well as grounds for excluding criminal responsibility, such as self-defence, necessity, superior order, error, incapacity, and consent (Article IX); secondly, the Updated Siracusa Draft³⁷ which, in cooperation with the AIDP, the ISISC (Istituto Superiore Internazionale di Scienze Criminali in Siracusa/Italy), and the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany, with the assistance of public and international criminal law experts from all over the world, presented the, to date, most comprehensive 'General Part' of an international criminal code in at least regulating the 'core provisions' found in most modern national codes.³⁸ Aside from the questions regulated in earlier drafts, the Updated Siracusa Draft also contains provisions on the age of responsibility, insanity and intoxication, omission, causation, the mental element, and, not least, a rather comprehensive list of grounds for excluding criminal responsibility. Between these two initiatives, the AIDP, in cooperation with the ISISC, had made a probably influential contribution to the development of an international criminal code by procuring *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*.³⁹ In assuming that both these commentaries and the Updated Siracusa Draft had been taken into account by the ILC in the revision of its Draft Code 1996 and in realizing that these documents also had

³⁵ For more details cf. the historical survey and the pre-note to the Draft Statute: International Tribunal by M. C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998) 1 ff., esp. 3 ff. and 759, respectively.

³⁶ By M. C. Bassiouni, originally published 1980, and revised 1987.

³⁷ 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.

³⁸ This was reached in three steps: after a committee of experts, which convened in July 1995 in Siracusa, had identified a list of open questions and elements to be circulated in a general part (in Draft Statute for an International Criminal Court: Alternative to the ILC Draft, Siracusa/Freiburg, July 1995, p. 38 ff.), a smaller working group on substantive law, consisting of A. Eser, D. Koenig, O. Lagodny, and O. Triffterer, prepared a draft of general provisions (unpublished Freiburg Draft of February 1996), which then was integrated into the Updated Siracusa Draft (*supra* note 37, as Arts. 33-0 to 33-18). Since not all provisions of the Freiburg Draft had been taken over without modifications into the Updated Siracusa Draft, it appeared appropriate to integrate the Freiburg recommendations into an amendment of the ILC 'Draft Code of Crimes' of 1991, published as annex by O. Triffterer, 'Acts of Violence and International Criminal Law', 4 *Croatian Annual* (2/1997) 872. For a comparison of the Freiburg Draft of 1996 and the Updated Siracusa Draft see K. Ambos, *Der 'Allgemeine Teil' des Völkerstrafrechts* (2002) 941 ff.

³⁹ Edited by M. C. Bassiouni (1993).

been taken into consideration by the Preparatory Committee in 1996,⁴⁰ it seems fair to say that the Rome Statute is the result of combined efforts both by State officials and non-governmental initiatives. This is no less true for the principles of individual criminal responsibility in question here.

IV. Individual Criminal Responsibility as Distinct from Other Types of Responsibility

By establishing the jurisdiction of the ICC over natural persons (Article 25(1)) and proclaiming their individual responsibility (Article 25(2)),⁴¹ the Rome Statute limits at the same time the scope of international criminal law to *individual criminal responsibility*. This makes it necessary to distinguish it from other types of criminal liability.

A. Responsibility of Corporations

At first glance, paragraph (1) of Article 25 of the ICC Statute seems to do no more than to state the self-evident course when implicitly restricting the jurisdiction of the Court and, thus, the responsibility for international crimes within the Rome Statute to natural persons, as the particular definitions of crime in Articles 5 to 8 are connected to a human act and, consequently, to the conduct of a natural person. However, even if this point of departure still allowed the sanctioning of a legal entity (such as a corporation or other 'juridical persons'), as long as its 'activity' can be traced back and attributed to a natural person, when reading paragraphs (1), (2), and (3) of Article 25 of the ICC Statute together, there can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates—at least for its own jurisdiction—the punishability of corporations and other legal entities. In the same line it had already been stated by the IMT that international crimes 'are committed by men not by abstract entities'.⁴²

Even in face of this authority, however, the question of whether a corporation should be excluded from criminal responsibility was an issue in the deliberations prior to the Rome Statute. In particular, the Draft Statute of 1998 contained a proposal which—with the exception of States—would subject legal entities to the jurisdiction of the ICC if 'the crimes committed were committed on behalf of

⁴⁰ Cf. Triffterer, *supra* note 38, 873.

⁴¹ Cf. *supra*, II.A.1.

⁴² See the references by Ambos, in Triffterer (ed.), *supra* note 7, margin No. 4 to the *Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, HM Attorney-General by HM's Stationery Office London (1950) Part 22, 447

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such legal persons or by their agencies or representatives'.⁴³ This inclusion of legal persons was demanded in particular by the French Delegation in order to make it easier for victims of crimes to sue for restitution and compensation.⁴⁴ This proposal, however, was not successful in the end as it had—among others—these arguments against it: from a pragmatic point of view it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities, and from a more normative–political point of view it was emphasized that criminal liability of corporations is still rejected in many national legal orders,⁴⁵ an international disparity which could not be brought in concord with the principle of complementarity (Article 17 of the ICC Statute).⁴⁶ Furthermore, it was felt 'morally obtuse for States to insist on the criminal responsibility of all entities other than themselves'.⁴⁷ This alludes to the next point of exclusion.

B. Responsibility of States

Like other legal persons, States are also not subject to the jurisdiction of the ICC. Although this is not explicitly stated, Article 25(4) of the ICC Statute, according to which individual criminal responsibility 'shall [not] affect the responsibility of States under international law', has to be read in such a way that the implicit exclusion of States from criminal responsibility shall not preclude other kinds of responsibility of States, if so provided for by other customary international law or treaties. By limiting criminal responsibility to individual natural persons and by not attributing their acts to the legal persons they represent,⁴⁸ the same holds true for the case that a natural person acts as 'an agent of the State' or 'in the name of the State'.⁴⁹

C. Individual Responsibility vs. Co-responsibility

When the Rome Statute in Article 25(3)(a) declares that a natural person can commit a crime not only 'as an individual', but also 'jointly with another person' or 'through another person', this equalization of 'individual' perpetration with co- or even intermediary perpetration seems at first sight contradictory to Article 25(2) which refers only to individual responsibility: this seems to allow the

⁴³ Art. 23 para. 5 UN Doc. A/CONF. 183/2/Add. 1 (1998), reprinted in M. C. Bassiouni (ed.), *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 7 ff.

⁴⁴ Cf. the references in Schabas, *supra* note 1, 409 f.

⁴⁵ Cf. recently the contributions in A. Eser, B. Huber, and K. Cornils (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht* (1998).

⁴⁶ Cf. Saland, in Lee (ed.), *supra* note 1, 199; Ambos, in Triffterer (ed.), *supra* note 7, margin No. 4.

⁴⁷ Wise in Sadat Wexler and Bassiouni (eds.), *supra* note 10, 42.

⁴⁸ Cf. *supra*, IV.A.

⁴⁹ For more details on the development of State responsibility in international law and, in particular, in the ILC Draft on State Responsibility, see *Report of the ILC on the work of its fifty-fourth session*, UN GAOR, 54th Sess., Supp. No. 10 (A/54/10 and corr.1 & 2), paras. 49 ff.

conclusion that paragraph (2) solely points and is limited to the 'solitary perpetrator'.⁵⁰ This seeming contradiction can be solved, however, if the real nature of co-perpetratorship is analysed. This legal figure of complicity is characterized by the fact that the joint perpetrators put together a united plan for a crime which they perhaps perform by division of labour. As explained later,⁵¹ based on the common plan, the individual contributions of the co-perpetrators in performing the crime can be reciprocally attributed to each other. In this way, joint perpetratorship does not imply liability for wrongdoing of another; rather the basis for criminal responsibility is the individual blame placed on each perpetrator for having participated in the planning of the crime and for having consented to the illegal contributions of the other co-perpetrators. Thus, it is the reproach of unlawfulness against each individual which makes it feasible to attribute the reciprocal contributions to each other. On these terms, the solitary perpetrator as well as co-perpetrators can be considered 'individually responsible' for the crime, as intended by paragraph (2).

D. Individual Responsibility (even) in the Case of Official Capacity

The Rome Statute considers the principle that a natural person is criminally responsible for a crime as valid without exception. This is expressed in Article 27 which declares the Statute applicable to all natural persons regardless of any 'official capacity'. Parallel provisions can already be found in the ICTY and ICTR Statutes in Articles 7(2) and 6(2), respectively. Even Article 7 of the Nuremberg Charter contained a provision according to which a perpetrator may not invoke his official position to escape from liability.⁵² The rationale behind this rule is the proposition that a person in an official function ordering or causing an international crime to be carried out may not be placed in a better position than the person who himself commits the crime. Furthermore, the gravity of the crimes covered by the Rome Statute would not allow a Head of State to invoke his or her official position, even if the official concerned received, under other circumstances, special protection under international law.⁵³

Article 28 of the ICC Statute goes even further than Article 27, as far as superiors are concerned. These officials are not only barred from invoking their official capacity, they may eventually even be criminally responsible for the international crime of a subordinate if they failed to exercise the necessary command and control. This liability for 'omission' goes even as far as to cover negligence for not duly realizing that the forces were committing or about to commit an international crime (Article 28(a)(i)).⁵⁴

⁵⁰ *Infra*, V.C.1.

⁵¹ Cf. *infra*, V.C.2.

⁵² IMT Nurnberg Charter, *supra* note 22.

⁵³ Cf. Report of the ILC, 48th Sess., *supra* note 5, 39 ff.

⁵⁴ See *infra*, VII.

V. Perpetration and Participation

A. Basic Models in National Law(s)

When trying to systematize the various structural modes of perpetration and participation as found in numerous national legal orders, one finds two basic models on which—though partially combined or modified—national laws with regard to criminal (single and co-) responsibility are founded.⁵⁵

1. The ‘unitary perpetrator model’

By disregarding national specifics, one model can be characterized as considering every person who contributes to the carrying out of a crime in whatever way and degree as a ‘perpetrator’, without distinguishing in any way between different types of true ‘actors’ or mere ‘accomplices’. This ‘expansive’ notion of perpetratorship is based on the assumption that whoever contributes any cause to the commission of a crime, regardless of how close to or distant the cause is from the final result, must be considered as (co-)author of the crime. If a difference is to be made between the weight or distance of the individual cause contributed by different (co-)authors, this might be a matter of individualized determination of the sentence, not however of guilt or innocence.

Prominent representatives of this model are Austria and Italy. But even for supra-national courts and codes, this somehow ‘holistic’ model of perpetratorship seemed attractive enough to be followed by the Nuremberg and Tokyo Tribunals⁵⁶ and in the form of an additional clause, adopted by the ICTY and ICTR Statutes⁵⁷ and, as a general clause, recommended by the Updated Siracusa Draft,⁵⁸ which declared individually responsible any person ‘who plans, instigates, orders, commits or otherwise aides and abets in the attempt or execution of a crime’, thus putting the commission of the crime on the same level and within the same category as planning, instigating, ordering, or otherwise aiding (Article 33-9(1)).

This ‘unitary perpetrator model’ is also characterized by declaring each party to a crime individually responsible, ‘apart from the responsibility of other participants’ (Updated Siracusa Draft, Article 33-9(2)), thus not employing the notion of ‘accessorial liability’ as characterised by the other model.

⁵⁵ To the following, cf. M. Burgstaller, ‘Individualverantwortung bei Alleinhandeln; Einzel- und/oder Mitverantwortung bei Zusammenwirken mit anderen’, in Eser, Huber, and Cornils (eds.), *supra* note 45, 17 ff.

⁵⁶ See *infra*, V.B.1 at note 67.

⁵⁷ See *infra*, V.B.3.

⁵⁸ See *supra* note 37.

2. The 'differential participation model'

This model is characterized by distinguishing between 'perpetratorship' (in a narrower sense) and (mere) 'participation', although the borderline to be drawn between the two may vary between various countries which fundamentally follow this model. This 'restrictive' theory of perpetratorship is based on the observation that, except for the case of truly equal cooperation of various persons in the commission of the crime, the causal contributions can be so different in weight and closeness to the accomplishment of a crime that it would be unjust to treat all persons involved in the same way. For this reason the notion of 'perpetrator' (in terms of the German 'Täterschaft' or the Spanish 'autoría') is restricted to those persons who either stand in the centre of the committing of a crime or who steer it by means of predominant influence, whereas other parties to a crime are mere 'participants' (in terms of the German 'Teilnahme' or the Spanish 'participación'). In addition, these two groups may be further differentiated by distinguishing within 'perpetratorship' between solitary perpetrator, co-perpetrators, and intermediate perpetrator, and within 'participation' between solicitor/instigator (Anstiftung/inducción) and aider/abettor (Beihilfe/cooperación), if not treating accessories as a special group of complicity after the fact.⁵⁹

Prominent representatives of this 'differential participation' model are France, Germany, Spain, Switzerland, and—although with certain particularities—penal codes and systems of the common law tradition. As will be seen later, the Rome Statute seems to be based on this model as well.

There are at least two features which are characteristic of the various expressions of this model. One is the obvious possibility of sanctioning 'perpetrators' and mere 'accessories' of the crime in a different way, by either *upgrading* perpetrators or *downgrading* accessories, or by declaring complicity only punishable with regard to the more serious crimes such as felonies and not mere misdemeanours, or for requiring intent and, by doing so, excluding mere negligence or even recklessness from accomplice liability. Differentiated treatments of this sort, however, do not necessarily correspond to the distinction between true 'perpetrators' and mere 'accomplices', rather there may be differences even within the one or the other category. Such 'crossovers' can be found, for instance, in German Law where, on the one hand, participation in terms of instigation ('Anstiftung') and aiding and abetting ('Beihilfe') requires intent, both by the accomplice and the perpetrator carrying out the crime (§§ 26, 27 German Strafgesetzbuch); on the other hand, with regard to punishment, only a mere aider and abettor can expect mitigated punishment (§ 27), whereas the instigator shall be punished 'in the same manner as the perpetrator' (§ 26).

⁵⁹ Cf. G. P. Fletcher, *Rethinking Criminal Law* (1978) 645 f.

The other characteristic of the 'differential participation model' is the relationship between the 'principal act' of the perpetrator and the contributions of accomplices in terms of 'derivative' or '*accessorial liability*'.⁶⁰ Unlike the 'unitary perpetration model', in which each causal contributor to the crime is individually liable for his own conduct, in the 'differential participation model', the responsibility of mere accessories depends on and is 'accessorial' to the principal act. This leaves the question of how narrow this dependence must be. There are basically two ways to be considered. One can either presuppose that the 'principal' perpetrator fulfils all requirements of a crime, with the inclusion of his own personal culpability and the exclusion of any ground or justification and excuse: with this type of 'strict accessorial liability', however, note that in the case of a war crime in which due to intoxication the principal perpetrator has lost his capacity to control his conduct (as in the case of Article 31(1)(b) of the ICC Statute), any other instigators or aiders, even if themselves in a sober state of mind, could not be held criminally responsible. Or, on the other hand, the responsibility of accomplices is merely dependent on the unlawfulness of the principal act: in this case of 'limited accessorial liability', accomplices could be held criminally responsible even in the case where principal perpetrator is under the age of 18 years (Article 26 of the ICC Statute) or for some other reason, such as incapacity (Article 31(1)(a), (b)) or mistake of law (Article 32(2) of the ICC Statute) is not personally responsible. Whereas traditional codes and theories of participation, if they address this problem at all, appear to have been based on the notion of '*strict accessorial liability*',⁶¹ the modern trend goes towards some sort of '*limited accessorial liability*', as, for instance, clearly expressed in the German reform act of 1975⁶² or as interpreted in the same way in Switzerland and Spain.⁶³ It goes without saying that models are not necessarily reality. But even if the various divisions in perpetration and participation presented before may be combined and modified from country to country,⁶⁴ the regulation in this area has at some point to opt for this or the other way. This, however, presupposes that the law-makers must be aware of the underlying problems. There is some doubt as to whether this has been the case on the level of international criminal law until now.

⁶⁰ With regard to this terminology, this is adopted from the German '*Akzessorietat*', also known in other systems such as the Spanish '*accessoriedad*', but apparently still foreign to English, although it could be easily phrased as '*accessoriety*'. Instead, and perhaps not without conceptual differences, Fletcher, *supra* note 59, 581 ff., prefers to speak of '*derivative*' liability.

⁶¹ As, for instance, the German Penal Code until 1943 (cf. P. Cramer, in A. Schonke and H. Schroder (eds.), *Strafgesetzbuch Kommentar* (24th edn., 1991), § 25 pre-note 22).

⁶² §§ 26–29 German Strafgesetzbuch.

⁶³ As to Switzerland, cf. P. Noll and St. Trechsel, *Schweizerisches Strafrecht, Allgemeiner Teil I* (3rd edn., 1990), 181 ff., as to Spain, cf. S. Mir Puig, *Derecho Penal, Parte General* (5th edn., 1998) 395 ff.

⁶⁴ As to further possible ways of structuring participation in Italian, French, Polish, Czech, Lithuanian, and English law, see the national reports in Eser, Huber, and Cornils (eds), *supra* note 45, 35 ff., 43 ff., 57, 61 ff., 73 ff., and 79 ff. respectively; furthermore cf. the comparative survey from a common law perspective by Fletcher, *supra* note 59, 634 ff.

B Survey on Regulations of Perpetration and Participation in International Criminal Law

1. Early Codifications⁶⁵

Starting with the Hague Land War Convention of 1907,⁶⁶ which already contained prohibitions and duties with regard to warfare the violation of which individual criminal responsibility could ensue, the rules pertaining to participation are still rather rudimentary: according to Article 50, States were entitled (but not obliged) to penalize the co-responsibility of individual persons in war crimes, and according to Article 34 a parleyer could lose his status of immunity if he used his position to commit treason or for instigating it, the latter implying some sort of complicity in terms of inducement.

More elaborate provisions subsequently appeared in the IMT Charters of Nuremberg and Tokyo, which listed various forms of participation in connection with single crimes, but still without any general regulation. The various single crimes appear less defined by the same legislative technique, rather than in a seemingly accidental way. Whereas according to subparagraph (a) of Article 6(2) of the IMT Charter of Nuremberg, crimes against peace shall comprise 'namely, planning, preparation, initiation or waging of a war of aggression', thus naming certain accessories before the fact, subparagraph (2)(b) on war crimes simply lists specific violations of the laws or customs of war (such as murder, ill-treatment, or deportation to slave labour), without, however, naming any accessory contribution before the fact, such as planning or preparation, as was the case with crimes against peace (subparagraph (a)). Once more, another technique is used with regard to crimes against humanity (subparagraph (c)) by first naming certain crimes such as murder, extermination, enslavement or 'inhumane acts committed against any civilian populations' (sub-section 1), and then proclaiming the responsibility of 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes' (sub-section 2), thus not describing certain actions (as was the case in subparagraph (a)) but rather certain types of actors. This lack of clarity may have led the Nuremberg and Tokyo Tribunals to a sort of 'unitary' model by not distinguishing between perpetrator/principal and accessory.⁶⁷

Expanding criminal responsibility beyond the point of individually acting persons to groups or organisations, is Article 10 of the Nuremberg IMT Charter which entitles national authorities to bring individuals to trial for membership in

⁶⁵ To the following, cf. Triffterer, *supra* note 5, 227 ff and Ambos, *supra* note 38, 444 ff

⁶⁶ Convention Respecting the Laws and Customs of War on Land (Hague, IV) of October 18, 1907; reprinted in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 25.

⁶⁷ Cf. Ambos, in McDonald and Swaak-Goldman, *supra* note 6, Vol. I, p. 8 f.

those groups or organizations which have been declared criminal by the IMT. By this device, which has been traced back to the Anglo-American notion of 'conspiracy',⁶⁸ individual responsibility is extended back into the early stages of crimes subject to the IMT Charter.

In the search for some more general proclamation of the punishability of participation, one needs to look at the Genocide Convention of 1948 which probably for the first time obliged the Contracting Parties to penalize not only genocide as such but also conspiracy to commit and complicity in genocide.⁶⁹ A similar generalization of participation can be found in the so-called *Seven Nürnberg Principles* of the ILC (1950) by declaring 'complicity in the commission of a crime against peace' as a crime under international law (Principle VII).⁷⁰

2. Draft Code of Crimes against the Peace and Security of Mankind (1991/96)⁷¹

The first document which clearly distinguishes between the commission of an international crime and other forms of participating therein appears to have been the Draft Code of 1991 (Article 3(1) and (2) respectively).⁷² Yet, this step forward almost immediately ends in open questions, as the Draft Code neither describes different forms of commission, nor does it clarify whether and to what degree participation (namely aiding, abetting, providing the means for the commission of a crime, conspiring, or directly inciting) requires the principal perpetrator's own responsibility (in terms of accessorial liability)⁷³ or whether it suffices that the accomplice made a contribution with the intent to support the commission of the crime, without requiring that the principal crime in fact be carried out.⁷⁴

Fortunately, the Draft Code of 1996 brought some clarification (Article 2(3)) in favour of accessorial liability by requiring that ordering the commission of a crime is only punishable if this crime has in fact been committed; the same is true with regard to aiding, abetting, or otherwise assisting in the (obviously factual)

⁶⁸ Cf. Triffterer, *supra* note 5, 227.

⁶⁹ Art. III(b) and (c), Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, reprinted in McDonald and Swaak-Goldman, *supra* note 6, Vol. II/1, p. 83 ff.

⁷⁰ Cf. *supra*, III, at note 24

⁷¹ As to the three versions of this Draft Code by the ILC, cf. *supra*, III, at notes 25 ff.

⁷² This observation is true despite the fact that the Apartheid Convention of 1973 (reprinted in Bassiouni, *supra* note 22, 630 ff.) mentions committing and participating (Art III), since in this provision 'committing' stands side by side with 'participating' (in the same section (a)) and in addition names 'directly inciting' or 'conspiring in the commission', and in a yet further section (b) names 'directly abetting', 'encouraging' or 'cooperating in the commission' of the crime of apartheid, thus again completely mixing up perpetration and participation in an accidental way.

⁷³ Cf. *supra*, V.B 1

⁷⁴ Cf. the criticism by Th. Weigend, 'Article 3: Responsibility and Punishment' in Bassiouni, *supra* note 4, 115.

commission of such a crime.⁷⁵ The concept of conspiracy as well has been structured according to accessory principles.⁷⁶ Another question is whether the drafters realized that the conspiracy concept would lose its function of covering the early stages of a crime (in terms of stages preceding even its preparation or attempt) if the crime must be carried out in order to make the conspirators criminally liable.

3. ICTY/ICTR Statutes of 1993/94

The Statutes of the *ad hoc* Tribunals for former Yugoslavia and Rwanda are yet another example of regulations which, partly due to the wording of earlier conventions such as that on genocide, lack a clear notion of perpetration and participation. Whereas the articles on crimes against humanity and war crimes simply name the various violations without any hint of liability for complicity,⁷⁷ the articles on genocide also mention conspiracy, incitement to, and complicity in genocide.⁷⁸ In addition to these special crime provisions, however, both Statutes, in a general clause, declare individually responsible every person 'who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime'.⁷⁹ Not mentioning the unclear relationship between the special participation provisions with regard to genocide and the general responsibility clause, the latter again mixes together the perpetration of the crime and the various modes of participation therein. It is also not clear whether and to what degree the principal act must in fact have been performed. In addition, whereas, quite remarkably, conspiring is not named in the general clause, criminal responsibility can still go far ahead of the commission of a crime as even the aiding and abetting in the planning and preparation of a crime are made punishable. It is no wonder that such uncertainties in this regulation left some room and need for interpretation by the Tribunals.⁸⁰

4. The Main Features of Perpetration and Participation in the Rome Statute

In comparison with the foregoing drafts and qualifications, the Rome Statute can claim to deal with questions of perpetration and participation in a rather comprehensive and detailed way. This is apparent by distinguishing within the committing of a crime between solitary perpetration ('as an individual'), co-perpetration ('jointly with another person'), and intermediary perpetration

⁷⁵ Cf. Art. 2(3)(b) and (d) of the Draft Code of 1996, but also the (less explicit) commentary in Report of the ILC, 48th Sess., *supra* note 5, 24 f.

⁷⁶ Cf. Art. 2(3)(e).

⁷⁷ Arts. 2, 3, 5 of the ICTY Statute and Arts. 3, 4 of the ICTR Statute.

⁷⁸ Paras. 3(a), (c), (e) of Art. 4 of the ICTY Statute and Art. 2 of the ICTR Statute, respectively.

⁷⁹ Art. 7(1) of the ICTY Statute and Art. 6(1) of the ICTR Statute.

⁸⁰ Cf., for instance, the ICTY *Tadić* case, *supra* note 6, paras. 673 ff. (see further p. 822, Addendum to note 80).

(‘through another person’). Unlike the rather broad responsibility approach of the ICTY/ICTR Statutes, the Rome Statute in Article 25(3) seems to follow a narrower concept of participation. Instigation as well as aiding and abetting presuppose that the principal act has at least been attempted (subparagraphs (b) and (c)). Similarly, participation in the preparation of or the conspiring to commit a crime is no longer punishable if the principal crime does not at least reach the stage of an attempt (subparagraph (d)), the only exception being direct or public incitement to genocide which does not actually need to be carried out (subparagraph (e)). With regard to punishment, the Rome Statute does not explicitly differentiate between principals and accessories to a crime. Yet, by obliging the Court, in determining the sentence to take such factors into account as ‘the individual circumstances of the convicted person’ (Article 78(1) of the ICC Statute), the door is open for weighing the commission of a crime by the principal and the contributions of accomplices in a gradual way. Further evidence of the drafters’ readiness to structure perpetration and participation in a more lucid way than in earlier regulations can be drawn from the fact that the Rome Statute does not mix together instigation, aiding, and committing a crime, but rather distinguishes, thereby perhaps even creating a hierarchy, between committing, instigating, aiding, otherwise supporting, and inciting a crime (Article 25(3)(a)–(e) of the ICC Statute).

When searching for a concept of perpetration and participation that is comprehensive enough to comprise all cases worthy of being penalized, the Rome Statute, however, with its Article 25(3) overshot the mark, in particular by not paying sufficient attention to the question of whether certain modes of participation do indeed need regulation as perhaps already covered elsewhere. This is true, for instance, with regard to ‘ordering’ the commission of a crime (subparagraph (b)), as ordering supposes a superior position which advances the superior to the rank of an ‘intermediate’ perpetrator (in terms of committing a crime through another person, according to subparagraph 3(a)).⁸¹ Furthermore, was it necessary in face of the broad scope of assistance to a crime (subparagraph (c)) to penalize contributions to group activities by an additional special provision (subparagraph (d))?⁸²

When trying to decide into which of the above-mentioned models of perpetration and participation the Rome Statute fits, it is difficult to find an unambiguous answer. When keeping in mind that we are moving in the area of macro-criminality and perhaps state-supported crimes, it appears advisable for an effective fight against crime to judge the responsibility of individual parties to a crime on their

⁸¹ Cf *infra*, V D 3

⁸² Cf K Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10 *Criminal Law Forum* (1999) 13 and *infra*; V F.

own merits as far as is possible. This aim seems best served by interpreting the Rome Statute's regulation in terms of a 'unitary perpetration model' as in this system the responsibility of a party to the crime is less, if at all, dependent on the responsibility of the principal perpetrator.⁸³ This view seems to be supported by the fact that the frame of punishment provided for by the Rome Statute is the same for all parties to a crime (though differentiations may be possible in the individual determination of the sentence according to Article 78 of the ICC Statute). Another indication in this direction may be seen in the various forms of instigation, such as 'inducing the commission of such a crime which in fact occurs or is attempted' (Article 25(3)(b) of the ICC Statute). This leaves open the question as to whether this phrase implies the dependence of the inducement on the wrongdoing of the principal (in terms of the 'differential participation model') or whether it is merely expressing the need for a crime to at least be attempted, without thereby derogating from the accomplice's own wrongdoing. This appears expressed by the ILC to the effect that 'an individual is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual'.⁸⁴ On these terms, as in the 'unitary perpetration model', each party to a crime is responsible for his own contribution, not for the commission or participation by another. On the other hand, however, the 'differential participation model' can draw some support from the fact that Article 25(3) of the ICC Statute, contrary to the Draft Code of 1991 and the ICTY/ICTR Statutes,⁸⁵ distinguishes in a systematic way between perpetration (subparagraph (a)) and other forms of participation (subparagraphs (b)–(e)) and that, with regard to the latter, it indicates a sort of graduated responsibility, as for the weakest form of participation (subparagraph (c)) any sort of contribution ('otherwise assisting') shall suffice.⁸⁶ Remarkably enough, on an even less stringent regulation than that of the Rome Statute, the ICTY appears to have interpreted the participation concept of Article 7 of the ICTY Statute in terms of the 'differential participation model' when stating that the difference between 'committing' a crime and other forms of participation such as aiding and abetting lies in the fact that 'the aider and abettor is always an accessory to a crime perpetrated by another person, the principal'.⁸⁷ The accessorial dependence of the accomplice on the principal act of the perpetrator, however, is just the typical mark of the 'differential participation model'.

⁸³ Cf. Triffterer, *supra* note 5, 230, Wise, in Sadat Wexler and Bassiouni (eds.), *supra* note 10, 42 f.

⁸⁴ Cf. Report of the ILC, 48th Sess., *supra* note 5, 24.

⁸⁵ Cf. *supra*, V B.2, 3.

⁸⁶ Cf. Ambos, in Triffterer (ed.), *supra* note 7, margin No 2.

⁸⁷ ICTY Appeals Chamber, *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 229. Cf. also *infra*, V.C 2.

C. Perpetration (according to Article 25(3)(a) of the ICC Statute)

As previously stated,⁸⁸ a person can be criminally responsible in terms of 'perpetration' in three ways.

1. Solitary (Direct) Perpetration (Committing 'as an individual')

In the first line, this phrase refers to the case of a single person who, without any assistance or influence by another person, commits the crime. In this case the perpetration can truly be called 'solitary'.

In a broader sense, however, this phrase also covers the case where there are still other parties to the crime who are merely rendering accessory contributions to the commission by a 'principal'. This case is neither identical with the legal figure of 'co-perpetrators' (*infra* 2), in which all persons jointly co-acting are individually liable, nor with that of 'intermediate' perpetratorship (*infra* 3), in which the perpetrator is using another person as his tool, but rather refers to the combination of perpetration (of one or more principals) and participation (by one or more accessories before, during, or after the fact). What makes a person the 'principal' in such a situation is the fulfilment of all statutory elements of the crime in his own person, which, perhaps instead of the English term 'individual', is better expressed by the Spanish version of 'por sí solo' or by the original French version of 'à titre individuel'.⁸⁹ If this is the case, as in killing or torturing the victim with one's own hands, this person must be treated as the (direct or immediate) 'perpetrator' even if he was induced to do so or somehow assisted by others.

There is no question that this form of perpetration could be more clearly expressed by reference to committing the crime 'by himself or herself' (as in the German wording of § 25(1) Strafgesetzbuch), instead of repeating in a kind of vicious circle that a person is 'individually responsible' when committing a crime 'individually' (ICC Statute Article 25(2) and (3)(a), respectively).

2. Co-perpetration (Committing 'jointly with another person')

Similarly brief is the definition of co-perpetration in Article 25(3)(a) alternative (2) of the ICC Statute. To commit 'jointly with another person' seems to express no more than two requirements: first, there must be more than one person committing the crime, and secondly, they must work together. Both phenomena, however, are characteristic of cases of mere complicity as well, be it instigation by X or assistance by Y of A who commits the crime. If co-perpetration and the various modes of complicity are to be distinguished, then either the term 'jointly' must be interpreted in a qualitative way by meaning more (or at least something

⁸⁸ Cf. *supra*, II A.2, V.B.2.

⁸⁹ Cf. Ambos, in Triffterer (ed.), *supra* note 7, margin No 7

else) than mere inducing or assisting the commission of the crime, or particular weight must be given to the term of 'committing' the crime, a requirement common to all three modes of perpetration.

From an analytical point of view, with regard to 'committing' the crime, the question arises whether each co-perpetrator must fulfil the definitional requirements of a crime in the same way as a solitary perpetrator (*supra* 1) or whether 'committing' in the case of co-perpetration can be understood in a less strict sense allowing one to combine and mutually attribute the contributions of various co-perpetrators made for the accomplishment of the crime. In the first alternative, murder in co-perpetration could be acknowledged only for those persons who kill with their own hands, but not by those who give the command or hand over the knife or keep the victim down on the ground, even if all of them are acting in a common plan. According to the other interpretation, by understanding 'commission' in broader terms, as by accepting the mutual attribution of contributions made in a functional division of labour for the accomplishment of the crime, not only the person who physically kills the victim, but also the organizer of the plan and the provider of means can be held liable as co-perpetrators. In this second alternative, however, the softening of 'committing' must be counterbalanced by stronger requirements for the 'jointly' committing, because otherwise co-perpetration is no longer distinguishable from mere instigation or aiding and abetting.

When scrutinizing national and international sources with regard to this question, it is unsurprising that different approaches can be found.⁹⁰ In countries following the 'unitary perpetrator model',⁹¹ it seems obvious that by declaring each contribution to the commission of a crime as 'perpetratorship', it is, on the one hand, not necessary to work with some sort of mutual attribution of functionally coherent contributions, while on the other hand, however, each party to a crime is only responsible for his own wrongdoing and culpability. On these terms, co-perpetratorship as in Austrian law can be described as a more factual unity in accomplishing the crime ('Ausführungsgemeinschaft') rather than a normative unity ('Bewertungsgemeinschaft').⁹² The other end of the spectrum seems to be represented by common law which, on the basis of a 'differential participation model',⁹³ requires a 'principal in the first degree' to make a direct contribution to the accomplishment of the crime with *mens rea*, thereby degrading participants

⁹⁰ For a comparative survey, cf. H.-H. Jescheck, 'Versuch und Rücktritt bei Beteiligung mehrerer Personen an der Straftat', 99 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1987) 124 ff, W. Dietz, *Täterschaft und Teilnahme im ausländischen Strafrecht* (1957).

⁹¹ *Supra*, at V B.1.

⁹² Cf. D. Kienapfel and F. Hopfel, *Grundriss des österreichischen Strafrechts*, Allgemeiner Teil (8th edn., 2000) 206. This view, however, is not undisputed even in Austria. cf. e.g. H. Fuchs, *Österreichisches Strafrecht*, Allgemeiner Teil I (3rd edn., 1998) 302.

⁹³ Cf. *supra*, V. 2 (b).

with minor contributions to 'secondary parties' or to 'principals in the second degree'⁹⁴ Between these two extremes, German law holds a middle position by not declaring, on the one hand, each contribution to the accomplishment of a crime as perpetration, but, on the other hand, by not requiring a co-perpetrator to carry out the crime with his own hands but that the various contributions are mutually attributable as based on a functional division of labour according to a common plan. On these terms, co-perpetratorship is commonly defined as joint commission of a crime by knowingly and voluntarily working together.⁹⁵

Since the national laws are divided, supranational approaches to the interpretation of co-perpetration deserve particular attention. This is especially true with regard to judgments of the ICTY, which have adopted a wide notion of co-perpetration. Although Article 7(1) of the ICTY Statute does not explicitly mention co-perpetration, but rather mixes the 'committing' of the crime with various forms of participation,⁹⁶ in the *Tadić* case, the Appeals Chamber of the ICTY saw the need for distinguishing between co-perpetration and mere participation.⁹⁷ In departing from the assumption that co-perpetratorship does not necessarily require direct physical perpetration of the offender, thus, on the objective level opening the door for indirect contributions for accomplishing the crime, consequently the subjective level of *mens rea* becomes the main field for distinguishing between perpetration and participation. In this respect, two criteria seem to be essential: first, the co-perpetrators must have a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the Statute, though this plan does not need to have been previously arranged or formulated. Secondly, the co-perpetrators must participate in the common design whereby this participation may 'take the form of assistance in, or a contribution to, the execution of the common plan or purpose'.⁹⁸ As in this way the requirements of co-perpetratorship are lowered substantially, the ICTY sees the need to distinguish between co-perpetration (in terms of acting in pursuance of a common purpose or design to commit a crime) and aiding and abetting. The main differences are the following: the aider and abettor is always a mere accessory to the crime of the principal; aiding and abetting does not presuppose a common concerted plan, as it is possible that the principal is not aware of the accomplice's support; and with

⁹⁴ This seems to be the common opinion at least in England and the United States, cf. W. Wilson, *Criminal Law* (1998) 577 ff., A. P. Simester and G. R. Sullivan, *Criminal Law Theory and Doctrine* (2000) 186 ff., Dietz, *supra* note 90, 89 ff.

⁹⁵ K. Kuhl, *Strafrecht, Allgemeiner Teil* (3rd edn., 2000) 765. For further details, in particular to the still disputed question of whether each co-perpetrator must necessarily be on the scene when the crime is accomplished or whether even a contribution in the preparatory stage may suffice, cf. P. Cramer and G. Heine, 'Taterschaft und Teilnahme', in Schonke and Schroder (eds.), *supra* note 61, § 25 pre-notes 80 ff. and margin No. 60 ff.

⁹⁶ Cf. *supra*, V B 3.

⁹⁷ ICTY Appeals Chamber *Tadić*, *supra* note 87, paras 185–232.

⁹⁸ *Tadić* case, *ibid.*, para 227 (iii).

regard to the requisite mental element the aider and abettor must merely know that his act assists the commission of the principal's crime.⁹⁹ Though realizing that it is not easy to get a clear picture of the ICTY's position regarding perpetration and participation, as it seems to intermingle different national concepts, the ICTY puts particular emphasis on the common plan: whereas the support of the aider and abettor must have 'a [objectively] substantial effect upon the perpetration of the crime', for co-perpetration it suffices 'to perform acts that in some way are [subjectively] directed to the furthering of the common plan or purpose'.¹⁰⁰ Consequently, the structure of co-perpetratorship is characterized by the common purpose as the main basis of responsibility, whereas the qualities of the single contributions are of minor importance. In this way, a mutual attribution of contributions within the common plan becomes possible.

This leaves the question of how criminal acts of a co-perpetrator outside the common plan have to be treated, in particular, whether such 'excess' of an offender may also be attributed to his co-perpetrators. According to the aforementioned principle that the common purpose is the main basis of attribution, one would expect that contributions of a party to a crime may be attributed to other co-perpetrators only insofar as they stay within the common plan, as is, for instance, the position in German doctrine and practice.¹⁰¹ The ICTY Appeals Chamber, however, would be prepared, particularly in cases involving a common design to pursue one course of conduct (such as to effect 'ethnic cleansing'), to deem all co-perpetrators responsible even for an excessive act if this is a 'natural and foreseeable consequence of the effecting of that common purpose',¹⁰² provided that the co-perpetrators are aware of the risk of excessive acts and 'nevertheless willingly took that risk'.¹⁰³ Although the ICTY Appellate Chamber, thus, still requires intent in terms of 'dolus eventualis', there are some doubts whether this broad notion can be applied to the Rome Statute. For in Article 30 requiring 'intent and knowledge' for the commission of a crime (paragraph 1), and in its definition of knowledge as awareness of the occurrence of a consequence 'in the ordinary course of events' (paragraph 3), it is at least a question of fact, if not of law, as to when an 'excessive' act can be considered part of the 'ordinary course' of events.¹⁰⁴

In sum, co-perpetration finds its own profile from two sides: while, in an objective respect, it does not necessarily require the own physical performance of a definitional element of the crime, as a contribution may be rendered during the entire commission of the crime, from as early as the planning of the crime until the

⁹⁹ *Tadić* case, *ibid.*, para. 229 (ii) and (iv)

¹⁰⁰ *Tadić* case, *ibid.*, para. 229.

¹⁰¹ Cf Cramer and Heine, in Schonke and Schroder (eds.), *supra* note 61, § 25 margin No 95.

¹⁰² ICTY Appeals Chamber *Tadić* case, *supra* note 87, *ibid.*, para 204

¹⁰³ *Ibid.*, para. 220.

¹⁰⁴ For further details of this problem, see *infra*, Ch. 23.

accomplishment of the criminal end, still the perpetrator's contribution must co-determine the crime by being more than marginal or merely accidental. As to what degree this is the case depends, in a subjective respect, largely on the common plan and the role to be played within it by the perpetrator. At any rate, however, as soon as a party to a crime fulfils in his own person all definitional elements of the crime, he becomes a perpetrator and is thus no longer a mere accomplice.

3. Intermediary Perpetration (Committing 'through another person')

The Rome Statute is probably the first international instrument in which this mode of indirect perpetration by using another person as a tool is explicitly regulated. Differing from the aforementioned co-perpetratorship in which the parties to the crime are more or less on an equal standing, 'intermediary perpetration' (*autoría mediata, mittelbare Täterschaft*) is characterized by the predominance of an indirect perpetrator (*auteur médiat, Hintermann*) who uses the person that physically carries out the crime (*intermédiaire, Tatmittler*) as his instrument. Whereas this human tool is typically an innocent agent, in particular because he has acted erroneously or is otherwise excused or of minor age, the indirect perpetrator—as a kind of 'master-mind'¹⁰⁵—employs higher knowledge or superior willpower to have the crime executed.

The wording of the Statute, again rather terse, says, however, more than most national codes. Whereas, for instance, the new French Code Pénal does not even explicitly mention the 'auteur médiat' in its Article 121-4 on perpetration, Article 25(3)(a) alternative (3) of the ICC Statute speaks of committing a crime 'through' another person. Furthermore, whereas even some recently reformed codes such as the German Strafgesetzbuch content themselves with speaking of commission 'durch einen anderen' (§ 25(1)), the Rome Statute additionally states that the indirect perpetrator is punishable 'regardless of whether that other person is criminally responsible' (paragraph (3)(a)). In another respect, the Rome Statute does not go as far as some recent national codes which partly require that the intermediary serve as an instrument (as according to Article 28 Spanish Código Penal) or by describing the modes of perpetration by directing the performance of the crime or inducing the other person in abusing his dependence (as in Article 18 Polish Kodeks karny) or by limiting indirect perpetration to the instrumentalization of persons who, due to their age, lack of culpability, or another legally recognized circumstance are not subject to criminal responsibility (as according to Article 33(2) Russian Uголовnyi kodeks).

¹⁰⁵ This description of the German 'Hintermann' (the individual in the background), though perhaps not covering cases of force, is at least appropriate for cases of intellectual superiority: cf. Ambos, in Triffterer (ed.), *supra* note 7, margin No 9 with reference to C. Roxin and E. Silverman.

In comparison to these partially too open and partially rather narrow national approaches, the Rome Statute pursues a moderately happy medium marked by three guidelines:

First, as with the other modes of perpetration, the intermediary one also requires 'commission' of the crime in that the indirect perpetrator finally fulfils all statutory elements of the crime, though not physically himself, yet by exerting his higher knowledge or predominant will. In this respect, any personal qualities which might be required by the statutory definition of the crime (such as being an officer or soldier), as well as the absence of any justification or excuse on his part, have to be present in and evaluated with regard to his person. This means that any circumstance which may exclude the punishability of the person he uses as his instrument (as for instance minor age or lack of a required personal quality) is irrelevant with regard to the person and responsibility of the indirect perpetrator.

Second, as the indirect perpetrator must commit the crime 'through' another person, this intermediary must be used as a tool. This requires, on the one hand, more than inducing or soliciting a person to commit a crime, as otherwise indirect perpetration would hardly be discernible from instigation in terms of Article 25(3)(b) of the ICC Statute. On the other hand, the Rome Statute does not name and, thus, not limit the instruments by which another person may be steered to a criminal act, as was mentioned above with regard to the Polish Code. Therefore, any means of instrumentalizing another person to commit a crime, be it the use of force or the exploitation of an error or any other handicap on the tool's side, may suffice, provided that it is the exertion of some controlling predominance on the indirect perpetrator's side.

Third, as the indirect perpetrator is punishable 'regardless of whether [the] other person is criminally responsible', the ICC Statute provides clarifications in respect of two controversial questions.¹⁰⁶ In one direction, by making indirect perpetration independent from the tool's own criminal responsibility and, furthermore, by refraining from naming certain grounds of excluding criminal responsibility (as mentioned before with regard to the Russian Code), the Rome Statute opens the door to indirect perpetration for any deficiency on the tool's side: starting from lack of jurisdiction over persons under 18 (Article 26), continuing with incapacity due to a mental disease or intoxication (Article 31 (1) (a) and (b)), justification by self-defence or excuse by duress (Article 31(1)(c) and (d)), mistake of fact or law (Article 32), or any other ground of excluding criminal responsibility

¹⁰⁶ As to the preceding question of whether this clause of the independence of the perpetrator's punishability from the responsibility of other persons would have already concerned the case of co-perpetration (*supra*, V.C.2) or whether it is only relevant for indirect perpetration here in question, see—with convincing arguments for the latter position—Ambos, in Triffterer (ed.), *supra* note 7, margin No. 10 f.

(Article 31(1) and (3)),¹⁰⁷ and perhaps not even ending with the special case of Article 28(b)(i) that the instrumentalized person in fact lacked the quality of a superior. This openness due to the ‘independence clause’ (in terms of the indirect perpetrator’s responsibility independent from that of his tool) is also true in the other direction by making indirect perpetration possible even in a case in which the tool himself is in full terms criminally responsible such as, for instance, in the case where the intermediary was fully conscious of his own responsibility but bowed to overwhelming influence or force, or where the indirect perpetrator thought to exploit the error of his tool who was fully aware of the situation but did not dare to resist. This legal figure of an ‘(indirect) perpetrator behind the (direct) perpetrator’, which as ‘Täter hinter dem Täter’ has found special attention and elaboration in German doctrine and practice,¹⁰⁸ is especially characteristic for hierarchically organized power structures. As this is not only typical for mafia-like organizations but for military systems as well, this type of perpetration may easily occur with war crimes or other state-supported criminal acts.¹⁰⁹ In order to be still distinguishable from normal instigation (Article 25(3)(b) of the ICC Statute), this sort of ‘Organisationsherrschaft’¹¹⁰ by which the crime of the direct perpetrator is attributed to the perpetrator behind him as though it were his own, can be justified only if there is a sufficiently tight control by the indirect over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility (Article 28 of the ICC Statute).¹¹¹

D. Instigation (Article 25(3)(b) of the ICC Statute)

Although the Rome Statute itself does not speak of ‘instigation’ but rather of ordering, soliciting, or inducing the commission of a crime, it appears fair to use this term as perhaps the best and most common expression for summarizing what also used to be called ‘accessory before the fact’.

1. Accessorial to the Principal Crime

As a mode of participation distinct from perpetration, instigation must remain in a certain relationship to the principal crime.¹¹² Whereas this accessorial problem

¹⁰⁷ See also *supra*, V.A.2.

¹⁰⁸ For further details see F. C. Schroeder, *Der Täter hinter dem Täter* (1965); Cramer and Heine, in Schönke and Schröder (eds.), *supra* note 61, § 25 margin No. 6-60, in particular 20 ff.

¹⁰⁹ Therefore, it is no wonder that the breakthrough for the judicial recognition of this type of indirect perpetration in Germany was a case of criminal responsibility of members of the National Defence Council of the former German Democratic Republic for intentional killings of refugees by boarder control soldiers: *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt) 40 (1995), 218 ff. Cf. Ambos, in McDonald and Swaak-Goldman, *supra* note 6, Vol. I, p. 20 f.

¹¹⁰ On its development, cf. in particular C. Roxin, *Täterschaft und Tatherrschaft* (6th edn., 1994) 242–252, 653–654.

¹¹¹ See Ambos, in Triffterer (ed.), *supra* note 7, margin No. 9.

¹¹² Both on the differentiation of perpetration and participation and their relation, cf. *supra* V.A.2.

was left open in most former drafts and codifications, in particular the ICTY/ICTR Statutes,¹¹³ Article 25(3)(b) of the ICC Statute explicitly presupposes a crime 'which in fact occurs or is attempted'. This requirement, however, is not without exception, since, at least with regard to genocide, direct and public incitement is punishable even if the principal crime is not carried out (Article 25(3)(c)).¹¹⁴

2. Soliciting or Inducing a Crime

Although 'ordering' a crime is named at first place, it appears appropriate to start with soliciting or inducing a crime as the 'classical' modes of instigation which should also entail criminal responsibility in the area of international criminal law.¹¹⁵ In common legal language, 'soliciting' means to 'command, authorize, urge, incite, request or advice' another person to commit a crime, whereas 'inducing' means 'to affect, cause, influence an act or course of conduct, lead by persuasion or reasoning'.¹¹⁶ When comparing both definitions, it is difficult to find clear demarcations between them; therefore it seems advisable to use inducing as a sort of umbrella term, covering soliciting as a stronger method of instigating another person to commit a crime.¹¹⁷ Certainly, instigation usually works by means of exerting psychological influence on another person. This can also be done by inducing various persons in a chain, provided that the first instigator knows and wishes his influence on the first person to be carried on via other persons to the final perpetrator.¹¹⁸

3. Ordering a Crime

Whereas the preceding modes of instigation may occur between equals, 'ordering' a crime presupposes some superior position as is typical for commander-subordinate relationship: the superior uses his power of command over persons who are bound to him by obedience. In fact, his culpability is, in comparison to that of his subordinates, not only higher but even twofold, the reason being that he, on the one hand, violates his duty to hinder his subordinates from wrongdoing, and, on the other hand, he actively abuses his own powers in ordering his subjects to com-

¹¹³ Cf. *supra*, V.B.3.

¹¹⁴ This seems to be leftover from earlier propositions attempting to substitute the accessory requirement by a concept of 'conspiracy' as an 'inchoate offence'; cf. Weigend, in Bassiouni (ed.), *supra* note 4, 115 ff.

¹¹⁵ Cf. Schabas, *supra* note 1, 410, but see also the criticism by Ch. Tomuschat, 'Die Arbeit der ILC im Bereich des materiellen Völkerstrafrechts', in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) 270, 286 ff.

¹¹⁶ *Black's Law Dictionary* (5th edn, 1979) 1249 and 697, respectively.

¹¹⁷ Cf. Ambos, in Triffterer, *supra* note 7, margin No. 13

¹¹⁸ For more details to this 'Kettenanstiftung', cf. Cramer and Heine, in Schonke and Schroder (eds.), *supra* note 61, § 26 margin No. 13.

mit a crime.¹¹⁹ Therefore ordering a crime is certainly the strongest form of instigation.

Yet, the question is whether ordering a crime is not more appropriately dealt with by other provisions.¹²⁰ Whereas a case of commanders not preventing crimes by subordinates is covered as an offence of omission in Article 28 ICC Statute,¹²¹ the active ordering of a subordinate to commit a crime is a typical case of intermediary perpetratorship by exploiting a hierarchical power structure in terms of organizational predominance.¹²² Therefore, to name ordering a crime as a case of instigation was not only superfluous but perhaps even inappropriately degrading a form of perpetration to mere complicity.¹²³

4. Mental Requirements with Regard to the Instigator

Other than in the case of aiding and abetting, which must be carried out ‘for the purpose’ of facilitating the commission of the crime,¹²⁴ no special *mens rea* requirements are referred to in case of instigation. Consequently, the general requirements of Article 30 of the ICC Statute must be observed. These, however, must be put in more concrete terms in two respects: first, with regard to his own conduct, the instigator must exert his influence with intent and knowledge. This means that the intent of the instigator must be directed at causing the principal to commit the crime. Secondly, the instigator must presuppose that the principal will carry out the crime in a state of mind required by the Statute. If, for instance, the crime requires intent (and not merely negligence or recklessness), the instigator must foresee and recognize that the principal will perform the crime intentionally and in fulfilling all definitional elements thereof. In this sense, the instigator must have a ‘double intent’ with regard to his own conduct and that of the principal.

Furthermore, the intent of the instigator must also be concrete in being directed at a certain crime and perpetrator. This does not necessarily mean, however, that the crime is determined in all details; it rather suffices, as probably in most

¹¹⁹ Cf. Report of the ILC, 48th Sess., *supra* note 5, 22 ff.

¹²⁰ Cf. *supra*, V.C 3

¹²¹ For more details, see Ch. 21 below.

¹²² Cf. *supra*, V.C 3 at note 109.

¹²³ On the same line, see Ambos, *supra* note 82, 9 f., *id.*, in Triffterer (ed.), *supra* note 7, margin No. 12. Whether, however, Ambos may indeed properly cite the International Criminal Tribunal for Rwanda in his support, is doubtful: certainly, the ICTR Trial Chamber in the *Akayesu* Judgment correctly holds that ‘ordering implies a superior–subordinate relationship’ whereby ‘the person in a position of authority uses it to convince (or coerce) another to commit an offence’, but nevertheless the ICTR seems to handle the situation as a form of complicity (through instructions) rather than of perpetration (*Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, para. 483, reprinted in McDonald/Swaak-Goldman, *supra* note 6, Vol II/2, p. 1573 (1627)).

¹²⁴ Art. 25(3)(c), cf. *infra*, V.E 2(a).

national laws, that the instigator anticipates the crime in its essential elements and rough outlines.¹²⁵

5. Excess of the Perpetrator

As the instigator's scope of intent at the same time limits his responsibility, he cannot be held liable for crimes which go beyond his intent. Consequently, an excess of the principal by committing a crime which was not covered by the intent of the instigator, cannot be attributed to him. This is clearly the case in which the principal commits another crime than he was instigated to (e.g. instead of supposedly torturing a man, he rapes a woman), but also in the case that the principal does more than he was instigated to (e.g. killing the victim instead of merely injuring him). It is still irrelevant, however, when the deviation of the actual from the proposed crime is inessential.

E. Aiding, Abetting, or Otherwise Assisting (Article 25(3)(c) of the ICC Statute)

This provision covers the 'classical' field of complicity by assistance which falls short of instigation (subparagraph (b)), on the one side, and goes beyond other contributions (such as contributing to group activities according to subparagraph (d)) on the other. In contrast to the usual language of 'aiding and abetting', used in the ICTY and ICTR Statutes,¹²⁶ the Rome Statute speaks of a person who 'aids, abets or otherwise assists' in the attempt or accomplishment of a crime, including 'providing the means for its commission'. This wording indicates that, first, aiding and abetting are no more an indistinguishable unity but that each of them has its own meaning, secondly, that aiding and abetting are just two ways of other possible forms of 'assistance', the latter thus serving as a sort of umbrella term, and thirdly, that 'providing the means' for the commission of a crime is merely a special example of assistance.

1. Objective Requirements

(a) Like instigation, complicity by assistance is also a form of *accessorial* liability in relation to the principal crime; this means that it must assist the accomplishment (or at least the attempt) of a crime.¹²⁷ Therefore, preparatory contributions, though determined to enable the commission of a crime, remain unpunishable if the intended principal crime is not carried out.¹²⁸ If, however, the principal crime reaches at least the stage of an attempt, it does not matter at what time and place

¹²⁵ E.g. to the German law, cf. H.-H. Jescheck and Th. Weigend, *Strafrecht, Allgemeiner Teil* (5th edn., 1997) 688.

¹²⁶ In Arts. 7 and 6(1) of the ICTY and ICTR Statutes, respectively 'otherwise aiding and abetting' comes after 'planning, instigating, ordering and committing'; cf. *supra* V.B.3.

¹²⁷ Cf. *supra*, V.D 1.

¹²⁸ As to the question of attempted complicity, cf. *infra*, VI.E.

during the preparation and performance of the crime the assistance was rendered. Although in this respect the ICTY and ICTR Statutes are clearer by explicitly speaking of aiding and abetting 'in the planning, preparation and execution' of a crime,¹²⁹ there is no reason why the assistance in certain stages of a crime should be excluded from responsibility here either.¹³⁰

(b) The *forms of contribution* for facilitating the commission of the main crime are, except for 'providing the means' for its being carried out, not specified, as even the 'classical' terms of 'aiding and abetting' are far from determined.¹³¹ If the ICTR defines aiding as 'giving assistance to someone', whereas abetting would 'involve facilitating the commission of an act by being sympathetic thereto',¹³² aiding, perhaps not surprisingly, is practically identical with assisting, while abetting comes close to, if not being almost completely identifiable with, instigation.¹³³ Instead of exchanging synonyms, which are in any case rather unclear, it appears preferable to resort to the umbrella term of 'assistance' which can consist of any sort of contribution facilitating the commission of the crime.

(c) With such a broad understanding of assistance, however, some sort of other restriction appears necessary if not even very remote involvement in or connection with the planning or performing of a crime is to be made punishable. One way of keeping complicity within certain boundaries could be the requirement of a *causal connection* between the assistance and the principal crime. If this requirement in terms of a '*conditio sine qua non*' were taken seriously, however, complicity by assistance would not only come very close to, if not even be absorbed by, co-perpetration, but would exclude even most serious contributions in the preparation or performance of the crime from criminal responsibility if the aider were

¹²⁹ Arts 7 and 6(1) of the ICTY and ICTR Statutes, respectively.

¹³⁰ The same view was taken by the ICTY Trial Chamber in the *Tadić* case when stating: 'not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporarily distanced', *supra* note 6, para 687; cf. also paras. 691 f. As far as the ILC was dealing with aiding and abetting and related problems, it was merely occupied with the question of direct and/or substantial contribution, but obviously not concerned with the stage and place where it is rendered (cf. Report of the ILC, 48th Sess., *supra* note 5, 23 ff.). With regard to the national laws as well, even where the time of a contribution to the commission of a crime plays a role, this mainly concerns co-perpetration rather than complicity by aiding and abetting: cf., for instance, to the Spanish Código Penal which in its Art. 29 speaks of 'actos anteriores o simultáneos', Mir Puig, *supra* note 63, 406 ff., or to the German Strafgesetzbuch which in its § 27 simply speaks of "'Hilfeleistung" zu einer vorsätzlich begangenen rechtswidrigen Tat', cf. Cramer and Heine, in Schonke and Schroder (eds.), *supra* note 61, § 27 margin Nos. 13, 17.

¹³¹ Cf., for instance, the endeavours for distinguishing between aiding and abetting and for demarcating a lower and a higher frontier by Fletcher, *supra* note 59, 640 ff.

¹³² ICTR Trial Chamber *Akayesu* case, *supra* note 123, para. 484.

¹³³ This is even more evident with the common definition of abetting in terms of 'to command, procure, counsel, encourage, induce, or assist' in *Black's Law Dictionary*, *supra* note 116, 5. See also B. Huber, 'Alleinhandeln und Zusammenwirken aus englischer Sicht', in Eser, Huber, and Cornils, *supra* note 45, at 79, 84

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

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

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

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

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

¹³⁷ Cf. *supra*, V.B.3.

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

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

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

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

2. Subjective Requirements

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

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

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

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

¹⁴² Cf. *supra*, V.D.4.

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

¹⁴⁴ Cf. *supra*, V.D.4.

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

F. Complicity in Group Crimes (Article 25(3)(d) of the ICC Statute)

This provision on complicity in group crimes can be traced back almost literally to the recent International Convention of the Suppression of Terrorist Bombings of 1997¹⁴⁶ which presents itself as a compromise of former 'conspiracy' concepts that have been controversial since Nuremberg.¹⁴⁷ In common law 'conspiracy' means the agreement of two or more parties to commit a crime, regardless of whether it is actually committed or not; it is therefore considered as an 'inchoate offence'.¹⁴⁸ After some conspiracy concepts had found their way into the Draft Codes of 1991/96,¹⁴⁹ connected with efforts to restrict broader responsibility for conspiracy,¹⁵⁰ the Model Draft Statute for the ICC of 1998, though still containing the concept of 'participation in conspiring', required that the crime in fact be accomplished.¹⁵¹ In this way, the Model Draft Statute rejected the 'inchoate offence' notion of an independent conspiracy in now following the continental European concept of conspiracy as a sort of participation in a crime.¹⁵² Thus, in particular by the accessorial dependence from the principal crime, the concept of conspiracy converged to such a degree with instigation that it appeared no further loss to abandon it completely. Consequently, the Rome Statute no longer contains the notion of 'conspiracy'.

1. Objective Requirements

(a) Like instigation and aiding and abetting, complicity in group crimes, too, is accessorial in requiring the commission of the principal crime or at least the attempt thereof.¹⁵³

(b) Unlike instigation and aiding and abetting, however, the contribution of the accomplice must be rendered to a '*crime by a group of persons acting with a common purpose*'. In assuming that it must be distinguished from a 'couple' consisting of two people, the 'group' must consist of at least three persons who are connected by the same purpose; though not explicitly required by the ICC Statute, this purpose is usually a criminal one.

(c) As '*contributions in any other way*' than those already comprised by subparagraphs (b) and (c) suffice, the objective threshold for participation in subpara-

¹⁴⁶ UN Doc. A/RES/52/164 (1998), annex, Art. 2(3).

¹⁴⁷ For further details and references to this and the following, see Ambos, in Triffterer, *supra* note 7, margin No. 20.

¹⁴⁸ Cf. Wilson, *supra* note 94, 550 f.

¹⁴⁹ Cf. *supra*, V.B.2.

¹⁵⁰ Art. 3(2) of the Draft Code 1991 and Art. 2(3)(e) of the Draft Code 1996.

¹⁵¹ Art. 23(5)(e) of the Model Draft Statute for the ICC, in Sadat Wexler and Bassiouni (eds.), *supra* note 10, 41.

¹⁵² Cf. Schabas, *supra* note 1, 413; Ambos, *supra* note 82, 12 f.

¹⁵³ For further details on this requirement, see *supra* V.D.1.

graph (d) is lowered once more and, consequently, is even more difficult to circumscribe than the assistance in subparagraph (c).¹⁵⁴

2. Subjective Requirements

In the face of the relatively low requirements in the aforementioned objective respects, it is all the more necessary to find some correctives on the subjective level. As with aiding and abetting, though with other differentiations, complicity in group crimes presupposes two different mental elements.

(a) The contribution to the group crime must be *intentional* in one of two alternative ways: it must either be made with the *aim of furthering* the criminal activity of the group (subparagraph (d)(i)) or it must be made in the *'knowledge' of the intention of the group* to commit the crime (subparagraph (d)(ii)). Whereas the 'aim' in the first alternative seems to mean some 'special intent' with regard to the common purpose of the group, the second alternative merely requires the 'knowledge' of the group's intention to commit the crime. But whereas in the latter case the intention of the group must already be directed to a specific crime, in the former case the 'aim' may be directed to the criminal activity or purpose of the group in general while the crime(s) to be carried out need not yet be determined in a concrete manner.¹⁵⁵

(b) With regard to all other elements, in particular in comparison to the ordinary *'double intent'* of the accomplice, the requirements of Article 30 of the ICC Statute are applicable in the same way as with instigation and aiding and abetting.¹⁵⁶

In sum, on the one hand, it seems doubtful whether this type of complicity is not 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.¹⁵⁷

G. Incitement to Genocide (Article 25(3)(e) of the ICC Statute)

This provision is in substance identical to Article III(c) of the Genocide Convention of 1948¹⁵⁸ and its equivalents in the ICTY and ICTR Statutes.¹⁵⁹ In not requiring that the genocide incited is finally in fact committed, this provision

¹⁵⁴ Cf. *supra*, V.E.1(c).

¹⁵⁵ For more details, also with regard to the legislative history of this rather complicated provision, see Ambos, in Triffterer, *supra* note 7, margin No. 22 with further references.

¹⁵⁶ Cf. *supra*, V.D.4, E.2.

¹⁵⁷ Cf. also Ambos, in Triffterer, *supra* note 7, margin No. 23.

¹⁵⁸ Cf. *supra*, B.1 at note 69.

¹⁵⁹ Para. 3(b) of Art. 4 of the ICTY and Art. 2 of the ICTR Statute, respectively.

is designed to prevent the early stages of genocide even prior to the preparation or attempt thereof by not waiting until a certain person has been used for a certain genocidal act as is necessary for instigation according to Article 25(3)(b) of the ICC Statute, but by already prohibiting direct and public incitement of undefined other people to commit genocide. As genocide has remained the only international crime the public incitement to which was deemed necessary to be penalized regardless of whether genocidal acts were in fact carried out or not,¹⁶⁰ one may wonder whether it was indeed appropriate to locate such an exceptional speciality within the 'General Principles of Criminal Law' of the Rome Statute (Part 3), or whether it would not have been preferable to prescribe this as a further alternative of genocide in Article 6 within Part 2 containing the various international crimes.¹⁶¹ Regardless of its placement, this protection against hardly controllable public provocation to genocide has, as a pretracted form of participation, the following essential elements.

1. Subjective-Volitional rather than Objective-Causal Link to the Crime of Genocide

In contrast to the other forms of participation in subparagraphs (b), (c), and (d), where the crime contributed to must at least reach the stage of an attempt,¹⁶² incitement to genocide does not require that genocidal acts are in fact carried out nor does it require effective planning or preparation thereto. Although this independence of the incitement from the realization of genocide is not explicitly stated in the wording of the provision and although an express answer to this question seems to have been avoided by the drafters of the Genocide Convention,¹⁶³ there can be no serious doubt that this provision, in face of the high risk of arousal of the public at large by incitements of this sort, would be meaningless if it required at least the attempt to commit genocide, not to mention the fact that the incitement to at least attempted genocide would be covered by subparagraph (b). Therefore, as was already held with regard to the identical provision in the ICTR Statute by the Trial Chamber in the *Akayesu* case, direct and public incitement to commit genocide must be 'punished as such, even where such incitement failed to produce the result expected by the [inciter]'.¹⁶⁴ This does not mean, however, that the crime incited to is without any significance; for, as the incitement must be

¹⁶⁰ On deliberations of covering the early stages of other international crimes as well, see Report of the Preparatory Committee Draft Statute and Draft Final Act, p. 59 (in Bassiouni, *supra* note 35, 142) and Saland in Lee, *supra* note 1, 200. With regard to the coverage of public incitement in national codes, cf. A. Eser, 'The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective', in D. Kretzmer and S. K. Hazan (eds.), *Freedom of Speech and Incitement against Democracy* (2000) 19–46.

¹⁶¹ See also the comment by Ambos, in Triffterer, *supra* note 7, margin No. 26.

¹⁶² Cf. *supra*, V.D.1, E.2(a), F.1.

¹⁶³ Cf. ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 561.

¹⁶⁴ *Ibid.*, para. 562.

directed at the commission of genocide, the intent of the inciter must comprise the definitional elements of a form of genocide according to Article 6 of the ICC Statute. In this sense, there must be a link between the incitement and genocide; however, this is not an objective 'causal' link,¹⁶⁵ but rather a subjective 'volitional' one in terms of being directed at the genocidal aim of the inciting act.

2. Directly and Publicly Inciting

Being rather broad by not requiring that a genocide actually takes place, this provision needs some restriction with regard to the act of incitement. This can to some degree already be reached by understanding incitement not as a mere causing another person to commit a crime, but by provoking, arousing, exhorting, inspiring, urging on, or otherwise promoting the other person to engage in genocidal activities.

In addition, the incitement must be made both 'directly' and 'publicly'. This raises no problems as far as the requirement of '*publicly*' is concerned; for in describing this requirement as 'communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large', the ILC also comprises 'technological means of mass communication, such as radio and television',¹⁶⁶ thus taking into account the risk of arousal which can result both from open-air speeches and by media influence of uncontrollable reach. The intended breadth and strength of protection against public arousments can be easily hampered, however, as the incitement must be '*direct*' as well. If this, as again in the words of the ILC, requires 'specifically urging another individual to take immediate criminal action rather than making a vague or indirect suggestion',¹⁶⁷ this incitement comes very close to, if not even substantially covered by, instigation according to subparagraph (b), thus losing much of its own significance.¹⁶⁸ Therefore, 'directly' must be less understood with regard to a certain individual to be influenced but rather in terms of excluding merely indirect influences as, for instance, by public speeches which not by themselves but by means of misleading interpretations of ill-intentioned mediators are used for provoking genocidal activities. Furthermore, the concepts of publicity as well as directness can differ from country to country and must therefore be viewed in the light of the given cultural and linguistic context. This admonition of the Trial Chamber in the *Akayesu* case,¹⁶⁹ however correct it may be, may not be used as a political excuse for not taking xenophobic agitations seriously.

¹⁶⁵ As misleadingly described by Ambos, in Triffterer, *supra* note 7, margin No. 28 when he speaks of the requirement of a specific 'causal link' between the act of incitement and the main offence.

¹⁶⁶ Report of the ILC, 48th Sess., *supra* note 5, 26 f.

¹⁶⁷ *Ibid.*; cf. also ICTR Trial Chamber *Akayesu* case, *supra* note 123, para. 557.

¹⁶⁸ As only remaining relevant for cases in which not even an attempt is made at genocidal acts (cf. *supra*, V.D.1). See also the criticism by Ambos, in Triffterer, *supra* note 7, margin No. 28.

¹⁶⁹ *Supra* note 123, para. 557.

3. Mental Element

(a) As subparagraph (e) does not provide for a special subjective requirement, the inciter needs no more than ordinary intent and knowledge according to Article 30 of the ICC Statute. Similar to subparagraphs (b) and (c), he must have '*double intent*', first, by knowing that he is acting publicly and that his acts have a direct inciting effect on (any) other persons and, secondly, by knowing and desiring that the persons to be incited by him would, if carrying out the crime, act with the intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group' as required by Article 6 of the ICC Statute on genocide.¹⁷⁰

(b) A different question is, however, as to whether the inciter himself has to act with the own '*special intent*' of destroying one of the protected groups, as suggested by the Trial Chamber in the *Akayesu* case.¹⁷¹ But it is not only that this proposition has no basis in the wording of subparagraph (e), it comes up against subparagraph (d) in which the need for a special mental element is explicitly stated;¹⁷² the same, however, should also be expected with subparagraph (e) if the inciter were to act with this special intent. Therefore, the inciter here must merely know and want the incited persons to commit the crime with genocidal intent while he himself might have completely different motives, eventually important for sentencing but not for the question of his guilt or innocence.

H. Complicity after Commission

It is common in certain legal systems for participation in the crime to be not only punishable for contributions in the preparatory phase or during the commission of a crime, but also after its completion,¹⁷³ the reason being that the so-called 'successive accessory' after the fact covers the crime retroactively by his own intent and may eventually secure the final end of the crime and its effects by his own contribution. In this way, the whole crime may be attributed to him as an accessory after the fact. The same principles may also be applied to a 'successive' co-perpetrator. While some national laws would regulate this phenomenon as a form of perpetration in general, other national laws may treat them as special crimes such as 'harbouring a criminal'.¹⁷⁴

¹⁷⁰ Cf. *supra*, V.G.2. In this respect I can fully agree with the ICTR Trial Chamber *Akayesu* case, *supra* note 123, para. 560.

¹⁷¹ *Akayesu* case, *ibid.*, para. 560, supported by Ambos, in Triffterer, *supra* note 7, margin No 30.

¹⁷² Cf. *supra*, V.F.2(a).

¹⁷³ For German law, cf. Jescheck and Weigend, *supra* note 125, 692; for further references, see Schabas, *supra* note 1, 412.

¹⁷⁴ Cf. ILC with regard to Art. 3 of the Draft Code 1991, *YILC* (1991) Vol. II/1, p 98, C Van den Wyngaert, 'The Structure of the Draft Code and the General Part', in Bassiouni, *supra* note 4, 55, Ambos, *supra* note 82, 11 with further references.

After earlier drafts had also drawn attention to these problems, the ILC finally drafted a compromise according to which contributions after the fact would still be covered as complicity if made and based on a commonly agreed plan.¹⁷⁵ As the Rome Statute did not address this question, it must be assumed that it was not prepared to accept this position.¹⁷⁶ Contrary to the Rome Statute, however, the ICTY expressly accepted the possibility of complicity after the fact if the accessory participated 'through supporting the actual commission before, during or after the incident'; in this case, he is responsible 'for all that naturally results from the commission of the act in question'.¹⁷⁷ As the silence of law-makers is always ambiguous and does not necessarily point in one or other direction, the better reasons espouse including even contributions after the fact and into the general concept of participation if they have both a causal connection with the final accomplishment of the crime and have been made with intent to this effect.¹⁷⁸

VI. Attempt and Abandonment

A. Genesis and Scope of Article 25(3)(f) of the ICC Statute

Article 25(3)(f) contains two messages: first, it declares the attempt of all international crimes covered by the Rome Statute punishable (sentence 1); secondly, it offers the exclusion of criminal liability in the case of abandonment (sentence 2). In both respects it took considerable time and effort to reach this state of regulation.

With regard to the IMT Charters of Nuremberg and Tokyo (1945/46),¹⁷⁹ it appears as if attempt was not yet punishable as it was not mentioned at all. With one exception, the same is still true with the ICTY and ICTR Statutes of 1993 and 1994. A closer look, however, shows that by certain definitions of crimes which extended the punishability for preparation, implicitly attempt as well—and even the early stages thereof—was included. This was the case particularly with crimes against peace in Article 6(a) of the Nuremberg Charter which had covered the planning and preparation of a war of aggression, as well as in the ICTY and ICTR Statutes by penalizing the 'attempt' to commit genocide and even more generally by holding those persons individually responsible who 'planned' or otherwise aided in the 'planning' or 'preparation' of a crime.¹⁸⁰ As in these cases the preparation or attempt was part of the definition of the crime, even preparatory activities

¹⁷⁵ Cf. Report of the ILC, *YILC* (1991) Vol. II/2, p. 98; Van den Wyngaert and Weigend, both in Bassiouni, *supra* note 4, 5 f. and 116 f., respectively; in agreement Ambos, in Triffterer, *supra* note 7, margin No. 40.

¹⁷⁶ See Bassiouni, *supra* note 35, 141 note 4.

¹⁷⁷ ICTY Trial Chamber *Tadić* case, *supra* note 6, para. 692.

¹⁷⁸ On further aspects of this problem, cf. Ambos, in Triffterer, *supra* note 7, margin No. 40 f.

¹⁷⁹ Cf. *supra*, III at note 22.

¹⁸⁰ Arts. 4(3)(d), 7(1) of the ICTY Statute and Arts. 2(3)(d), 6(1) of the ICTR Statute.

it covered were and are to be considered completed crimes which leave no chance for discharging abandonment.¹⁸¹ Thus, it appears fair to say that, prior to the Rome Statute, neither a duly generalized nor an adequate concept of attempt as a category of criminal responsibility of its own was in force.

In contrast to the state of formal charters and statutes, more focus on an appropriate regulation of attempt can be found in drafts of international crimes. Starting with the 1954 Draft Code of Offences against the Peace and Security of Mankind, continuing with the Draft Code of 1991 and the Draft Code of 1996, each of them contained its own provision on attempt, although with some differences: whereas the Draft Code of 1954 (Article 2(13)(iv)) merely provided for 'attempts to commit any of the offences' of that Code, the Draft Code 1991 (Article 3(3)) contained a certain definition of attempt,¹⁸² while it was still disputed however, whether the criminal responsibility for attempt should be restricted to certain crimes.¹⁸³ Before the Draft Code of 1996 (Article 2(3)(g)) finally came forward with an attempt rule eventually applicable for all international crimes, though still not yet explicitly mentioning the possibility of abandonment, in the mean time the Updated Siracusa Draft had proposed a more comprehensive definition of attempt and an explicit rule for abandonment too (Article 34-8).¹⁸⁴ The final step was then taken by the Rome Statute which—in disregarding the reservations of the ILC¹⁸⁵—arrived at a full penalization of attempt, combined with an equally general possibility of abandonment.¹⁸⁶ This generalization of attempt can indeed be applauded as the Rome Statute restricts itself from its very outset to the most serious crimes against humanity and international law which need to be prevented at the earliest stage of commission.

With regard to the fundamental question, which is perhaps discussed worldwide, of why an incomplete crime should be punished at all, the ILC gives two main reasons: 'First, a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his

¹⁸¹ Cf. Triffterer, *supra* note 5, 233.

¹⁸² Cf. *infra*, VI.B.1 at note 192.

¹⁸³ Cf. Report of the Preparatory Committee, 51st Sess., *supra* note 10, 99.

¹⁸⁴ Updated Siracusa Draft, *supra* note 37. As will be seen later, however, this provision left out the attempt element of non-completion which had been expressed in the proposal by Eser, Koenig, Lagodny, and Triffterer, *supra* note 38, in this way: 'In the case of an incomplete crime, the person is punishable for an attempt if he, with the intent to commit the crime, engages in conduct constituting a substantial step towards the accomplishment of the crime' (Art. 33 g(1)) unpublished Freiburg Draft, *supra* note 38).

¹⁸⁵ As reported by Ambos, the ILC could not reach a consensus on a list of crimes eligible for attempt because many members and some governments considered an attempt only possible in a case of war crime or crimes against humanity (Ambos, in Triffterer, *supra* note 7, margin No. 31, footnote 78 with detailed references).

¹⁸⁶ As to the various Pre-Drafts of the Rome Statute, cf. Report of the Preparatory Commission 51st Sess., *supra* note 10, 93 f.

control rather than his own decision to abandon the criminal endeavour. Secondly, the fact that an individual has taken a significant step towards the completion of one of the crimes . . . entails a threat to international peace and security because of the very serious nature of these crimes.¹⁸⁷ In other words, the reason for penalizing the attempt can be seen in the combination of two elements: a more objective one in seeing in the 'substantial step' towards committing the crime a threat to the legally protected interest, and a more subjective one expressed by the perpetrator's hostile attitude towards the law. From a more social-psychological perspective, an essential detrimental effect can be seen in the impression of shattered confidence of the population in the stability of the legal order exerted by the attempt. In these terms it is not so much the concrete object but rather the legal interest behind it which is endangered.¹⁸⁸

B. The Essential Elements of Attempt

As most precisely expressed by the Latin proverb of '*cogitare, agere, sed non perficere*', attempt—as distinct from mere planning, on the one hand, and full completion, on the other—is characterized by three elements: the perpetrator must have thought about committing a certain crime (*mens rea*), he must have acted towards this end (*actus reus*), but not have fully succeeded (*non-completion of the crime*).

1. Incompleteness of the Crime

As the attempted and the completed crime have the requirements of an *actus reus* and *mens rea* in common, they only appear distinguishable with regard to the (absence or presence of) completion. This negative element of attempt is addressed by subparagraph (f) in that 'the crime does not occur'.¹⁸⁹ Although it is laudable that this provision takes notice of this peculiarity of attempt at all, it is questionable whether it is properly phrased. Even by the Statute's additional reason that the crime does not occur 'because of circumstances independent of the person's intentions',¹⁹⁰ it is unclear and misleading since it obscures the fact that it is the incompleteness of the crime due to which an *actus reus* with *mens rea* gets stuck in a mere attempt.¹⁹¹ This can be due to various reasons, the main ones

¹⁸⁷ Report of the ILC, 48th Sess., *supra* note 5, 28.

¹⁸⁸ On more details of this so-called 'impression theory' (*Eindruckstheorie*) which is now the prevailing explanation for penalizing attempt in Germany, cf. A. Eser, in Schonke and Schroder (eds), *supra* note 61, § 22, pre-note 22.

¹⁸⁹ In a slightly different way the Draft Code 1996 Art 2(3)(g) had spoken of 'a crime which does not in fact occur'.

¹⁹⁰ The same wording—though merely speaking of 'intention' instead of 'intentions'—can already be found in the Draft Code of 1991 Art 3(3), and also in the Spanish Código Penal Art 16(1).

¹⁹¹ Cf. *supra* note 184 to Art 33 g of the unpublished Freiburg Draft, but also *infra*, VI C, with regard to the 'independence clause' in terms of expressing possible abandonment.

being, as provided for by the Draft Code 1991, objective failures or obstacles,¹⁹² as in the case where the victim suddenly turned away and therefore avoided being hit by the perpetrator's bullet or that the perpetrator was even stopped from firing in the first place. In more general terms, the non-accomplishment of a crime by reason of objective failure can be given due to the inaptitude of the means (e.g. use of inefficient tools), unsuitability of the object (e.g. if in case of a war crime military objects were mistaken for civilian ones), the inability of the perpetrator (if, for instance, an ordinary soldier, wrongly considering himself a commander, attempts to 'order' a genocidal action), or, though in rather exceptional cases, on grounds of justification (or some other circumstance negating the fulfilment of the definitional elements of the crime) the perpetrator did not know of (as for instance, if the victim to be deported in fact wished to leave this region without letting the perpetrator know). Aside from such personally conditioned and, therefore, partly subjective circumstances, a crime can also remain incomplete due to the lack of a mental element as, for instance, in the case where the victim the perpetrator tried to kill by shooting did indeed die in the end; this, however, in such an extraordinary course of intermediary events that the final end cannot be attributed to the perpetrator as not covered by his intent (as in a case, in which the victim was only slightly injured by the perpetrator's bullet, but because of his visiting a hospital for bandaging was killed by an aeroplane crashing into the hospital). If this case is meant (or at least also included) with 'circumstances independent of the person's intentions', one could accept this wording as not excluding cases of incompleteness of the crime for subjective reasons.

Particular problems with regard to the (in)completeness of a crime can arise in cases in which the definition of the crime does not require a certain effect, as rather (merely) prohibiting a certain activity, as, for example, in Article 8(2)(b) of the ICC Statute on war crimes. Whether some of these crimes are considered complete with the performance of the prohibited act or whether a certain 'intermediary effect' must have occurred, cannot be decided in a uniform manner but must be judged from the wording and purpose of the relevant provision. If, for instance, subparagraphs (i)–(iii) of Article 8(2)(b) of the ICC Statute prohibit the intentional directing of attacks against certain persons or objects, it should suffice for the completion of such a war crime that the perpetrator performs these attacks without additionally requiring that the persons or objects attacked be in fact damaged or destroyed. This may be different in the case of subparagraph (vii) of Article 8(2)(b) of the ICC Statute in which improper use of a flag of truce, of other military insignia or of the uniform of United Nations personnel is prohibited. As in this case the provision aims at protecting the enemy and/or the public at large against improper deception,

¹⁹² See Draft Code 1991 Art. 3(3): a crime that 'failed or was halted' only because of circumstances independent of the perpetrator's intention.

the crime may be completed only if the improper use of the said objects has caused an error of the counterparty or among the population.

Although distinctions of this sort may appear purely academic, in particular because the perpetrator, as soon as he transgresses the borderline to attempt is, in any case liable, if not for a completed crime, then for the attempt thereof, nonetheless the distinction between both and, thus, the question of whether the crime has been completed or not plays a role insofar as the door to discharging abandonment is open only as long as the attempt has not been completed.¹⁹³

2. Subjective Requirement: Intention to Commit the Crime

While the attempt is characterized by the incompleteness of the crime, the intention of the perpetrator is the main point of reference regarding what he is going to do. Although this subjective requirement of an intention to commit a certain crime is not explicitly stressed in subparagraph (f), it might be inferred from the Statute's mention of the perpetrator's failure independent of his 'intentions'.¹⁹⁴ This means that the perpetrator must have both the conception of a certain crime, as, for instance, expressed in the German § 22 Strafgesetzbuch, as well as the unconditional decision to carry it out; thus an attempt has to be denied for mental reasons as long as the perpetrator has not yet a determined proposition of a certain crime and/or if he has not yet definitely made up his mind to commit it. In order to fulfil this mental requirement, the perpetrator must therefore have anticipated all elements of the crime to be committed and decided to carry it out to full completion.

Another question concerns the form of intent required for an attempt. Whereas some national laws, as is particularly the tradition in common law, would require a direct intent, thus excluding mere *dolus eventualis*,¹⁹⁵ other national laws, such as the German, would find *dolus eventualis* sufficient, if that suffices in completed crimes as well.¹⁹⁶ The latter position also appears feasible for the Rome Statute, since subparagraph (f) obviously does not require an intent different from that according to Article 30.¹⁹⁷

3. Objective Requirement: Action Commencing the Execution of the Crime

Since the intention to commit a crime can be present as early as in the stage of planning or preparing it, the critical borderline to an attempt is transgressed by

¹⁹³ Cf. *infra*, VI.C.

¹⁹⁴ The same wording can be found in the Spanish Art. 16(1) of the Código Penal. As to predecessors of this wording, cf. *supra*, VI.B.1.

¹⁹⁵ As, for instance, barred by the Model Penal Code § 5.01 in requiring acting with 'purpose', and rejected also by Serini, in Lattanzi, *supra* note 141, 145.

¹⁹⁶ For the German law, cf. Eser, in Schönke and Schröder (eds.), *supra* note 61, § 22 margin No. 17.

¹⁹⁷ Cf. Ch. 23 below.

the perpetrator's 'taking action that commences the execution of the crime by means of a substantial step'. This definition consists of two components: whereas the commencement criterion, which has probably been borrowed from French law¹⁹⁸ and employed by the Draft Codes of 1991 and 1996,¹⁹⁹ provides the doctrinal basis for the distinction between preparation and attempt; the additional requirement of a 'substantial step', which can be traced back to the American Model Penal Code,²⁰⁰ tries to indicate the practical means by which the commencement is evidenced. The crucial question remains, however, which step in the chain of various actions leading from planning to preparation and going on to the realization of the crime can be considered the 'substantial' one marking the borderline to an attempt. If 'commencement' should mean at least a partial accomplishment of the definitional elements of the crime, a 'substantial' step would require in the case of a murder that the perpetrator had, for instance, discharged a shot, thus excluding cases from attempt in which the perpetrator, though already having raised his gun, was hindered at the last moment from pulling the trigger. If, on the other hand, 'substantial' could be any essential contribution in support of the commencement to accomplish the crime, the borderline to attempt would be transgressed as early as the perpetrator's taking a step without which the crime could not be carried out, as, for instance, loading the gun or setting the time clock of a bomb although the time and/or place of pulling the trigger or letting the bomb explode is still far away. As the wording of subparagraph (f) enforces neither one nor the other of these opposite interpretations, the door is open for teleological interpretation which would orientate itself by the degree of endangerment to the protected interest or object. This means that, on the one hand, attempt does not necessarily require a partial fulfilment of the definitional elements of the crime but that, on the other hand, the perpetrator according to his opposition and intention is already directly endangering the protected interest or object, as would be the case when the murderer is about to pull the trigger or the rapist ready to assault or seize the victim the next moment. This delineation is perhaps best expressed by the German concept which requires that the perpetrator 'in accordance with his conception of the crime, moves directly towards its accomplishment'.²⁰¹ This approach also appears in fact to be practised

¹⁹⁸ After already being included in Art. 2 of the French Code Pénal of 1810, it was preserved until the present Art. 121-5 of the Code Pénal of 1994 by speaking of 'commencement d'exécution'.

¹⁹⁹ Art. 3(3) of the Draft Code 1991 and Art. 2(3)(g) of the Draft Code 1996.

²⁰⁰ § 5.01(1)(c) and (2) of the Model Penal Code; cf. Wise, in Sadat Wexler and Bassiouni, *supra* note 10, 44; Fletcher, *supra* note 59, 171 f.

²⁰¹ § 22 German Strafgesetzbuch reads as follows: 'Eine Straftat versucht, wer nach seiner Vorstellung von der Tat zur Verwirklichung des Tatbestandes unmittelbar ansetzt.' For more details to the—partially controversial—interpretations of this definition, see Eser, in Schonke and Schroder (eds.), *supra* note 61, § 22 margin Nos. 25–55. Thus, it is not the subjective proposition of the attempter alone as perhaps misunderstood by Serini (in Lattanzi, *supra* note 141, 144 f.), but in connection with the objective move towards the execution of the crime which delineates mere preparation from attempt.

in French²⁰² and Spanish law,²⁰³ and last but not least, seems also to have guided the ILC when letting suffice for the 'commencement of execution' that 'the individual has performed an act which constitutes a significant step towards the completion of the crime'.²⁰⁴

Since the commencement of the execution as previously described represents the *actus reus* of the attempt, the question arises as to whether it also comprises so-called 'impossible attempts',²⁰⁵ which by no means can succeed, as in the case that the victim to be killed is already dead or the gun to be used is not working. Not unlike the national laws which used to leave this question open,²⁰⁶ the Rome Statute does not offer an answer either. Therefore, one has to resort to the rationale of the punishability of attempt: if it were, on the one hand, the concrete endangering of a certain object to be protected, the 'impossible' attempt would have to remain unpunished, as the prospective victim of the attempter can in fact not be endangered by an empty gun and still less if already dead. If it were, on the other hand, the ill will or attitude of the attempter which was to be punished, even attempts by superstitious means, such as cursing or praying that the victim be dead, would be covered. Instead, a happy medium could again be found by referring to the shattering of public confidence in the stability of the legal order resulting from seemingly possible though objectively impossible attempts, except for superstitious actions which are clearly harmless.²⁰⁷

A particular question is the commencement of the attempt in the case of an *omission*. Although omission is not made punishable by the ICC Statute in general,²⁰⁸ a special case of this sort can occur with commanders' and other superiors' failure to exercise control properly over their forces to prevent them from committing an

²⁰² Although somehow diverging from the wording of Art. 121-5 of the French Code Pénal, the French doctrine seems to have understood 'un commencement d'exécution' always in a broad sense of 'tout acte qui tend directement au délit'. Cf. H. Pelletier and J. Perfetti, *Code Pénal* (10th edn., 1997) 20.

²⁰³ In avoiding the term of 'commencement of execution', according to Art. 16 of the Spanish Código Pénal the attempt occurs 'quando el sujeto da principio a la ejecución del delito directamente por hechos exteriores', a definition which, according to Mir Puig, *supra* note 63, 340, comes closest to the German conception.

²⁰⁴ Report of the ILC, 48th Sess., *supra* note 5, 27. The same conclusion after evaluating the various comparative materials is drawn by Ambos, in Triffterer, *supra* note 7, margin No. 32.

²⁰⁵ Certainly, the term 'impossible' is misleading insofar as any attempt is 'impossible' in terms of finally not succeeding. Therefore, rather than the 'normal' non-accomplishment of the attempt it is the fact that the attempt can under the given circumstances by no means procure the expected result, that makes the attempt 'impossible'.

²⁰⁶ As, for instance, in French law, which, though not explicitly regulated in this way, would consider the 'délit manqué' as punishable; cf. references in J.-H. Robert, *Droit Pénal Général* (4th edn., 1999) 212 f.; P. Conte and P. Maistre du Chambon, *Droit Pénal Général* (14th edn., 1999) 175 f.

²⁰⁷ On more details of the position on which the present German law is essentially based, see Eser, in Schönke and Schröder (eds.), *supra* note 61, § 22 margin No. 60 ff., § 23 margin No. 12 ff.

²⁰⁸ Cf. *infra*, VII.

international crime according to Article 28(a) of the ICC Statute.²⁰⁹ If with regard to this provision a commander decided not to take control of his forces and, thus, had the intention of committing a crime by omission according to Article 28 of the ICC Statute, the question is whether in case the expected crime of the subordinate is not accomplished in the end, the commander's attempt of omission is commenced as early as his letting the first occasion pass in which he would be able to prevent the subordinate's action, or whether the omission is not commenced until the last possibility for intervention. Instead of these opposite extremes, both probably represented in national laws, considering the silence of the ICC Statute it again appears preferable to refer to the criterion of endangerment according to which the attempt commences as soon as the protected object is put in immediate danger due to the commander's not preventing his subordinate, or as soon as an existing danger is substantially increased by the commander's failure to intervene.²¹⁰ Aside from this, one must remember that in the special case of Article 28 of the ICC Statute, commanders are not only responsible for intentionally omitting the necessary control of subordinates, but also for the negligent failure to do so.²¹¹

C. Abandonment

As aforementioned, the possibility of being discharged from liability for the attempt if it was voluntarily abandoned before completing the crime was introduced into the Rome Statute at the last minute upon a Japanese move supported by Germany, Argentina, and other like-minded States.²¹² This does not mean, however, that the idea of abandonment was hitherto not at all present; for, as in the French tradition abandonment could be considered as part of the definition of attempt in presupposing that the crime was not completed 'because of circumstances independent of the person's intentions',²¹³ a wording that can be found as early as in the ILC Draft Code 1991 (Article 3(3) and still contained in Article 25(3)(f) sentence (1) of the ICC Statute. In following a proposal of the Updated Siracusa Draft²¹⁴ almost verbatim, the ICC Statute's subparagraph (f) sentence (2) does not only explicitly 'invite' the attempter to seize the opportunity of abandonment as an incentive to withdraw

²⁰⁹ On details of the definitional elements of commission by omission, cf. Ch. 21 below.

²¹⁰ On more details of the delineation of the attempt by omission see Eser, in Schonke and Schröder (eds.), *supra* note 61, § 22 margin No. 46 ff.

²¹¹ Art. 28(a)(i) alternative (2) of the ICC Statute; cf. also Ch. 23 below.

²¹² Cf. Ambos, in Triffterer, *supra* note 7, margin No. 34.

²¹³ Cf. G. Stefani, G. Levasseur, and B. Bouloc, *Droit Pénal Général* (16th edn., 1997) 203; Weigend, in Bassiouni (ed.), *supra* note 4, 117.

²¹⁴ Art. 33-8(2) Updated Siracusa Draft, *supra* note 37, which itself is identical with the Art. 33g(2) of the Alternative Draft by A. Eser, O. Lagodny, and O. Triffterer in their proposals to amend the 'Draft Code of Crimes against the Peace and Security of Mankind', in Triffterer, *supra* note 38, 877 f., and in Ambos, *supra* note 38, 941 ff.

from the commission or finally to prevent it from completion,²¹⁵ but also clarifies the conditions of abandonment at least in its basic features.

1. Precondition of Abandonment

Although not explicitly stated in Article 25(3)(f) of the ICC Statute, as a matter of logic abandonment presupposes that the attempt could still be completed. Consequently, if the perpetrator recognizes that his attempt has failed without having another chance to accomplish the crime, as in the case where the victim has already fled or the only explosive available turns out to be inefficient, there is no room for abandonment from the very outset. This means that in such a clear 'failed attempt', abandonment is excluded without needing to enquire about any voluntariness of the attempter.²¹⁶

2. Forms of Abandonment

Provided that the crime could still be completed or that the perpetrator believes this to be the case, abandonment entailing the discharge from attempt can be reached in three ways: two of them (a) and (b) are explicitly regulated by subparagraph (f) whereas the third one (c) has to be construed by analogy which, as restricting the perpetrator's responsibility, would be in accordance with Article 22(2) of the ICC Statute. Although not easily distinguishable, the requirements of abandonment are somewhat different in each way:

(a) *Abandoning the effort to commit the crime* (alternative (1) of subparagraph (f) sentence (2)) of the ICC Statute refers to the case where the completion of the crime can be avoided by simply not continuing the efforts towards its accomplishment. This presupposes that the actions taken thus far do not yet suffice to procure the prohibited result as, for instance, in the case of attempted murder in which the perpetrator has injured the victim with one (or even more) stabs while aware that more stabs would be necessary to kill the victim. In such a so-called '*unfinished attempt*' the attempter can abandon the commission of the crime by simply discontinuing his stabbing, of course, provided that he is doing so with the requisite subjective intent.²¹⁷

(b) (*Otherwise*) *preventing the completion of the crime* (alternative (2) of subparagraph (f) sentence (2)) of the ICC Statute refers to the case where in the normal course of events the perpetrator's action would procure the prohibited result, as in

²¹⁵ On this and other justifications of abandonment, see Fletcher, *supra* note 59, 186 f., Jescheck and Weigend, *supra* note 125, 538 f.

²¹⁶ On more details and references to this rather recently elaborated type of *subjectively* 'failed attempt'—as distinct from an *objectively* 'failed attempt' the perpetrator believes to be still accomplishable—cf. Eser, in Schönke and Schroder (eds), *supra* note 61, § 24 margin Nos. 6–11, 68–72; furthermore *infra*, VI.C.2(c)

²¹⁷ Cf. *infra*, VI.C.3.

the case where he has stabbed his victim so heavily that without intervening help he would die. In such a so-called '*finished attempt*' the perpetrator must not be content with discontinuing his stabbing but must actively take steps to prevent his victim from bleeding to death, for example, by bandaging him with his own hands or by taking him to a doctor. Certainly, in this case the risk of preventing the prohibited result is his; this means that in the case of a 'finished attempt' the perpetrator can obtain a discharge by abandonment only if he succeeds in preventing the completion of the crime.

(c) Not explicitly provided for in the ICC Statute is the case where the perpetrator believes he has done everything to complete the crime which in fact, however, has failed without him being aware of it, thus, making him believe that for abandoning the attempt he would have to prevent the completion, as, for instance, in the case that a drug overdose supposedly sufficient to cause the victim's death within an hour was in fact never strong enough to procure this result. If in such a case the perpetrator wanted to rescue his victim by taking him to a hospital to have his stomach pumped, it would not be the perpetrator's active effort which prevented the crime from completion but rather the primary failure the perpetrator was unaware of. On the other hand, he could hardly avail himself of alternative (1) of the ICC Statute by simply abandoning his efforts, as according to his subjective proposition he is no longer in the stage of an 'unfinished' (*supra* a) than rather a 'finished' attempt (*supra* b) as he believes he has done everything necessary to let the attempt reach completion. As in such a case of a '*supposedly accomplishable attempt*', it would be unjust if a perpetrator willing to prevent the completion were refused discharge for abandonment because neither alternative (1) nor alternative (2) of the ICC Statute are available for him; his efforts to prevent the completion, though objectively futile as well as unnecessary, should be treated as having prevented the accomplishment of the crime.²¹⁸

(d) Incidentally, the last case of abandonment is not the only question which would have deserved explicit regulation. This is particularly true for abandonment in case of *participation* if not all of the accomplices withdraw at the same time or in the same manner from the commission of the crime. As not only this question, but even the whole ICC provision on abandonment appears to be modelled on German § 24 Strafgesetzbuch, though not adapting it entirely and, thus, leaving the lacunas here in question, a general reference to the German regulation seems appropriate.²¹⁹

²¹⁸ The same end was reached by a landmark decision of the German Federal Supreme Court on the basis of an abandonment regulation which at that time was substantially the same as the one in the present Art. 25(3)(f) sentence (2) of the ICC Statute: cf. 11 BGHSt (*supra* note 109) (1958) 324 ff.

²¹⁹ On more details and references, see Eser, in Schonke and Schroder (eds.), *supra* note 61, § 24, in particular margin Nos. 12–106, Jescheck and Weigend, *supra* note 125, 536 ff.

3. Subjective Requirement of Abandonment

In addition to the objective prevention of the completion of the crime, the perpetrator must '*completely and voluntarily give up the criminal purpose*'. Though appearing united, this requirement contains two components, one of which is probably stronger than most national laws. Whereas the voluntariness probably goes along with most national laws containing an explicit regulation, the Rome Statute is not satisfied with the perpetrator's abstaining from the concrete criminal act, as would suffice in some national laws,²²⁰ but rather expects the perpetrator to give up his criminal purpose completely. This means that a rapist who abandoned his attempt as he was moved by the urgent plea of a mother would be discharged from this attempt only if he refrained from looking for another victim. This issue as well as the highly disputable meaning of 'voluntarily' are hardly solvable by abstract definitions but rather by means of case-by-case decisions, as until now, however, seem not to have been taken by international tribunals.

D. Punishment

(a) As Article 25(3)(f) of the ICC Statute does not make any mention of the punishment provided for attempt, it apparently can, if not must, be *the same as for a completed crime*. If this equation of attempt and completion (in terms of not differentiating between both with regard to sentencing) was a deliberate decision or rather accidental due to lack of time for a discussion is an open question. At any rate, this lack of differentiation is neither normal²²¹ nor convincing.²²²

(b) On the other hand, with regard to abandonment, the ICC Statute is clearer than most national laws in that it only frees the perpetrator from his liability for attempt and, thus, not from other *concurring crimes* which might have been completed. Consequently, if the perpetrator had physically injured the victim by his attempt of murder, his abandonment would not relieve him from his responsibility for the completed assault and battery.²²³

²²⁰ As, for instance, according to some German scholars, not so, however, according to the German Federal Supreme Court: for references, see Eser, in Schonke and Schröder (eds.), *supra* note 61, § 24 margin No. 39 f.

²²¹ Just to mention the German law which at least allows optional mitigation in the case of a mere attempt (§ 23(2) Strafgesetzbuch).

²²² Cf., with a plea for distinguishing between 'incomplete' and 'complete' attempts, A. Ashworth, 'Criminal Attempts and the Role of Resulting Harm Under the [Model Penal] Code, and in the Common Law', 19 *Rutgers LJ* (1988) 725–772, esp. 738 ff

²²³ On more details of such a so-called 'qualified attempt', cf. Eser, in Schonke and Schröder (eds.), *supra* note 61, § 24 margin No. 9 f.

E. Attempted Participation

The Rome Statute probably differs from many national laws in one respect: it lacks a general prohibition of attempted participation,²²⁴ which must not be confused with participation in an attempt according to Article 25(1)(b)–(d) of the ICC Statute.²²⁵ After it abstained, on the one hand, from maintaining broad conspiracy concepts as particularly known in the common law tradition and, on the other hand, was not prepared to introduce more specific provisions for attempted instigation or aiding, accomplices before the fact remain unpunished as long as the supposed main crime does not at least reach the stage of an attempt.²²⁶ This means, for example, that for ordering a crime which is not executed by his subordinates, a commander is, in principle, not liable. Consequently, if in such a case of ‘attempted participation’ the commander is not to remain completely unpunished, one must resort to the national law for criminal and/or disciplinary sanctions as suggested by the ILC.²²⁷

The only exceptional step into the early stages of attempted participation may be seen in incitement to genocide according to Article 25(3)(e) of the ICC Statute as it is punishable regardless of whether the incitement was successful or not.²²⁸ Thus, as by its substantial nature a mere attempt, it should be abandonable as any other attempt. This, however, seems barred by the formal structure of incitement to genocide in terms of a completed crime,²²⁹ as in that stage a withdrawal, as mentioned above,²³⁰ is in principle not possible. As this consequence may have been missed by the drafters of subparagraph (e), the ICC may resort by means of analogy to subparagraph (f) sentence (2) alternative (1) or (2), respectively, for discharging an inciter who, after first agitations, voluntarily gives up any further efforts, if not even calms any arousments.²³¹

VII. Commission by Omission

Criminal responsibility for omission is another field in which the Rome Statute refrained from a general regulation. The only genuine case of criminal responsibility for not doing what the person concerned was obliged to do is the failure of

²²⁴ For details of this highly complex field, cf. the comparative survey by Jescheck, *supra* note 90, 136 ff.; as to certain parallels to the common law notion of conspiracy, see Fletcher, *supra* note 59, 218 ff.

²²⁵ Cf. *supra*, V D.1.

²²⁶ On this consequence of the accessorial principle, cf. *supra* V.A.2, D 1.

²²⁷ Report of the ILC, 48th Sess., *supra* note 5, 23.

²²⁸ Cf. *supra*, V.G.

²²⁹ Cf. ICTR Trial Chamber in the *Akayesu* case, *supra* note 123, para. 562.

²³⁰ Cf. *supra*, VI B.1.

²³¹ This way of employing rules of abandonment to formally completed crimes by analogy can, for instance, be found in Germany: cf. Eser, in Schonke and Schroder (eds.), *supra* note 61, § 24 margin No. 110.

military commanders or other superiors to take necessary measures against crimes subordinates are about to commit according to Article 28(a) of the ICC Statute.²³² This provision, however, is not transferable to officials other than those named in Article 28.

This abstinence of the Rome Statute was surprising since the Draft Statute and Draft Final Act, as proposed by the Preparatory Committee, still contained a general regulation for omission²³³ on the basis of which the Model Draft Statute for the ICC recommended the following definition: 'Conduct . . . can constitute either an act or an omission, or a combination thereof', criminal responsibility for the result of an omission to act is given only 'if the person was under a legal obligation to avoid that result'.²³⁴ Still, the non-adoption of this recommendation in Rome was not completely unexpected after it turned out that it was extremely difficult to reach an agreement with regard to the question of under what circumstances mere omission should be punishable. Particularly with regard to the character of the legal duty to act, it was highly controversial whether this duty should be explicitly regulated by the Statute, as with the criminal responsibility of commanders according to Article 28(a) of the ICC Statute. As this, however, was not considered a way to cover all cases of omission which would deserve punishment, the counter-position would be content with unwritten duties to act, such as 'creating a particular risk or danger that subsequently leads to the commission of such a crime'.²³⁵ The same view was taken by the ILC in considering 'committing' a crime to cover both an 'unlawful act or omission' because, 'as recognized by the Nürnberg Tribunal, an individual has the duty to comply with the relevant rules of international law and therefore may be held personally responsible for failing to perform this duty'.²³⁶ As the final drafters of the Rome Statute knew of these propositions and the discussions about them, the abstinence from explicit regulation cannot be interpreted in any other way than the rejection of individual criminal responsibility for commission by omission, unless it has been specifically provided for as in the case of Article 28(a) of the ICC Statute.²³⁷

²³² Certain elements of omission are, however, also contained in 'intentionally using starvation of civilians [in terms of letting them die] as a method of warfare' according to Art. 8(2)(b)(xxv) of the ICC Statute.

²³³ Art. 28(1) of the Preparatory Committee Draft Statute, p. 64 f. (in Bassiouni, *supra* note 35, 144).

²³⁴ Art. 28(2) and (3) of the Model Draft Statute (Sadat Wexler and Bassiouni, *supra* note 10, 48).

²³⁵ E. M. Wise, in 'Commentary on Parts 2 and 3 of the Zutphen International Draft: General Principles of Criminal Law', in L. Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee* (1998) 49 f. Cf. also Report of the Preparatory Committee, 51st Sess., *supra* note 10, 91.

²³⁶ Report of the ILC, 48th Sess., *supra* note 5, 21 f.

²³⁷ The same conclusion was drawn by Ambos, in Triffterer, *supra* note 2, Art. 25 margin No. 42.

Although the ICTY and ICTR Statutes do not provide for responsibility by omission in a general manner either, the ICTY and ICTR seem to extend the commanders responsibility for failing to prevent subordinates from criminal acts²³⁸ to some sort of complicity by omission.²³⁹ Whether this will indeed be a solid and appropriate way for developing criminal responsibility for omission in broader terms remains to be seen. Even guessing would need more elaboration than is possible here.

VIII. Concluding Assessment

Despite the criticism which must be made of various aspects of the ICC Statute's regulation on individual responsibility, it certainly signifies progress in comparison to former drafts and provisions.

This is particularly true with regard to the emphasis on each individual's own responsibility for their participation in the commission of an international crime depending on the sort and extent of the personal involvement. This emphasis on genuinely individual responsibility is supported both by banning immunities traditionally invoked, if not abused, by Heads of State and Government, on the one hand, and by excluding obedience of subordinates to superior orders as a defence, on the other. Another position likely to find principal approval is the rather comprehensive as well as differentiated regulation of perpetration and participation, even if this was reached at the cost of the traditional conspiracy concept. Attempt is another example of a rather unconvincing regulation, particularly with regard to the inconsistency of abandonment, yet still presents a principal step forward.

On the whole, however, as indicated in the beginning, Article 25 of the ICC Statute does not entirely keep to what it promises. Contrary to its title's proclamation of a comprehensive regulation of 'individual criminal responsibility', at a closer look it merely regulates the various forms of participation and attempt, thereby leaving in particular an essential lacuna with regard to commission by omission. In addition, although it remains true to its fixation on 'individual' responsibility, it limits at the same time responsibility for international crimes to individuals, thus excluding collective criminal responsibility of States and other corporate entities. Changing this, if desired and politically accomplishable, poses a challenge to both public international and international criminal law in the future.

²³⁸ See Art. 7(3) of the ICTY Statute and Art. 6(3) of the ICTR Statute

²³⁹ Cf. ICTY Trial Chamber in the *Furundžija* case, *supra* note 134, para 207, and ICTR Trial Chamber in the *Kayshema and Ruzindana* case, *supra* note 138, paras. 201 ff., 210

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MENTAL ELEMENTS—MISTAKE OF FACT AND MISTAKE OF LAW

Albin Eser

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General Principles of International Criminal Law

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I. Introduction: Progress on Misconceived Propositions

The Rome Statute's Article 30 on 'Mental element' and Article 32 on 'Mistake of fact or mistake of law', if read together as their substantive interrelations necessitate,¹ create an ambivalent impression.

On the one hand, it cannot be stressed enough that the Rome Statute explicitly proclaims basic postulates of culpability by requiring a certain state of mind and also by recognizing that responsibility may be excluded by certain misperceptions of the perpetrator. Thus, the Rome Statute not only removes itself from older notions of 'result liability' which punished the wrongful deed without consideration of the actor's mind, but it also dissociates itself from notions of 'strict liability', as they are still practised in certain areas of common law. So perhaps for the first time in international legislation, the Rome Statute proclaims a principle which, if not necessarily traceable back to Roman law, was basically developed in the canon law and was finally expressed in the Latin maxim: *actus non facit reum nisi mens rea*.² This progress towards a conception of crime in which culpability is an essential element, is particularly remarkable considering that the *mens rea* principle used to be limited to the requirement of an intentional (or at least negligent) act which may be excluded by a mistake of fact, but not by a mistake of law, as is still the position in certain national penal codes.³ By now admitting mistake of law, though still under narrow conditions, as a ground for excluding criminal

¹ In the same sense the Preparatory Commission Elements (p. 18, 26 f) when speaking of the 'interplay between articles 30 and 32' of the ICC Statute.

² Cf G Williams, *Textbook on Criminal Law* (2nd edn., 1983) 70 In a gender-free reformulation of Lord Hailsham's translation (in *Haughton v Smith* (1975) AC 476, at 491 f): 'An act does not make a person guilty of a crime, unless the person's mind be also guilty' (cited after J Smith and B Hogan, *Criminal Law* (9th edn., 1999) 28).

³ As particularly in common law countries: as to England, cf Smith/Hogan, *supra* note 2, 79 ff; J Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht* (1997) 257 ff., as to US criminal law, W LaFare and A. Scott, *Substantive Criminal Law*, Vol. 1 (1986) 575, at 577 But see also A. T. H. Smith (in A. Eser and G. P. Fletcher (eds), *Justification and Excuse Comparative Perspectives* (1987) Vol II, p. 1077 ff) in questioning the common maxim of 'ignorance of the law is no excuse' as 'aphoristic half-truth', cf also the criticism by A. Ashworth, 'Excusable Mistake of Law', *Crim L Rev* (1974) 652-662, at 655) and J. Kaplan (in Eser and Fletcher, Vol II, pp. 1125 ff) with regard to American concessions. As to the position of other legal cultures in Europe and Asia, see the contributions by Tiedemann, Arzt, Stratenwerth (in Eser and Fletcher, Vol II, pp. 1003 ff., 1025 ff., and 1055 ff., respectively), by Figueiredo Dias, Frisch, Mir Puig, Stile, Castoldo (in A. Eser and W. Perron (eds), *Rechtfertigung und Entschuldigung* (1991) Vol III pp. 201 ff., 217 ff., 291 ff., 311 ff., and 343 ff., respectively) and by Gao, Burkhardt, Cho, and Nishida

responsibility, Article 32(2) of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability which doesn't fully equate to the psychological-mental elements of intent or knowledge but also requires some sort of normative blameworthiness. On these terms, the combined message of Articles 30 and 32 may be understood as laying the foundations for culpability as an independent subjective requirement of criminal responsibility in addition to the objective wrongdoing by the wilful act.

On the other hand, however, it cannot be overlooked that Articles 30 and 32 are, to say the least, not the best way of embedding essential issues into law. This is neither the place to question political shortcomings in the scope of certain requirements nor the place for denouncing the Statute's obvious disregard of certain conceptions to be dealt with later. What is at issue here are rather the inherent inconsistencies and presumably more or less unconscious implications and exclusions which make these two articles partially meaningless or, even worse, partially counterproductive. If, for instance, according to Article 32(1) a mistake of fact shall exclude criminal responsibility (only) 'if it negates the mental element', this paragraph simply repeats what is already stated in Article 30(1) by requiring a certain mental element. Instead of this repetition which seems to have been acceptable to the Preparatory Committee as a mere clarification of a generally accepted principle,⁴ it would have been much more interesting to have clarified under which conditions a mistake of fact may negate the mental element. Even worse, as a mistake of fact shall be a ground for excluding criminal responsibility 'only' if it negates the mental element, an error on facts seems to be irrelevant if, instead of a 'material' element in terms of the definitional elements of the crime (such as the nature of the act or the harm caused to a certain victim), it merely concerns a ground of justification or excuse as in the case that the perpetrator mistakenly believes himself attacked by the victim and thus shoots in the subjective state of self-defence. Whereas quite a few national laws would simply not regulate this case of a mistaken assumption of a justifying situation and, thus, would leave room for excluding criminal responsibility by analogy to a mistake of fact, the drafters of the Rome Statute, perhaps not aware of this configuration—and perhaps due to a 'mistake' of their own—barred the exclusion of responsibility.⁵ Or just to give another example of an ill-conceived proposition, the limitation of mistake of law as a merely optional ground for excluding criminal responsibility to the

(in A. Eser and H. Nishihara (eds.), *Rechtfertigung und Entschuldigung* (1995) Vol. IV, pp. 379 ff., 405 ff., 234 ff., and 431 ff., respectively).

⁴ See Preparatory Committee, *Draft Statute and Draft Final Act*, p. 67 with note 21 (in M. C. Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998) 145); cf. the comments by O. Triffterer, 'Art. 32', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), margin No.11.

⁵ For more details, see *infra*, V.C.1(c), D(d).

case that it 'negates the mental element' (Article 32(2) sentence 2), is again, repetitious 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.

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 'wanton' 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/46710, *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.

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. 13/2/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 Zutphen (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, 630).

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 Triffterer, *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—Traacherous

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 (e)(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 misconceived 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 '*dol general*' 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 '*dol general*' to the act as such, thus being forced to comprise the result of the act as '*dol special*' and to catch additional aims as '*dol aggravé*' (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.

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.

a multiplicity of regulations regarding the mental element, Article 30(1) of the ICC Statute could, at least in theory, allow its complete suspension. Such a return to 'strict' liability concepts, meanwhile happily relinquished in most criminal justice systems of the world, is hardly likely to happen in practice though, since the Rome Statute, rather than yield to any sort of strict liability, in the end rejected preliminary proposals for the inclusion of recklessness or mere negligence,⁷⁰ the only exception being the commander's responsibility for negligently not realizing his forces were committing a crime.⁷¹

As a matter of course, the mental element, whatever it is required for, must not be presumed but proven in each individual case.⁷² Consequently, it appears questionable whether conclusions from the objective commission of a crime to the presence of the relevant mental element can be drawn as easily as suggested by the Preparatory Commission's Elements in allowing that the 'existence of intent and knowledge can be inferred from relevant facts and circumstances'.⁷³ If at all, such an inference would only be feasible as a procedural device, but not in terms of a substantive substitute for intent.

2. No Full Comprehension of Guilt (in terms of 'culpability' or 'blameworthiness')

When reading of 'mental element' one could perhaps expect more than mere regulations on intent and knowledge or on the exclusion of recklessness and negligence. For if 'mental element' is understood as '*mens rea*', as it appears from the equivocal usage of 'mental element' and '*mens rea*' in the drafts of the Rome Statute,⁷⁴ and if the Latin phrase of '*mens rea*' is translated into modern English in terms of 'guilty mind', as commonly done,⁷⁵ criminal guilt for an international crime seems to be either synonymous with intent and knowledge, and thus restricted to a purely psychological fact, or guilt may also have a broader meaning by requiring, beyond mere intention and knowledge, some sort of normative culpability or blameworthiness which may be lacking even if the perpetrator, as in the

⁷⁰ Cf. *Report of the Preparatory Committee*, 51st Sess., Vol. I, p. 45, Vol. II, p. 92 (in Bassiouni, *supra* note 4, 416 and 488, respectively), *Draft Statute Draft Final Act*, p. 65 (in Bassiouni, *supra* note 4, 144).

⁷¹ Art. 38(a)(i) ICC Statute.

⁷² Cf. A. Sereni, 'Individual Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 141.

⁷³ Preparatory Commission Elements, General Introduction, p. 5, para. (3); cf. also K. Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis—From Nuremberg to The Hague', in McDonald and Swaak-Goldman, *supra* note 10, Vol. I, p. 24 to the *Tadić* case.

⁷⁴ Cf. in particular *Report of the Preparatory Committee*, 51st Sess., Vol. I, p. 18, 27, *Draft Statute and Draft Final Act*, p. 65 (both documents in Bassiouni, *supra* note 4, 144 and 377, 382, respectively).

⁷⁵ See Lord Hailsham's translation, *supra* note 2

case of mental disease or duress (Article 31(1)(a) and (c) of the ICC Statute), is aware that he is killing a human being and does it nevertheless. This broader concept is represented in several recently reformed penal codes, such as those of Austria and Germany, which expressly speak of '*Schuld*' (guilt) in terms of culpability or blameworthiness as distinct from intent and negligence,⁷⁶ and thus, in fact, recognize normative elements such as blameworthiness as well as psychological mental elements such as intention and negligence, and both together under the common umbrella of subjective elements. Contrary to this, the Rome Statute appears to adhere to a narrower psychological concept of the mental element (intent and knowledge according to Article 30 of the ICC Statute) while the defendant's incapacity to appreciate the unlawfulness of the conduct or his acting under duress are described less specifically as 'grounds for excluding criminal responsibility' (Article 31 of the ICC Statute). This more psychological approach rather than a normative reproach may also explain why mistake of law shall exclude criminal responsibility only if it negates the 'mental element' (Article 32(2) of the ICC Statute), whereas in the case of the perpetrator's ignorance of the prohibition German law, better reflecting reality and leaving the mental intention of the act untouched, would merely deny his '*Schuld*' (in terms of blameworthiness), provided that his mistake of law was unavoidable.⁷⁷ Therefore the Rome Statute can hardly be accredited a full comprehension of blameworthiness, as occasionally assumed.⁷⁸ In the Rome Statute's favour, however, it must be conceded that quite a few national penal codes barely older than the Rome Statute, such as those of France and Spain, neither speak specifically of 'mental element' nor distinguish the lack of blameworthiness from other grounds for excluding responsibility.⁷⁹ Nevertheless, the criminal law doctrines of these countries did not prevent them from developing normative concepts in terms of the French '*élément moral*' or the Spanish personal '*culpabilidad*'.⁸⁰ There is no reason why a similar development of a more comprehensive concept of the mental elements and blameworthiness should not be possible on the basis of the Rome Statute as well.

B. Intention, Intent and/or Knowledge: Relations in Need of Clarification

At first glance, Article 30 of the ICC Statute appears quite clear when, first, requiring 'intent and knowledge' with regard to the material elements of the crime

⁷⁶ Cf. § 4 Austrian Strafgesetzbuch and §§ 16, 17, 20, 35 German Strafgesetzbuch.

⁷⁷ § 17 German Strafgesetzbuch.

⁷⁸ As, for instance, by Piragoff, in Triffterer, *supra* note 47, margin Nos. 1 f., 18, when obviously understanding the mental element in terms of 'moral culpability'.

⁷⁹ Cf. Art. 122-1 to 122-8 French Code pénal and Arts. 5, 14, 19, 20 Spanish Código Penal.

⁸⁰ Cf. to the French law G. Stefani, G. Levasseur, and B. Bouloc, *Droit pénal général* (16th edn., 1997), margin No. 253, and to the Spanish law S. Mir Puig, *Derecho Penal* (5th edn., 1998) 535 ff. From a comparative perspective, see also J. Vogel, 1998 *Goltdammer's Archiv für Strafrecht*, p. 133 f.

(paragraph 1) and, second, by defining 'intent' (paragraph 2) and 'knowledge' (paragraph 3). On closer inspection, however, it appears puzzling that the elements of intent and knowledge, although through the use of the word 'and' they are required together conjunctively (paragraph 1), they are not equally related to the same points of reference: whereas 'intent' is related to conduct (paragraph 2(a)) and its consequences (paragraph 2(b)) and in the latter case even reduced to mere awareness of the consequences, 'knowledge' is related to the existence of certain circumstances or consequences occurring in the ordinary course of events (paragraph 3). The uncertainty is increased when you realize that prior to the February 1997 session of the Preparatory Committee there had been some debate as to whether the two terms in question should be disjunctive using the word 'or' rather than conjunctive as in the final draft.⁸¹ However, if the conjunctive version was chosen on the theory that one cannot act 'intentionally' without having the 'knowledge of the relevant surrounding circumstances',⁸² it would not have been necessary to mention knowledge as an element of its own at all as an inherent precondition of intent. At any rate, the conjunctive version is at least better than a disjunctive one would have been as the latter might promote the misinterpretation that an international crime may be punishable either for mere proof of the perpetrator's intention to act (without necessarily knowing all relevant circumstances) or for the perpetrator's mere awareness of the circumstances and consequences of a crime (without necessarily intending for them to occur).⁸³

In order to ease the apparent frictions in the structure and wording of Article 30 of the ICC Statute, both an analytical and a linguistic clarification might be helpful. From the psychological-analytical point of view, the mental element is determined by (the presence or absence of) cognitive and volitional components both of which can vary in different degrees.⁸⁴ Only to name five gradations of the mental element most common in national criminal codes and textbooks, its strongest type is characterized by the perpetrator's full knowledge of all material elements of the crime

⁸¹ Cf. *Report of the Preparatory Committee*, 51st Sess., Vol. II, p. 92, and *Decisions Taken by the Preparatory Committee at its New York Session February 1997* (A/AC.249/1997/L.5 (1997) 382 (in Bassiouni, *supra* note 4, 488 and 382, respectively).

⁸² As the decision of the Preparatory Commission is explained by Piragoff (in Triffterer, *supra* note 47, margin No. 10). He can be hardly followed, however, insofar as he declares the concepts of 'intent' and (as its prerequisite) 'knowledge' as incorporated in the civil law term '*dolus directus*' (ibid., margin No. 19); at least in German doctrine '*dolus eventualis*' as well is characterized by both volitional and cognitive components, as described hereafter. Cf. also the criticism by Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.

⁸³ To be sure, however, there exists quite a strong doctrine which would mainly, if not even exclusively, base the responsibility for an intentional crime on the perpetrator's awareness of all material elements of the crime and his notwithstanding performing it; cf. in particular, W. Frisch, *Vorsatz und Risiko* (1983) esp. pp. 94 ff., 255 ff., 494 ff.; for criticism of this position, see A. Eser and B. Burkhardt, *Strafrecht* Vol. I, (4th edn., 1992) p. 77 ff., 84 ff.

⁸⁴ For more details to this and the following, cf. Eser and Burkhardt, *ibid.*, Vol. I, p. 73 ff., 84 ff. with further references

and by his purposeful will to bring about the prohibited result; in this so-called *dolus directus in the first degree* the volitional element is certainly predominant, as for instance in the case of genocide where the perpetrator plans on killing as many members of the protected ethnic group as possible. This final will to kill is less strong in terms of a *dolus directus in the second degree* when, as in the case of a war crime, the perpetrator aims at destroying a certain building, while not wishing, however certainly knowing that he cannot reach his military aim without inevitably killing innocent civilians. The volitional element becomes even less strong and, thus, the cognitive element gains more weight, in the case of so-called *dolus eventualis*, where in the aforementioned example of a war crime the perpetrator does not wish to kill civilians, but in being aware of this danger is prepared to approve of it if it should happen. Although coming very close to this last gradation, a further one can vary insofar as the perpetrator is aware of the dangerousness of his bombing a building, but is not prepared to hit innocent civilians as well and therefore acts solely due to his relying on the absence of civilians at the scene; within this spectrum of 'recklessness' or 'conscious negligence', as named in certain jurisdictions, the cognitive element is still present while the volitional element is lacking. One step further takes us to so-called 'unconscious negligence', where even the cognitive element is no longer actually present, but is merely hypothetical in that the perpetrator should and could have known of the presence of circumstances and the occurrence of consequences constituting a crime by his conduct.

When in describing these various gradations of the mental element the terms 'intent', 'intention' and 'intentionally' did not appear, this was done on purpose as these terms are burdened with various meanings and their broader and narrower senses may be easily mixed up. This terminological problem seems to be an English phenomenon. Whereas other legal languages, such as Italian and German, can easily comprise the three aforementioned forms of *dolus* as 'dolo' or 'Vorsatz', thereby possessing special expressions for their cognitive and volitional elements in terms of 'coscienza e volontà' or 'Wissen und Wollen',⁸⁵ in English legal terminology a similar distinction between 'dolus' as distinct from other mental elements (such as recklessness and negligence) and their cognitive and volitional components seems not to exist; therefore, the term 'intentional' appears at times in the broader sense of 'dolus' and in other contexts in the narrower sense of volitional (as distinct from cognitive). Despite the fact that 'intention' and 'purpose' are commonly used synonymously,⁸⁶ however, if it is true that 'intention' is the

⁸⁵ Cf. to Art. 42 of the Italian Codice Penale C. Fiandaca and E. Musco, *Diritto Penale, Parte Generale* (3rd edn., 1999) 305 ff. and to § 15 German Strafgesetzbuch, P. Cramer and D. Sternberg-Lieben, in A. Schönke and H. Schroder, *Strafgesetzbuch: Kommentar* (26th edn., 2001) § 15, margin Nos. 9 ff.

⁸⁶ An observation which had induced the Canadian drafters of a new Penal Code to substitute 'intent', because of the difficulties surrounding this term, entirely by 'purpose' (in Law Reform Commission of Canada, *recodifying criminal law*, 1987, p. 22).

general word, while 'intent' is directed at a certain result and 'purpose' expressing a certain determination,⁸⁷ 'intention' could stand for *dolus*, whereas 'intent' could express its volitional component.⁸⁸

In view of these facts the mental element in Article 30 of the Rome Statute may be construed in the following way.

First, instead of 'mental element', Article 30 should bear the heading, or at least be understood, in terms of '*intention*', the reason being that the present title gives the impression of comprising all mental requirements while, in fact, Article 30 only deals with intention (in the aforementioned broader sense), whereas other equally mental phenomena, such as mistake of fact or law as well as the commander's responsibility for negligent failure to prevent his forces from committing a crime, are dealt with elsewhere (in Articles 32 and 28(a)(i), respectively).

Second, paragraph 1 of Article 30, in requiring '*intent and knowledge*' (unless otherwise provided) expresses the principal composition of 'intention' by both *volitional and cognitive components*. By expressly naming both, it is made clear that each of them may have its own significance as, for instance, in the case of Article 7(1) of the ICC Statute where the crime of murder, extermination etc. must be committed with both intent and knowledge, whereas with regard to the widespread or systematic attack the crime is part of 'knowledge' alone suffices.⁸⁹

Third, paragraph 1 of Article 30 having left open what is to be understood by 'intent' and 'knowledge', definitions are given in paragraphs 2 and 3. Although paragraph 1 relates intent as well as knowledge without any differentiation to the '*material elements*' of the crime, the reference points of intent and knowledge are, in fact, different as evidenced by the distinctive mental requirements with regard to conduct, consequences, and circumstances in paragraphs 2 and 3.

Fourth, whatever else the material elements may be,⁹⁰ according to paragraph 2, the reference points of *intent* are only the *conduct* and the *consequence(s)* thereof.

⁸⁷ Cf. *The Random House College Dictionary* as to intention. As to the still varying use of these terms and concepts in English legal terminology, see G. P. Fletcher, *Rethinking Criminal Law* (1978) 396 ff.; Smith and Hogan, *supra* note 2, 54 ff.

⁸⁸ As a matter of fact, this terminology seems also reflected in Art. H Proposal 3 of the Preparatory Committee which in providing that 'there cannot be a crime without the *intention* to commit it' (*Report of the Preparatory Committee*, 51st Sess., p. 92 f., in Bassiouni, *supra* note 4, 488), obviously understood 'intention' in the broader sense of *dolus* (as distinct from mere recklessness or negligence) whereas Proposal 1 in requiring 'intent [or] [and] knowledge' means 'intent' in the narrower sense of volitional (as distinct from cognitive). Yet, a completely different position was taken by Proposal 2 which wanted to exclude punishability only 'if a person is not aware of the facts constituting an offence', thus apparently getting completely rid of the volitional element.

⁸⁹ For more details, see H. Von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 79–126 (98). Another example of different requirements with regard to the volitional and cognitive element can be found in Art. 8(2)(b)(iv) ICC Statute.

⁹⁰ For more details, see hereafter at IV.C.

But even between these two material elements a remarkable difference must be mentioned: whereas the relation to conduct must be truly volitional (sub-paragraph (a)), the relation to a consequence (of the conduct) need not in any case be volitional as according to sub-paragraph (b), rather it suffices that the perpetrator is 'aware' that the consequence will occur in the ordinary course of events—thus, even within the intent requirement a clear degradation from volition to mere cognition is to be noticed.⁹¹

Fifth, in relating *knowledge* primarily to *circumstances* and to *consequences*, though the latter only insofar as they occur in the ordinary course of events, paragraph 3 is correct in assuming that circumstances can normally only be known of but not be intended. This is not exclusively so, however, as in certain cases the perpetrator can very well wish to have a certain circumstance present, as for instance, if he intends to kill not just any human being but rather a member of an ethnical group (in terms of Article 6 of the ICC Statute); this circumstance is, thus, not only an object of knowledge (according to paragraph 3 of Article 30) but of intent as well (paragraph 2). An even plainer inconsistency between paragraphs 2 and 3 concerns 'consequences occurring in the ordinary course of events' of which the perpetrator may have 'knowledge' (according to paragraph 3) as well as be 'aware' under the mantle of 'intent' (according to paragraph 2 (b)).

After all, although Article 30 on the 'mental element' can certainly not be called a masterpiece of legal architecture, it provides sufficient building blocks for a meaningful construction of 'intention' (as distinct from other states of mind which have not been explicitly regulated), the details of which are still to be considered.

C. The Object of Intention: The 'material elements'

It seems worth mentioning that the 'material elements' as the object of intention came into Article 30(1) of the ICC Statute at the very last moment, another sign of uncertainty about how to define the mental element. While the earlier drafts had continuously spoken of 'physical elements'⁹² and the late change to 'material elements' may appear as nothing more than a matter of synonymy,⁹³ there is at least a difference between the two terms insofar as 'physical' would certainly be narrower in connoting some sort of corporeal or at least external objects (such as bodily harm or destruction of property) whereas 'material' is open enough to

⁹¹ As to whether the volitional requirement for conduct is nothing more than the basic voluntariness of the act or as to how far the cognitive alternative with regard to the consequences is a gangway to mere *dolus eventualis* or even to a basically cognitive notion of intention, has to be dealt with later; see *infra*, IV.D.2.

⁹² Cf. Art. H Proposal 1 (1) in *Report of the Preparatory Committee*, 51st Sess., p. 92 (in Bassiouni, *supra* note 4, 488) up to Art. 29(1) in Draft Statute and Draft Final Act, p. 65 (in Bassiouni, *ibid.*, 144).

⁹³ As obviously assumed by Piragoff, in Triffterer, *supra* note 47, margin No. 8, when speaking of 'physical or material elements'.

comprise psychological injuries (as breaking the victim's will) or even legal detriments (as discrimination by apartheid or deprivation of a prisoner of war of a fair trial). On the other hand, however, 'material' element might even be understood as open enough to comprise any element connected 'with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct'. In these terms, as they can be found in the definition of 'material element of an offense' in the American Model Penal Code (Section 1.13 (10)), the intention of the perpetrator would have to comprise not only all positive definitional elements of the crime but the absence of justifications or other exclusions of criminal responsibility as well. Thus, provided that 'material' is understood in terms of 'substantive' as distinct from procedural elements, the only exceptions not to be covered by the intention would be matters of a procedural nature, such as the jurisdiction of the Court or the statute of limitations.⁹⁴ This broad notion of material elements, as it is represented in the German literature by a minority of scholars,⁹⁵ certainly has its merits if one is confronted with a mistake as to a ground of justification; for if the intention must comprehend both the presence of all positive elements of the crime (i.e. the act, its consequences, and attending circumstances) and the absence of facts which might negate the crime (as by a justification), the perpetrator's mistaken belief of being in a situation of self-defence would exclude his intention and, thus, his criminal responsibility. In this way, as will be seen later, one could indeed quite easily treat the mistaken assumption of a justification, as in the case of putative self-defence; for if the intention also had to comprise the absence of justifying facts, the erroneous assumption of those would 'negate the mental element' according to Article 32(2) sentence (2) of the ICC Statute.⁹⁶

Yet, it is very questionable whether this route can in fact be taken. Even if the aforementioned broad notion of 'material elements' in the Model Penal Code is a strong argument in this direction, the American Law Institute itself does not adhere to it consistently, as it later on defines the 'material element' of offences as 'those characteristics (conduct, circumstances, result) of the actor's behaviour that, when combined with the appropriate level of culpability, will constitute the offense'.⁹⁷ As culpability is thereby only mentioned as an additional (albeit necessary) component of responsibility, the 'material elements' constituting the offence are conduct, circumstances, and result (in terms of consequences) and, thus, exactly the same three objects of intent and knowledge according to Article 30(2)

⁹⁴ As, indeed, accepted in the aforementioned MPC formula as well.

⁹⁵ In particular by the so-called 'Lehre von den negativen Tatbestandsmerkmalen'; cf. the survey (with criticism) by H.-H. Jescheck and T. Weigend, *Strafrecht, Allgemeiner Teil* (5th edn., 1997) 248 ff.

⁹⁶ Cf. *infra*, V C.1(c), D(d), E(a)

⁹⁷ Model Penal Code § 2.02, Comment (1), note 1, p. 229.

and (3) of the ICC Statute. So when certain drafters of the Rome Statute considered 'material' to be interchangeable with 'physical', they apparently had the traditional *actus reus* in mind, as it also obviously underlay the definition of the 'material element' in Article IV(2) of the Draft International Criminal Code.⁹⁸ This narrower notion of 'material element' also corresponds to the '*élément matériel*' in the French translation of the Rome Statute, as the classical French doctrine would comprehend this element as '*manifestation extérieure de la volonté délictueuse*' (in terms of a prohibited result, such as aggression towards a human person and injuries in the case of homicide or, in the case of theft, the taking away of another's property),⁹⁹ as distinct from the '*élément légal*' comprising the unlawfulness and the absence of justification.¹⁰⁰ It thus comes as no surprise that the German translation of Article 30(1) of the ICC Statute (drawn up by the Federal Government) speaks of '*objektive Tatbestandsmerkmale*' in terms of comprising the positive definitional elements of the crime while not covering negative grounds for excluding responsibility.¹⁰¹

Continuing in this vein, precluding elements of (constituting or negating) unlawfulness from the concept of the 'material elements' and thus from being objects of intention, limits intention to the material elements and leads to the disregard of the prohibition as such and, consequently, to the irrelevance of the perpetrator's consciousness of unlawfulness (which meanwhile by many jurisdictions is deemed a necessary requirement of culpability). This logic could provide another explanation why the common law tradition with its narrow restriction of intent to the 'material' (in terms of physical-factual) elements of the crime definition has such difficulties in incorporating mistake of law into a comprehensive concept of an unlawful and culpable act.¹⁰²

⁹⁸ *Supra* at note 33.

⁹⁹ R. Merle and A. Vitu, *Traité de Droit Criminel* (7th edn., 1997) 604 ff.

¹⁰⁰ Cf. Merle and Vitu, *ibid.*, 506 ff.; see also Vogel, *supra* note 80, 132.

¹⁰¹ In the same sense comparing English and German law, see J. Watzek, *Rechtfertigung und Entschuldigung im englischen Strafrecht: eine Strukturanalyse der allgemeinen Strafbarkeitsvoraussetzungen aus deutscher Perspektive* (1997) 39 ff.

¹⁰² This restricting of intent and knowledge to the positive material elements of the crime, as Art. 30(1) ICC Statute was prepared to accept, would in the end also stand in the way of the so-called 'theory of intention' (as distinct from the 'theory of culpability'), according to which the consciousness of unlawfulness is part of intention (rather than an additional element of culpability); cf. Fletcher, *supra* note 87, 736 ff. For details to this competing '*Vorsatztheorie*' and '*Schuldtheorie*', discussed in other countries such as Spain as well in terms of '*teoría del dolo*' and '*teoría de la culpabilidad*', cf. Jescheck and Weigend, *supra* note 95, 452 f. and Mir Puig, *supra* note 80, 561 ff., respectively, both with further references. As to the general structure of the crime, cf. the scheme by Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 61 ff.

D. Reference Points of 'intent': Conduct—Consequences

1. The Distinction between Conduct, Consequences, and Circumstances

From a non-common law point of view, it may be surprising that the objects of intention are explicitly split between conduct and circumstances as reference points of intent (paragraph 2 of Article 30 of the ICC Statute) and consequences and circumstances as reference points of knowledge (paragraph 3).¹⁰³ Although certainly analytically possible and indeed relevant in other contexts (such as causation and aggravating or mitigating circumstances), these distinctions seem to be of little significance, as the intention must comprise all definitional elements of the crime anyway.

At a closer look, however the distinction between the conduct and its consequences (including physical effects and any other detrimental results), as it is familiar to common law doctrine and legislative drafting,¹⁰⁴ can at least sharpen one's eye for more or less apparent differences in the character of crimes and possibly different conclusions with regard to the requisite mental state. This holds true particularly for the distinction between 'conduct-crime' and 'result-crime', as the 'classical' German distinction between '*Tätigkeitsdelikte*' and '*Erfolgsdelikte*'¹⁰⁵ may be best described.¹⁰⁶ Both categories are to be found in the Rome Statute's catalogue of crimes as well: whereas most international crimes require a certain result to be caused by the forbidden conduct, such as the killing of members of the protected group in the case of genocide,¹⁰⁷ quite a few crime definitions merely proscribe a certain activity, such as the declaration that no quarter will be given¹⁰⁸ or the simple employment of poison without necessarily injuring a particular person.¹⁰⁹

Different again are two other types of provisions. One is characterized by merely proscribing a certain result without specifying the action bringing it about, as in

¹⁰³ Cf. *supra* IV.B.

¹⁰⁴ As a now 'classical' example, see Art. 2 § 2.02 Model Penal Code, p. 255 ff.; this same distinction can be found in § 2 (4) of the Canadian Draft Bill, *supra* note 86, 21 f.

¹⁰⁵ Cf. Jescheck and Weigend, *supra* note 95, 260 ff.; in the same way the Spanish doctrine distinguishes between '*delito de mera actividad*' and '*delito de resultado*'; cf. Mir Puig, *supra* note 80, 200 ff. Although with different terminology, in substance the same distinction seems to underlie the French differentiation between '*infraction formelle*' and '*infraction matérielle*'; cf. F. Desportes and F. Le Gunehec, *Droit pénal* (1999) 361, at 377 ff.

¹⁰⁶ Cf. G. Williams, *Criminal Law* (1983) 78; Smith and Hogan, *supra* note 2, 29 f.; P. Alldridge, 'The Doctrine of Innocent Agency', 2 *Criminal Law Forum* (1990) 45–83 (54 f.).

¹⁰⁷ Art. 6(a) ICC Statute.

¹⁰⁸ Art. 8(2)(b)(xii) and (d)(x) ICC Statute. Another example might be 'conscripting or enlisting children under the age of fifteen years into the national armed forces' (Art. 8(2)(b)(xxvi) ICC Statute whereas the other alternative of this provision as to 'using [the children] to participate actively in hostilities' would constitute a result crime.

¹⁰⁹ Art. 8(2)(b)(xvii) ICC Statute. For further examples, see Art. 8(2)(b)(xvii–xx) ICC Statute.

the case of 'causing serious bodily or mental harm to members of the group'.¹¹⁰ The other type is composed of both a specific action and a special result, as in the case of 'other inhumane acts of a similar character intentionally causing great suffering'.¹¹¹

Differences such as those found in the various crime definitions may entail different requirements regarding states of mind. This point, however, is less a matter of the general requirements of intent than of the construction of the individual crimes.

2. Intent in Relation to 'conduct'

According to Article 30(2)(a) of the ICC Statute, in order to have intent in relation to conduct the person must 'mean to engage in the conduct'. This formulation, perhaps meaningless to some rather cryptic to others, needs clarification in two respects.

First, speaking of 'conduct' seems to 'constitute either an act or an omission, or a combination thereof', as proposed in the 1997 Session of the Preparatory Committee¹¹² and finally submitted to the Rome Conference.¹¹³ As the Conference was not able to reach agreement on the circumstances in which a person could be held criminally responsible for an omission, the aforementioned definition of conduct was deleted with the understanding that the question of when omissions might constitute or be equivalent to (positive) conduct should be resolved by the Court.¹¹⁴ Thus, the term conduct in this article on the mental element seems to be a forgotten remnant which would have to be understood as a positive act which is to be intended by the perpetrator. With this interpretation, however, any cases of omission would not be covered by Article 30 but would rather need special regulation according to the opening words of paragraph 1 ('unless otherwise provided').¹¹⁵ Yet, this interpretation is neither cogent nor recommendable since the Rome Statute does indeed contain instances of responsibility for omissions, as in the case of 'intentionally using starvation of civilians as a method of warfare'¹¹⁶ or of a commander 'failing to take all necessary and

¹¹⁰ Art. 6(b) ICC Statute.

¹¹¹ Art. 7(1)(k) ICC Statute.

¹¹² Art. G: *Actus reus* (act and/or omission) (1) in *Decisions Taken by the Preparatory Committee at its Session held in New York 11–21 February 2000*, AJAC.249/1997/L.5 (1997) 26 (in Bassiouni, *supra* note 4, 382).

¹¹³ Art. 28(1) of the *Draft Statute and Draft Final Act*, p. 64 (in Bassiouni, *supra* note 4, 144); as to the inclusion of *omission* finally not recognized by the ICC Statute as general base of criminal responsibility (Ch. 20 above, at VII), cf. P. Saland, 'International Criminal Law Principles', in Lee, *supra* note 89, 205.

¹¹⁴ Cf. Piragoff, in Triffterer, *supra* note 47, margin No. 17.

¹¹⁵ As suggested by Piragoff, in Triffterer, *ibid.*, margin No. 18.

¹¹⁶ According to Art. 8(2)(b)(xxv) ICC Statute

reasonable measures' to prevent his subordinates from committing a crime.¹¹⁷ Even if in the first instance intent is required explicitly, its content has to be determined according to Article 30(2)(a) of the ICC Statute in that, in the case of omitting duties, the perpetrator must 'mean to engage in the omission'.

Secondly, with regard to 'means to engage' in the conduct, one may wonder whether this phrase is nothing else than the requirement of a voluntary act (or omission) as is essential for a human act anyway or whether it is to require some 'knowledge' of certain circumstances¹¹⁸ or whether it must be understood in terms of requiring a certain purpose, and, thus, restricting intent to '*dolus directus*'.¹¹⁹ In remembering the apparent uncertainty among the drafters of how to define the mental element, it seems very doubtful whether they consciously pursued such far-reaching consequences as that of the latter interpretation with such vague words as 'meaning to engage'. In addition, if this phrase was to require a certain purpose or even the causation of a prohibited result, it would not only be difficult to comprehend mere 'conduct crimes', (which by definition require neither a certain result¹²⁰ nor that it was aimed at), but even more the next provision on intent in relation to a consequence (paragraph 2 (b)) would be superfluous if the person's 'meaning to engage in the conduct' already encompassed any of its consequences or circumstances. Therefore, though it may appear as a matter of course, 'meaning to engage in the conduct' does not mean more than the perpetrator's will to act at all in voluntarily doing or omitting the physical movement (as distinct from involuntary moving or staying unmoved) and to behave in this and not in another way.¹²¹ In this respect, Article 30(2)(a) is indeed no more than the requirement of voluntary conduct without regard to its purpose or result.¹²² Another question then arises of whether and how the perpetrator must be aware of his conduct fulfilling the definitional elements of the relevant crime; this, however, concerns his knowledge to be dealt with later.¹²³

3. Intent in Relation to a 'consequence'

According to Article 30(2)(b) of the ICC Statute, this relation can exist in two ways: first, in that the perpetrator 'means to cause that consequence'; or secondly,

¹¹⁷ Art. 28(a)(ii) and (b)(iii) ICC Statute.

¹¹⁸ As for instance suggested by Piragoff, in Triffterer, *supra* note 47, margin No. 19.

¹¹⁹ As speculated by C. Kress, 'Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts', 1 *Humanitäres Völkerrecht* (1999) 6 and apparently assumed by Piragoff (*ibid.*) in perhaps misinterpreting the civil law concepts of intent.

¹²⁰ Cf. *supra*, IV.D.1.

¹²¹ The same seems to be meant in the German translation that 'die betreffende Person im Hinblick auf ein Verhalten dieses Verhalten setzen will'.

¹²² To this extent, para. 2(a) could indeed correspond to the French '*dol général*', as probably assumed by Elliott, *supra* III.C at note 59), whereas subparagraph (b) would correspond to the '*dol special*'.

¹²³ *Infra*, IV.E.

that it suffices that the perpetrator 'is aware that [the consequence] will occur in the ordinary course of events'. Whereas in the preceding subparagraph (a) on conduct little was to be learned with regard to the content and degrees of intent, this subparagraph (b) contributes more in these respects.

(a) First and foremost, it must be made clear what is meant by the 'consequences' the perpetrator must mean to cause or at least to be aware of. Although this provision is primarily designed for 'result crimes' in the aforementioned sense, and thus, can be treated as referring to the prohibited result (such as the death or the pain of the victim in cases of homicide or torture and their preceding causal chains), this provision can also concern 'conduct crimes' at least insofar as the perpetrator must intend to procure the prohibited effect. So in the case of declaring to give no quarter¹²⁴ this declaration would need to be understood as such by the addressees or, in the case of the employment of poisoned weapons, the perpetrator must intend the poison to be exposed in such a way that it can become effective on humans.¹²⁵ Therefore, in transgressing the borderline between result and conduct crimes, 'consequences' must be understood in the broad sense of all definitional effects which may ensue from the prohibited conduct.

(b) The next question is that of the degree to which the intent must, more or less purposefully or perhaps merely 'eventually', be orientated towards the relevant consequence. In remembering the main gradations by which the volitional element of intention may be analysed,¹²⁶ three types of '*dolus*' must be examined with regard to sub-paragraph (b).

First, in so far as according to alternative (1) of Article 30(2)(b) of the ICC Statute the perpetrator must 'mean to cause' the consequence, the Rome Statute is obviously thinking of *dolus directus in the first degree*, where the perpetrator is directly aiming at procuring the prohibited result or any other definitional effect, for instance, where he wishes to kill many members of an ethnical group with the intent to destroy it at least in part according to Article 6(a) of the ICC Statute. In this example, the perpetrator would act on purpose both with regard to the killing of human beings and its being part of the genocidal aim to destroy an ethnical group.¹²⁷

Secondly, even if the perpetrator does not desire the prohibited consequence to occur, he can still have intent if, according to alternative (2) of Article 30(2)(b) of

¹²⁴ Cf. *supra* at note 107.

¹²⁵ Cf. *supra* at note 108.

¹²⁶ Cf. *supra* IV.B.

¹²⁷ Although not specifying in terms of 'first degree', Piragoff seems to conceive it in the same sense when speaking of '*dolus directus*' (in Triffterer, *supra* note 47, margin No. 21). Remarkably enough, however, Piragoff does not treat this alternative of 'means to cause the consequence' within para. (2)(b) here in question, but rather under the heading of 'knowledge' according to para. (3), for reasons not exposed but quite understandable as will be seen later.

the ICC Statute, he is 'aware' that the consequence will occur in the ordinary course of events. Whatever may be meant by 'ordinary course of events',¹²⁸ with regard to the awareness thereof this clause is obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that the action will result in the prohibited consequence (though not desired) with certainty, as in the case of bombing a building inhabited by members of a persecuted ethnical group where some of them will unavoidably be killed, with the further inevitable consequence of destroying parts of this group. If in this case the genocidal act is considered as 'intentional' although the bomb planter may not have desired to kill any people or does not personally support the ethnical cleansing intentions of his superiors, this conclusion can be supported by attributional as well as evidentiary arguments: with regard to attributing consequences to the causer, it does not matter whether he was directly aiming at them or whether he, in pursuing a different goal, was prepared to let the prohibited result occur, thus using it as means to another end, as in the case where it is the military commander's first priority to destroy the building for strategic reasons while knowing with certainty that this goal could not be reached without killing innocent inhabitants. And from an evidentiary point of view, one could argue that, in acting though aware of the prohibited consequences, the perpetrator was indeed willing to accept them. This position is at least feasible so long as the perpetrator assumes that the prohibited consequences 'will' occur, as required by sub-paragraph (b).

Finally, the last mentioned requirement of the perpetrator's awareness that the prohibited consequence 'will' occur, is also crucial in marking the borderline mere *dolus eventualis* and other less strong forms of the mental element,¹²⁹ as in the case where the perpetrator is merely aware of the risk that the prohibited effect may result from his conduct but is not certain that it will in fact occur. Whereas the civil law tradition would still treat it as intention if the perpetrator, aware of the risk that his conduct may cause the prohibited result, is prepared to accept the result should the prohibited result in fact occur,¹³⁰ this seems not to be the position of the Rome Statute when requiring that in the perception of the perpetrator the consequences 'will' rather than merely 'may' occur. Therefore, when bombing the building, the perpetrator would be responsible for intentional killing only if he was certain that he could not reach his strategic aim without

¹²⁸ As will be discussed in connection with the 'knowledge' thereof according to para (3), *infra*, IV.E.2.

¹²⁹ Cf. *supra*, III A.

¹³⁰ Although very much could be said about the critical borderlines of *dolus eventualis* to *dolus directus*, on the one side, and 'recklessness' and 'negligence', on the other, the demarcation as suggested here seems to prevail. Cf., for instance, Jescheck and Weigend, *supra* note 95, 297 ff; M. Cobo Del Rosal and T. S. Vives Anton, *Derecho Penal* (3th edn., 1990) 46 ff.; F. Mantovani, *Diritto Penale* (3rd edn., 1992) 330 ff. For further considerations, see *infra*, IV.I.

necessarily killing inhabitants of the building, but not if he either assumed that the building was empty of any people or that they could have had the chance of leaving it in time after having been warned. Thus, even if in the latter case the perpetrator would be prepared to take the risk of possibly killing people, he would not—unless otherwise provided, which is not the case thus far—act intentionally in terms of Article 30(2)(b) of the ICC Statute so long as in the perception of the perpetrator it is not certain that the casualties ‘will’ in fact occur.

E. ‘Knowledge’ with Regard to Circumstances and Consequences

1. The Role of Knowledge for the Mental Element

Basically, in combination with intent as the volitional component dealt with before, knowledge is the cognitive component of intention according to Article 30(1) of the ICC Statute.

In spite of this seemingly independent standing of knowledge as implied by its having its own definition in Article 30(3) of the ICC Statute, knowledge can in fact partially substitute intent by the perpetrator’s being aware that a definitional consequence of the crime will occur in the ordinary course of events according to Article 30(2)(b) of the ICC Statute. Thus, not only is knowledge a necessary element of intention, but, as in the case of *dolus directus* in the second degree and even more so for *dolus eventualis*, it is also an auxiliary one, at least as far as the awareness of consequences according to Article 30(2)(b) of the ICC Statute is concerned.

Despite its general nature, the definition of knowledge in Article 30(3) sentence (1) of the ICC Statute claims to apply only for this article, thus leaving room for deviating definitions in other articles of the Statute, as for instance with regard to intentionally launching an attack ‘in the knowledge’ that such an attack will cause incidental loss of life.¹³¹ Special definitions seem even more invited when the Statute speaks of ‘deliberately’ inflicting living conditions on an ethnical group ‘calculated’ to bring about its physical destruction in whole or in part.¹³² This move towards differing interpretations outside of Article 30 need not be taken too seriously, however, since according to paragraph (3) sentence (2) ‘know’ and ‘knowingly’ shall be construed in the same way as ‘knowledge’ even though Article 30 does not use either of these variations at all. Thus paragraph (3) sentence (2) can only be designed for interpretations of similar terms used outside of Article 30 in the same way as ‘knowledge’.

¹³¹ Cf. Art. 8(2)(b)(iv) ICC Statute.

¹³² Art. 6(c) ICC Statute; cf. also Art. 7(2)(b) where an almost identical crime definition speaks of ‘intentional’ instead of ‘deliberately’.

As according to Article 30(3), the object of knowledge must be ‘circumstances’ and ‘consequences’ and as in both cases knowledge is understood as ‘awareness’, each of these three terms needs particular attention.

2. With Regard to ‘consequences’

According to the substantially identical wording in Article 30(2)(b) alternative (2) and paragraph (3) sentence (1) alternative (2) of the ICC Statute, the perpetrator must be aware that ‘a consequence will occur in the ordinary course of events’. As with the intent construction in cases of *dolus directus* in the second degree, this cognitive requirement is designed primarily for result crimes, though not exclusively so; for it concerns any definitional effects the conduct may entail.¹³³ However, whereas with paragraph (2)(b) the emphasis is on the attribution of a consequence whose occurrence the perpetrator is anticipating in the ordinary course of events as being intended, with paragraph (3) which is considered here the focus is directed more to the cognitive question of what the perpetrator must be aware of in order to have knowledge of a consequence. In this respect, four points are particularly relevant.

The first concerns the expected *occurrence of the definitional consequence as such*. In this respect, the perpetrator must anticipate that his conduct will bring about the prohibited result or any other effects defined by the crime. This requires that the perpetrator, even if not necessarily anticipating the consequences of his conduct in every detail, must at least have a general proposition of the essential features of what will be procured by his conduct.

Secondly, the special reference to the ‘*ordinary course of events*’ concerns the situation where the perpetrator does not foresee with certainty that the consequence will occur in any event, for example where the intended ‘extermination’ by depriving the victims of access to food and medicine might not bring the calculated destruction of part of a population,¹³⁴ because the victims could get food or medical care unexpectedly by a foreign military support action from the air. Even if an ‘exterminator’ in these terms would not exclude sudden extraordinary foreign action impairing his intentions, he would still be held aware of the definitional consequence as long as he assumes that in the ‘ordinary course of events’, as would be the case without an ‘extraordinary’ foreign intervention, the victims will die due to lack of food or medicine. The same applies to simpler cases such as that of setting a fire which, if nothing surprising intervenes, will lead to the explosion of a building with then unavoidable casualties among the inhabitants.

¹³³ For more details to this aspect, cf. *supra*, IV D.1

¹³⁴ According to Art 7(1)(b)(2)(b) ICC Statute

Third, although it seems to come very close to the last configuration, as it also has to do with the course of events, another question concerns the awareness of *causation* as the link between the conduct and its consequence. As with the anticipation of the definitional consequence as such, so the causal chain need not be foreseen in all details but only in its essential course. Accordingly deviations in the actual path of causation from the one imagined are irrelevant as long as they remain within the boundaries of what may be foreseen according to general experiences of life. This would be the case if, instead of being killed immediately by the shot, the victim is merely wounded person but dies in the end from an infection due to not having been treated in a medically correct manner. If instead of maltreatment, however, the wounded person died from a foreign bombing while staying in the hospital, the boundaries of general life experience may be transgressed and, thus, the death is no longer attributable as intentional.

A further question concerns whether this distinction between essential and inessential deviations of the actual from the imagined cause may also be applied to the situation of a so-called *aberratio ictus* by which a victim other than the intended one is hit, as in the case where the perpetrator wants to kill A but for some reasons he fails and instead hits B. As this situation is hardly explicitly regulated anywhere, quite a few doctrines have developed which, (ignoring differences in detail and reasoning), can be summarized in two main ways. According to the one, it does not matter whether the perpetrator hit this or that object, so long as they are of the same kind and equal in value, as is the case with human beings. Consequently, the *aberratio ictus* would not discharge the perpetrator from having killed intentionally. According to the other view giving more weight to the concretization of the intent to a specific victim, the perpetrator could not be held liable for completed intentional killing but rather for attempted killing with regard to the intended victim and for negligent manslaughter with regard to the victim actually killed.¹³⁵ Whereas the latter position does not pose great problems for national laws which penalize negligent killing as well, the Rome Statute, when taking this route, as excluding responsibility for negligence, could punish only for attempted killing. This undesirable consequence might be a reason for opting in favour of the first position by disregarding the *aberratio ictus* with regard to equal objects and, thus, to hold the perpetrator responsible for an intentional crime. Which route is to be taken, is finally up to the Court.

At any rate, however, aberrations are irrelevant if the *perpetrator* is *indifferent* to the consequences his conduct may ensue. If the perpetrator shoots into a crowd without aiming at a specific victim, it does not matter if he hits this or that person. The

¹³⁵ For more details, see Jescheck and Weigend, *supra* note 95, 313 f; Mir Puig, *supra* note 80, 260 ff.; Smith and Hogan, *supra* note 2, 73; cf. also the explicit Italian legislation of Art. 82 of the Codice Penale and Mantovani, *supra* note 130, 383 ff

same is true with regard to a so-called *error in persona* to be dealt with in connection with other errors.¹³⁶

3. With Regard to ‘circumstances’

According to Article 30(3) of the ICC Statute, the perpetrator must be aware that ‘a circumstance exists’. This needs clarification in two ways.

Although *circumstance* could be understood as comprising all definitional elements of the crime with the exception of the perpetrator and his conduct, two reservations must be made: on the one hand, with regard to the consequences of the conduct because they are dealt with separately in an alternative version of paragraph (3),¹³⁷ therefore, even if consequences may generally be considered circumstances as well, in the Rome Statute they are treated as a special type. On the other hand, the perpetrator can himself be characterized by special circumstances in terms of possessing a definitionally required qualification, such as his being a military commander or superior.¹³⁸ Similarly, the conduct may require certain qualities or means, as for instance by the use of ‘force’ in the transference of children from one ethnical group to another or in the disappearance of persons.¹³⁹ This means that, with the exception of separately regulated consequences, circumstances can be any objective or subjective facts, qualities, or motives with regard to the subject of the crime (such as the perpetrator and any accomplices), the object of the crime (such as the victim or other impaired interests) or any other modalities of the crime (such as means or time and place of commission). Thereby it does not matter either whether these circumstances are required for constituting the crime as such or whether they are—though the Rome Statute, unlike most national codes, has not provided for this so far—merely of an aggravating or mitigating nature.

With regard to the required awareness that a circumstance *exists*, the wording is one-sided in its solely thinking of the presence of positive constituents of the crime (such as the victim’s belonging to an ethnical group or the use of certain means) while the knowledge of the absence of circumstances which would negate the crime (such as for instance grounds permitting deportation or necessities of war justifying the destruction or seizure of the enemy’s property¹⁴⁰) seem to have been forgotten. As it is indeed difficult to define knowledge in a way that it comprises both the presence of positive circumstances and the absence of negative circumstances of the crime, national codes, such as those of Germany and Poland,

¹³⁶ Cf. *infra*, V.C.1(a).

¹³⁷ Cf. *supra*, IV.E.2.

¹³⁸ Cf. Art. 28 ICC Statute.

¹³⁹ Cf. Art. 6(e) and Art. 7(1)(i) ICC Statute, respectively.

¹⁴⁰ Cf. Art. 7(2)(d) and Art. 8(2)(b)(xii) and (e)(xii) ICC Statute; for further examples, see Art. 8(2)(b)(v) and (viii) ICC Statute.

are more cautious, avoiding the reference to the 'existence' of a circumstance, they merely require the knowledge of the circumstances which are part of the crime definition,¹⁴¹ and thereby leave it open whether these circumstances are of a positive or negative nature. Nevertheless, the provision in question here can be construed in such a way as is favourable to the perpetrator and, thus, in accordance with Article 22(2) sentence (2) of the ICC Statute. Consequently, in order to have knowledge in terms of Article 30(3), the perpetrator must be aware of both the presence of the constituting circumstances and the absence of excluding circumstances of the crime.

4. With Regard to Aggravating or Mitigating Consequences or Circumstances

Although not explicitly mentioned in Article 30 of the ICC Statute, there can be no doubt that consequences or circumstances which merely aggravate (or, reversed, mitigate) the gravity of the crime or the blameworthiness of the perpetrator must be comprised by his intent and knowledge in the same way as the elements constitute the crime. It is along this line of reasoning that, with regard to the war crime of employing prohibited bullets,¹⁴² the Preparatory Committee's Elements require the perpetrator's awareness of the bullets uselessly aggravating the suffering or the wounding effect.¹⁴³ Although the ICC Statute, unlike most national penal codes, does not provide special sanctions for aggravating or mitigating circumstances, these can be taken into consideration in determining the sentence according to Article 78(1).

F. Requisites of 'awareness'

After having dealt thus far only with the object of the perpetrator's knowledge, namely as to what the perpetrator must be aware of in order to have intent or knowledge with regard to consequences or circumstances according to Article 30(2)(b) and (3) of the ICC Statute, the question remains as to whether awareness is nothing more than the knowledge of a certain fact or whether it may also require some sort of a normative knowledge and/or value judgement. The answer cannot be given unequivocally in one or the other direction as, to a certain degree, it depends on the nature of the definitional elements of the crime concerned, particularly with regard to the distinction between so-called descriptive and normative elements.

¹⁴¹ Cf. § 16 (1) German Strafgesetzbuch and Art. 28 Polish Kodeks karny.

¹⁴² Art. 8(2)(b)(xix) ICC Statute.

¹⁴³ Preparatory Commission Elements, p. 33.

1. Factual Knowledge

Insofar as the definitional element of a crime is perceivable by means of the human senses, such as sight, hearing, smell, taste, or touch, the necessity and possibility of the perpetrator being aware of it is most likely agreed upon universally. With regard to 'descriptive' elements of this sort, such as attacks on 'vehicles', 'towns', or 'villages',¹⁴⁴ the perpetrator must obviously know that the object he is attacking is not an unmovable construction but a movable 'vehicle' or that distant appearances are not mere images but buildings of a 'village' as well as a body which is being shot at is not a corpse but a still living human being. If the perpetrator lacks this factual knowledge, his mental element, as required by Article 30, is negated by mistake of fact excluding criminal responsibility according to Article 32(1) of the ICC Statute.¹⁴⁵

Although descriptive elements tend to be seen as being the same as objective elements, this identification with external objects is not entirely correct as internal elements can be of a descriptive nature as well as, for instance, in the case of forced pregnancy, the aider and abettor must be aware of the perpetrator's intent of ethnic cleansing.¹⁴⁶ In a similar way, the terms of 'utilizing' the presence of a civilian in order to fend off hostile military operations or of 'using' starvation of civilians as a method of warfare,¹⁴⁷ cannot be explained without regard to the subjective motivation of the perpetrator, a fact the perpetrator himself as any participant must be aware of.

2. Normative Evaluation

At a closer look, however, mere factual knowledge does not suffice in all, or even most cases. This is due to the psychological experience that the perception of a fact by the human senses must be transformed into a conceptual picture in order to be perceived as a definitional element of the crime. Although this may be realized regularly almost automatically and thus quickly, even in the simple case of attacking a 'vehicle' the perpetrator must not only see that the object of the attack is a construction with wheels, he must also perceive it as a 'vehicle' in terms of the crime definition concerned. Even this simple step, however, requires a conclusion which, beyond the sensual perception of facts, presupposes a (more or less) conscious or automatic judgement and, thus, implies some sort of normative evaluation. If more attention were paid to this psychological phenomenon, quite a bit of the dispute about whether *mens rea* is satisfied with mere factual knowledge or

¹⁴⁴ As in Art. 8(2)(b)(iii) and (v) ICC Statute.

¹⁴⁵ For more details, see *infra*, V.C.1.

¹⁴⁶ Cf. Art. 7(2)(f) in connection with Art. 25(3)(c) ICC Statute.

¹⁴⁷ As in Art. 8(2)(b)(xxiii) and (xxv) ICC Statute, respectively.

whether it requires some sort of value judgement as well (and, if so, whether the borderline runs between 'descriptive' and 'normative elements' or rather between elements of criminal and extra-criminal law¹⁴⁸) would lose significance as mere gradual rather than categorical issues. Nevertheless, it remains true that a material element of the crime, the more normative it is in nature, the more it requires some evaluation by the perpetrator for his being aware of it in terms of Article 30(3) of the ICC Statute.

This question of normative awareness is obvious in cases in which the crime definition explicitly refers to legal provisions as, for instance, in the case of imprisonment 'in violation of fundamental rules of international law'¹⁴⁹ or of war crimes 'within the established framework of international law'.¹⁵⁰ Provided that such 'referential norms', as the 'contextual elements' in the Preparatory Commission's concept may be characterized,¹⁵¹ are in the same way as the other definitional components indeed 'material elements' of the crime according to Article 30(1) of the ICC Statute,¹⁵² the perpetrator would be required not only to recognize the factual character of the deprivation of a civilian's physical liberty, but also to thereby be aware of his violating fundamental rules of international law, thus presupposing a sort of legal judgment.

The same holds true for elements whose normative-referential character, though not explicitly stated, can easily be gathered from their context. This is the case with the war crime of compelling a prisoner of war or other 'protected persons' to serve in hostile forces.¹⁵³ Whereas the 'person' is a descriptive element, its character as 'protected' cannot be determined without reference to certain protective norms.

Further down the ladder of normative elements are those which, without referring to specific legal norms, are inherently evaluative in nature, as with war crimes by 'inhuman' treatment¹⁵⁴ or by severe damage to the natural environment clearly 'excessive' in relation to the anticipated military advantage.¹⁵⁵ Obviously, it is

¹⁴⁸ As to a survey on this issue, see Jescheck and Weigend, *supra* note 95, 308 f.; C. Roxin, *Strafrecht, Allgemeiner Teil* (3th edn., 1997) 107 ff.; Smith and Hogan, *supra* note 2, 82 ff.

¹⁴⁹ Art. 7(1)(e) ICC Statute.

¹⁵⁰ Art. 8(2)(b) ICC Statute.

¹⁵¹ Without wishing to elaborate too extensively on this terminological problem, 'referential' appears preferable to 'contextual', as 'referential' expresses the relation to additional norms much better than 'contextual' elements which can be factual circumstances as well (as indicated by the Preparatory Commission Elements, Introduction, p. 5 para. 7 and p. 9, para. 3, respectively). The terming of 'legal elements' by Triffterer, in Triffterer, *supra* note 4, margin No. 17 f., seems even less helpful, as the other material elements of the crime are 'legal' as well.

¹⁵² As to this issue, see *infra*, IV.F.3.

¹⁵³ Art. 8(2)(a)(v) ICC Statute.

¹⁵⁴ Art. 8(2)(a)(ii) ICC Statute; cf. also Art. 7(1)(k).

¹⁵⁵ Art. 8(b)(iv) ICC Statute.

impossible to find treatment 'inhumane' or environmental damage 'excessive' without some sort of value judgement the criteria of which may differ.¹⁵⁶

Yet, even from apparently descriptive elements such as whether someone is a human being or something is a civilian object, and therefore easily perceptible by the human senses, normative implications can emerge if the aforementioned are to be distinguished from corpses or military objects, respectively; for whether a brain-dead, though still breathing body remains a human being protected against wilful killing, or whether a radio station used for private programmes, easily misused for military transmissions, remains 'civilian' or becomes 'military', is not merely recognizable by human senses, but depends on evaluative criteria.

Thus, before drawing conclusions from this analysis as to possible normative judgments by the perpetrator, one must keep in mind both the different types and the different degrees of evaluations and the factual basis which may be a component of a normative element. Therefore, rather than expecting a simplistic alternative between either requiring or rejecting any evaluation by the perpetrator (in addition to his factual knowledge), a differentiated approach should be taken along the following lines.

(a) Insofar as the material element is based on a certain *fact*, the perpetrator must be aware of it by means of his senses; therefore the perpetrator must know, for instance, that in the case of compelling service in hostile forces¹⁵⁷ he understands that his object is a protected 'person' in terms of being human or that in the case of destroying the enemy's 'property'¹⁵⁸ he is demolishing a physical object. The Preparatory Commission's Elements are correct to this extent in requiring that the perpetrator was aware of the 'factual circumstances that established the protected status' of the person or property.¹⁵⁹ The same holds true with regard to the type and gravity of the damage to the natural environment which render it 'excessive'¹⁶⁰ or with regard to the circumstances of the sexual violence constituting a 'grave' or 'serious' violation of the Geneva Conventions.¹⁶¹

¹⁵⁶ This is particularly evident with the war crime of outrages upon personal dignity according to Art. 8(2)(c)(ii) of the ICC Statute which the Preparatory Commission Elements also declare applicable to 'dead persons' (p. 39 fn. 57). In doing so, the Commission employs a concept of 'person' which may not be accepted universally, thus, evidencing its value character, the underlying criteria of which are open to dispute. This invitation to invoke mistake of law (Art. 32(2) ICC Statute) could have been easily avoided, however, if the Preparatory Commission had adhered to the wording of the Statute which does not speak of 'dignity' of a 'person' but rather of 'personal dignity' as still attributable to a human corpse even if it is no longer a 'person'.

¹⁵⁷ Art. 8(2)(a)(v) ICC Statute.

¹⁵⁸ According to Art. 8(2)(b)(xiii) and (e)(xii) ICC Statute, respectively.

¹⁵⁹ Cf. Preparatory Commission Elements, p. 18 ff. to Arts. 8(2)(a)(i)–(viii), (b)(iii), (xiii), (c)(i)–(iii), (e)(iii), (xii).

¹⁶⁰ According to Art. 8(2)(b)(iv) ICC Statute; cf. Elements, p. 24 f.

¹⁶¹ According to Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi) ICC Statute, respectively; cf. Preparatory Commission Elements, p. 45.

To the extent, however, that the factual core of the material element—expressly or implicitly—refers to a norm without which the material element can neither be fully conceived nor perceived, as with regard to the status of a person or property as ‘protected’, the full understanding and awareness of the material element is not an exclusive product of the senses alone but may additionally require some sort of evaluative conclusion, though not necessarily a particular act of evaluation; for when shooting at obviously unarmed civilians or bombing a nuclear plant producing uncontrollable and irreparable damage to the universal environment, the perpetrator’s knowledge of these facts—quasi-automatically—implies the awareness of the protected status of the civilians concerned or the excessiveness of the natural catastrophe. If, in such a case, the perpetrator nevertheless denied having been aware of the protected status or gravity of his act, he would simply not be credible. Therefore, the aforementioned, repeatedly employed phrase of the Preparatory Commission’s Elements¹⁶² can be followed so long as it is merely meant to express the perpetrator’s awareness of the factual circumstances that, as a matter of practice, allows us to infer his perception of the protected status or the disproportionality of his act. On the other hand, this phrase would no longer be feasible if it were meant to deny the perpetrator a value judgement in any case without exception.¹⁶³

(b) Insofar as the awareness of the material element thus presupposes a sort of normative *evaluation*, this does not necessarily entail that the perpetrator is required to know the relevant legal provision nor that he has to interpret the definition of a crime in the same professional way as can be expected from a lawyer; rather it will suffice that the perpetrator is aware of the existence of protective norms in the area concerned and the violative impact of his acts. This general guideline is to be exemplified in three respects:

First, with regard to norms establishing the status of certain persons or objects as protected, the perpetrator could not defend himself by pleading ignorance of the underlying statute or treaty; rather, it would suffice to show that he was aware that, for example, under the given circumstances, unarmed civilians cannot be equated with military enemies and, thus, must receive special protection.

Secondly, with regard to material elements, whose definition depends on normative criteria, as with regard to the differentiation between ‘military’ and ‘civilian’ objects, the perpetrator cannot, of course, be expected to have first read a military

¹⁶² References *supra* note 159.

¹⁶³ That such an exclusion of a value judgement by the perpetrator, although indicated in the Preparatory Commission’s General Introduction (Elements, p. 5, para. 4) is not its absolute position, is exemplified by the Commission’s exception with regard to the excessiveness (required by the war crime of excessive incidental death, injury, or damage according to Art. 8(2)(b)(iv) ICC Statute) the knowledge of which required ‘that the perpetrator makes the value judgement’ as described therein (Elements, p. 25, note 37).

manual; rather, by becoming aware of the way the vehicle is employed in a battle or the building is used for counter-attacks, he will be able to make that judgement without first having consulted special regulations.

Thirdly, the same is true with regard to material elements that are inherently, or at least partly, normative by nature, as with war crimes involving 'inhuman' treatment¹⁶⁴ or by outrages upon 'personal' dignity.¹⁶⁵ Even if these terms require and have found special interpretation in court decisions and handbooks, not easily accessible for a layman, the perpetrator can be treated as being aware of the mental element if he understands the social significance of the elements concerned in a layman's manner. This is to say that the perpetrator could not deny the characterization of biological experiments with a prisoner of war as 'inhuman' through ignorance of the learned literature on the concept of 'humanity' as long as he was aware of the general conviction that one may not treat a human being as an animal in terms of a guinea pig against his will and/or with disproportionate risks. This device of a 'parallel evaluation in the layman's sphere'¹⁶⁶ is, in fact, not an exceptional phenomenon, but relevant for almost any 'subsumption' of facts under the law. If, for instance, in the war crime of destruction of property¹⁶⁷ the perpetrator interpreted 'destruction' in terms of completely taking apart the vehicle, it would suffice for his *mens rea* to have known that by damaging all the wheels, the vehicle could no longer be used.

3. Special Issues of 'referential norms'

The question remains whether the preceding guidelines can be applied in the same way to those elements of the crime definitions which, as indicated in the prior analysis of potential normative implications, explicitly refer to legal provisions.¹⁶⁸ In resisting the temptation to prejudice the answer by speaking of 'contextual circumstances', 'context elements', 'attendant circumstances', 'international', or 'jurisdictional elements', as found in the Preparatory Commission's Elements as well as in other documents and publications, one must keep in mind that the 'referential' function of these norms cannot spare one the trouble of clarifying the specific nature of the elements concerned, as it may entail different consequences with regard to the perpetrator's awareness.

Above all, as a matter of analysis, it seems interesting to note that the ICC Statute employs a technique of referencing which appears diverse, to say the least.

¹⁶⁴ Art. 8(2)(a)(ii) ICC Statute; cf. *supra* note 154.

¹⁶⁵ Art. 8(2)(b)(xxi), (c)(ii) ICC Statute; cf. *supra* note 156.

¹⁶⁶ As in particular employed in German theory and practice in terms of a 'Parallellwertung in der Laiensphäre': cf. P. Cramer and D. Sternberg-Lieben, in Schönke and Schröder, *supra* note 85, § 15 margin Nos. 39, 43 f.; Jescheck and Weigend, *supra* note 95, 295 f., both with further references.

¹⁶⁷ According to Art. 8(2)(a)(iv) ICC Statute.

¹⁶⁸ Cf. *supra* notes 149–151.

Whereas Article 8 on war crimes explicitly refers to the Geneva Conventions (paragraph 2(a)) or the ‘established framework of international law’ (paragraph 2(b)), Article 7 on crimes against humanity refers to ‘fundamental rules of international law’ (paragraph 1(e)) and to ‘State policy’ of committing acts ‘as part of a widespread or systematic attack directed against any civilian population’, where-in knowledge is explicitly required solely with regard to the attack (Article 7(1)). Again different from this specification of the perpetrator’s knowledge, instead of referring to any antecedent convention, Article 6 on genocide defines the various genocidal acts on its own, all under the general chapeau, however, that the acts have to have been committed with intent ‘to destroy, in whole or in part, a national, ethnical, racial or religious group’, thus, providing contextual circumstances the perpetrator’s awareness of which is in question. Just to give some further examples of the variety of referential norms not exhausted here, mention may be made of the legal element of ‘unlawful’ deportation or confinement¹⁶⁹ or of the absence of ‘previous judgment pronounced by a regularly constituted court’.¹⁷⁰ Or to make the referential variety even more complex, the Preparatory Commission reads additional legal references into the Statute, as in the case of deportation by requiring that the protected persons were ‘lawfully’ present in the area.¹⁷¹ With regard to these and similar referential elements the question is whether and to what extent the perpetrator must be aware of them. As neither the relevant crime definitions (Articles 6–8) nor the general rule on mental element (Article 30) of the ICC Statute produce clear and comprehensive answers, the requisite awareness very much depends on the individual nature and function to be construed from the relevant elements concerned. This leads to the following inclusions and exclusions:

(a) On the one hand, there can be no doubt that referential norms or circumstances, as long as they are not of a predominantly jurisdictional or otherwise procedural nature as shown below (b), do in principle require awareness by the perpetrator in the same way as any other element material for constituting the crime as such or for heightening its gravity. On this basis, it does not matter whether an element is part of the specific crime definition, as in the case of severe deprivation of physical liberty in violation of ‘fundamental rules of international law’,¹⁷² or whether the relevant element is part of the chapeau, such as the genocidal intent to destroy a protected group (Article 6 of the ICC Statute). This general statement requires some specifications, however.

First, because in the last mentioned example of genocide the individual genocidal act (such as killing or torturing) must be committed with the broader intent to

¹⁶⁹ Art. 8(2)(a)(vii) ICC Statute.

¹⁷⁰ Art. 8(2)(c)(iv) ICC Statute

¹⁷¹ Preparatory Commission Elements, p. 11, paras. 2 f. to Art. 7(1)(d)

¹⁷² Art. 7(1)(e) ICC Statute

destroy in whole or in part the protected group, one would expect that the perpetrator knew that his conduct was 'part of a pattern of similar conduct directed against the group'.¹⁷³ As this general policy requirement seemed to be too difficult to be proven in each case, in its final Elements, the Preparatory Commission seems content with proving the individual intent and leaving it up to the Court to decide on a case by case basis on the perpetrator's knowledge of the contextual circumstances in terms of the general genocidal policy.¹⁷⁴ Even with this evidentiary reduction, however, the basic concept that the perpetrator must have been aware of a general genocidal plan is upheld, although he need not know all details of such a plan or policy as has also been ruled by the ICTR in the *Kayishema/Ruzindana* case.¹⁷⁵ The same holds true with regard to the chapeau of Article 7 of the ICC Statute according to which the individual crime against humanity must be committed 'as part of a widespread or systematic attack directed against any civilian population'. Even if the Statute explicitly requires knowledge solely with regard to the attack, the Preparatory Commission's Elements presuppose knowledge of the policy element of a widespread or systematic attack, thereby again lowering the requirements of proof by finding the intent clause satisfied if the perpetrator intended to further such an attack.¹⁷⁶ Although the chapeau of Article 8 of the ICC Statute on war crimes seems to be governed by the same principles, consequently requiring the perpetrator to be aware of committing the individual crime 'as part of a plan or policy or as part of a large-scale commission of such crimes' (paragraph 1), this conclusion is highly controversial due to additional qualifications to be discussed below (b).

Second, with regard to references to legal principles or provisions, as with the crimes against humanity of imprisonment or persecution 'contrary to international law',¹⁷⁷ or with regard to 'unlawfulness' in general, as with the war crimes of unlawful deportation, transfer, or confinement,¹⁷⁸ the manner of evaluation is not fundamentally different from that applied to other normative elements.¹⁷⁹

(b) These statements are only true, however, as long as the definitional element of the crime concerned is a 'material' one in terms of Article 30(1) of the ICC Statute. Although one might expect that all elements of a crime definition are

¹⁷³ As proposed by the 1999 Preparatory Commission Elements, p. 5 ff.

¹⁷⁴ Cf. Preparatory Commission Elements, Introduction to Art. 6, p. 6.

¹⁷⁵ *Prosecutor v. Kayishema/Ruzindana*, Judgment 21 May 1999 (ICTR-95-1-T), paras. 94, 133 f.; cf. also *ICTY Prosecutor v. Tadić*, Judgment 15 July 1999 (IT-94-1-A), paras. 248, 271; *Prosecutor v. Kupreškić*, Judgment 14 January 2000 (IT-95-16-T), paras. 556 ff.; *ICTR Prosecutor v. Rutaganda*, Judgment 6 December 1999 (ICTR-96-3-T), para. 70; *Prosecutor v. Ruggu*, Judgment 1 June 2000 (ICTR-97-32-I), para. 20. Cf. also Ambos, *supra* note 26, 356 f., 774 ff.

¹⁷⁶ Cf. Preparatory Commission Elements, p. 9, Introduction to Art. 7(2).

¹⁷⁷ Cf. Art. 7(1)(e) and (h) ICC Statute.

¹⁷⁸ Cf. Art. 8(2)(a)(vii) ICC Statute.

¹⁷⁹ For details, cf. *supra* IV.F.2(b). With regard to the negation of unlawfulness on grounds of justification cf. *infra* V.D(c).

'material' as a matter of course, this is not necessarily so because certain elements may be of jurisdictional rather than 'material' nature. This situation is brought about by the double structure of the crime definitions of the ICC Statute which both constitute the jurisdiction of the Court and define the crimes for which the perpetrator can be held responsible under the jurisdiction of this Court.¹⁸⁰ Since it seems universally agreed upon that matters of procedure, including the jurisdictional power of the Court, are not constituent for the perpetrator's substantive *mens rea*, he does not need to be aware of requirements which are merely relevant to the jurisdiction of the Court. Questionable elements of this sort can be found in particular in Article 8 of the ICC Statute on war crimes in three respects: first, by the general, though not exclusive ('in particular'), requirement that the crime must be committed 'as part of a plan or policy or as part of a large-scale commission of such crimes',¹⁸¹ second, with regard to the requirement of an 'armed conflict',¹⁸² and third, by distinguishing between 'international' and non-international conflicts.¹⁸³ Although this is not the place for a final analysis and evaluation of Article 8 of the ICC Statute,¹⁸⁴ more needs to be said here, at least for the purpose of demonstrating the possible consequences for the mental element.

First, although the 'policy requirement' in the chapeau of Article 8(1) seems similar to that of Article 7(1) of the ICC Statute, thus requiring awareness of the perpetrator in the same way, there is one decisive difference to be taken into account. Crimes against humanity and genocide on the one hand acquire their character as international crimes solely through the commission of the individual acts as part of a State policy or because of the genocidal intent and thus presuppose these accompanying circumstances or motives as material constituents of the crime on the other hand, in terms of their substantive 'meaning', war crimes are defined by Article 8(2), in an exhaustive list while its chapeau (1) merely restricts the Court's jurisdiction 'in particular' (and, thus, not in substance) by the policy or large-scale clause. Consequently, provided that all other elements of a war crime are fulfilled, the perpetrator can be held criminally responsible even if he did not know that his individual crime was part of a plan, policy, or large-scale commission. The same position seems to be taken by the Preparatory Commission which, unlike for Articles 6 and 7, with regard to Article 8 does not even mention an awareness of the war criminal of the jurisdictional policy or large-scale requirement.¹⁸⁵

Second, with regard to the requirement of an 'armed conflict' in Article 8 of the ICC Statute, the jurisdictional aspect appears similarly predominant. Therefore,

¹⁸⁰ As to this double structure of the Rome Statute, cf. Ch. 20 above, I.

¹⁸¹ Chapeau of Art 8(1) ICC Statute.

¹⁸² Cf explicitly, Art 8(b), (c), (e) ICC Statute

¹⁸³ Cf Art. 8(c), (d) and (e), (f) ICC Statute, respectively

¹⁸⁴ As has been dealt with in Ch. 11 3 above.

¹⁸⁵ The same view seems to be taken by W. J. Fenrick, 'Art 8' in Triffterer, *supra* note 4, Art. 8, margin No. 4 as well as by A. Zimmermann, 'Art. 5' in Triffterer, *ibid*, margin Nos 8.

as was discussed in an Intersessional Meeting of the Preparatory Commission,¹⁸⁶ a so-called 'objective international law approach' took the view that the existence of an armed conflict, legitimizing an international authority's intervening at all, is merely an objective requisite for the Court's jurisdiction and, consequently, independent of the perpetrator's awareness of such a conflict. When considering the fact, however, that most of the criminal acts which qualify as a war crime, are punishable *per se* under national law as well and that, therefore, the wrongdoing of these crimes is aggravated when committed in connection with an armed conflict, it is more convincing to require the perpetrator to have been aware of an armed conflict, as suggested by a so-called 'subjective criminal law approach'. In its final Elements, the Preparatory Commission only went half way when having denied in a first step the requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict, it required in a second step the perpetrator's awareness of the 'factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with"'.¹⁸⁷ This position is certainly acceptable so long as the mere knowledge of facts enables the awareness of an armed conflict. To the same extent, however, that the perception of the connection of the individual crime to an armed conflict requires an evaluative judgement, the same rules must apply as with any other normative material element of the crime.¹⁸⁸

Third, with regard to the question of whether the armed conflict is of 'international' or 'non-international' character, decisive for the applicability of the ICC Statute to war crimes according to Article 8(2)(a) and (b) or of (c) and (e), respectively, the Preparatory Commission can be followed in not expecting a legal evaluation of the perpetrator;¹⁸⁹ for, aside from the material distinction between mere internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature)¹⁹⁰ as distinct from an 'armed conflict', the character of the latter as international or non-international is indeed of merely 'jurisdictional' concern.¹⁹¹

(c) A further category of referential norms which have a sort of 'justifying' significance in common, have received scarcely, if any attention in the Elements of the Preparatory Commission. Whereas for the crime against humanity of deportation

¹⁸⁶ Informal Intersessional Meeting of the Preparatory Commission for the International Criminal Court on 'Elements of Crimes', Siracusa/Italy, 31 January–6 February 2000; cf. also HRW 2000, Commentary, p. 3.

¹⁸⁷ Preparatory Commission Elements, Introduction to Art. 8, p. 18.

¹⁸⁸ For further details to this, see *supra* IV.F.2(b).

¹⁸⁹ Preparatory Commission, Elements, Introduction to Art. 8, p. 18.

¹⁹⁰ Cf. Art. 8(2)(d) and (f) ICC Statute.

¹⁹¹ This material irrelevance of the character as international or non-international is, incidently, a further reason why the categorization as 'international element' in terms of not requiring the awareness of the perpetrator and the equation with 'jurisdictional' can be misleading and is therefore avoided here.

the perpetrator is merely required to be aware of the factual circumstances that established the (unwritten) lawfulness of the presence of those concerned,¹⁹² with the war crime of improper use of a flag the perpetrator must have known of the 'prohibited nature' of such use.¹⁹³ By the same token, the war crime of sentencing or execution without due process requires the perpetrator to have been aware of the absence of a previous judgment or of the denial of relevant guarantees, essential or indispensable for a fair trial,¹⁹⁴ a mental requirement hardly to be met without any legal evaluation.

Contrary to these instances in which the justifying factor is formulated somehow in a positive way, the Preparatory Commission does not even take notice of the mental requirement where it would concern the absence of a ground excluding the wrongdoing or culpability, as with the absence of consent in the war crimes of biological experiments, pillaging, or sterilization¹⁹⁵ or the absence of a military or medical justification in the case of displacing civilians and mutilation.¹⁹⁶

This uneven approach by the Preparatory Commission is hard to understand. Because it can be a matter of accident whether essential elements of the crime are formulated in a negative or positive way, the legal technique cannot be prejudicial to the type and degree of awareness expected from the perpetrator. Therefore, provided that Article 32 on mistake of fact and law does not rule otherwise,¹⁹⁷ the awareness of the absence of grounds excluding responsibility is basically determined by the same requirements of factual knowledge and normative evaluation as positive material elements of the crime.

G. The Relevant Time of Knowledge

When requiring that 'the material elements are committed with intent and knowledge', Article 30(1) of the ICC Statute leaves no doubt that intent and knowledge must be present during the commission of the crime. Consequently, neither *dolus antecedens* (in terms of former knowledge no longer present during the commission) nor *dolus subsequens* (in terms of knowledge acquired after the act) can suffice.¹⁹⁸

¹⁹² Preparatory Commission Elements, p. 11, to Art. 7(1)(d).

¹⁹³ Preparatory Commission Elements, p. 27, to Art. 8(2)(b)(vii).

¹⁹⁴ Preparatory Commission Elements, p. 40, to Art. 8(2)(c)(iv).

¹⁹⁵ Cf. Preparatory Commission Elements, pp. 20, 43, and 45, to Art. 8(2)(a)(iv), (e)(v), and (vi), respectively.

¹⁹⁶ Cf. Preparatory Commission Elements, pp. 46 and 47f., to Art. 8(2)(e)(viii) and (xi), respectively.

¹⁹⁷ Cf. in particular, *infra*, V.C.1(c), 2, D.3, E(a), (b).

¹⁹⁸ This seems to be universally agreed upon, although its practical application may differ; for references, see Cramer and Sternberg-Lieben, in Schonke and Schroder, *supra* note 85, § 15, margin No 49.

This does not mean, however, that the perpetrator has to permanently reflect on the elements of his crime. It suffices rather that the knowledge of the material elements of the crime was influential on the perpetrator's formation of his intent and remains more or less consciously present by means of an 'accompanying consciousness'.¹⁹⁹ Therefore, a commander charged with having omitted to exercise necessary control to prevent subordinates from committing a war crime according to Article 28 of the ICC Statute, can be held aware of his role as commander even if he does not continuously think of this.²⁰⁰ Similarly, in the case of improper use of a flag of the United Nations,²⁰¹ the perpetrator need not constantly keep the image of the military vehicle's being improperly marked with UN emblems in mind; rather, it suffices to have co-consciousness (*Mit bewusstsein*) of this use.

H. 'Wilful blindness'

As awareness seems to suggest positive knowledge, the question is whether the perpetrator can be held liable if he lacked this only because he had wilfully shut his eyes to what he had otherwise become aware of. As it appears unfeasible to offer the perpetrator, by allowing him to close his eyes, an easy escape from responsibility hardly less blameworthy than knowledge through open eyes, the Preparatory Committee had suggested to close this loophole of 'wilful blindness' by means of an additional clause: in offering two alternatives, knowledge should also mean 'to be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether this circumstance exists' or 'to be wilfully blind to the fact that a circumstance exists or that a consequence will occur'.²⁰²

Since these recommendations were dropped in the end, with the result that the ICC Statute does not contain a special provision for 'wilful blindness', this waiver could certainly be interpreted as a decision against covering this case, as indeed opined by some authors.²⁰³ This conclusion is not cogent though, as an offender shutting his eyes to the truth is at least aware of possible, or even obvious, facts he merely does not want to see. Whether this may be called 'implied knowledge', 'constructive knowledge'²⁰⁴ or, as occasionally suggested, the 'second degree of

¹⁹⁹ For more details on this concept, see W. Platzgummer, *Die Bewusstseinsform des Vorsatzes* (1964) 83, 89ff.; Cramer and Sternberg-Lieben, in Schönke and Schröder, *supra* note 85, para. 15, margin No. 51 with more references.

²⁰⁰ As a landmark case in this respect, see *Bayerisches Oberstes Landesgericht*, 30 *Neue Juristische Wochenschrift* (1977) 1974 f. with comment by Eser and Burkhardt, *supra* note 83, Vol. I, p. 71 ff.

²⁰¹ Art. 8(2)(b)(vii) ICC Statute.

²⁰² Art. H (Proposal 1) (3) (b) *Report of the Preparatory Committee*, 51st Sess., Vol. II, p. 92 (in Bassiouni, *supra* note 4, 488).

²⁰³ Cf., though himself appearing undecided, Piragoff, in Triffterer, *supra* note 47, margin No. 26.

²⁰⁴ As used by the ICTY in *Prosecutor v. Tadić*, 11 September 1999, No. IT-94-9-T, para. 659. Cf. also ICTY Appeals Chamber in *Prosecutor v. Aleksovski*, IT-95-14/1-Ar 77, Judgement, 30 May 2001, paras. 49ff.

knowledge'²⁰⁵ does not matter as long as it is considered sufficient knowledge.²⁰⁶ With this question not having been dealt with by the Preparatory Commission, the final clarification as to this point is again left up to the Court.

I. 'Dolus eventualis' and 'recklessness'

Unlike 'wilful blindness' which is characterized by peculiarities on the cognitive level, *dolus eventualis* and *recklessness* have in common the fact that the volitional element, though in varying degrees,²⁰⁷ falls short of *dolus directus* in which the perpetrator purposefully, or at least unconditionally, wishes the conduct or result to occur.²⁰⁸

While in one of its alternative proposals, the Preparatory Committee had, once more, recommended a special provision for *recklessness*,²⁰⁹ it was dropped again in the end, this time, however, due to the crime catalogue not containing any case of recklessness, thus rendering a corresponding special provision superfluous. This political decision of not penalizing international crimes for recklessness may be deplorable,²¹⁰ yet as the statutory situation stands, the mere awareness of a risk which might occur, not to speak of unconscious negligence, is not a sufficient base for criminal responsibility according to the ICC Statute,²¹¹ and thus does not require further elaboration.²¹²

Less clear is the situation with *dolus eventualis* which, in disregarding a great variety of subtle distinctions, may be characterized as the perpetrator being aware of the risk that might occur and additionally being prepared to accept it should it in fact occur.²¹³ Whereas some authors are prepared to see this case covered by the intent concept of Article 30(1) of the ICC Statute,²¹⁴ the opposite opinion which does not see *dolus eventualis* recognized by the ICC Statute seems to prevail.²¹⁵

²⁰⁵ As by J. W. Wilson, *Criminal Law*, (1998)164.

²⁰⁶ As, for instance, recognized by M. McAuliffe de Guzmán, 'The Road from Rome: The Developing Law of Crimes against Humanity', 22 *HRQ* (2000) 335, 400; Schabas, *supra* note 57, 213 (with further references to the common law), and most likely sympathized with by Piragoff, in Triffterer, *supra* note 47, margin No. 26.

²⁰⁷ Which seems to be weighed differently from the gradation made here (*supra*, IV.B) in the common law (cf. Wise, in Sadat Wexler and Bassiouni, *supra* note 54, 51 f.).

²⁰⁸ Cf. also *supra*, III.A and B, IV.E.3.

²⁰⁹ Art. H (Proposal 1) (4) *Report of the Preparatory Committee*, 51st Sess., p. 92 (in Bassiouni, *supra* note 4, 488).

²¹⁰ As, for instance, expressed by Ambos, *supra* note 38, 21 f. and A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 153 f.; see also Schabas, *supra* note 57, 211 f.

²¹¹ As to this common evaluation, see, for instance, Ambos, *supra* note 38, 21, but also Saland, in Lee, *supra* note 89, 206, pointing out that the concept of recklessness, though not the term itself, is present in the ICC Statute's Art. 28, which was negotiated after Art. 30.

²¹² Cf. Schabas, *supra* note 62, 420.

²¹³ Cf. *supra*, IV.E.3 as to note 127.

²¹⁴ Cf., in particular, A. Gil Gil, *Derecho Penal Internacional* (1999) 235 ff.

²¹⁵ Cf. Piragoff, in Triffterer, *supra* note 47, margin No. 22.

Contrary to these either/or positions, it seems feasible to distinguish between consequences and other circumstances of the crime: with regard to consequences, *dolus eventualis* is indeed excluded as, according to Article 30(2)(b) alternative (2), the perpetrator must be aware that the consequence ‘will’ (and not only ‘may’) occur in the ordinary course of events, thus requiring certainty and not mere speculation, whilst indifference may suffice with regard to other elements of the crime, such as the age of the victim. If, for instance, in the case of transferring or conscripting children,²¹⁶ the perpetrator took and approved of the risk that the victims concerned were within the protected age, there is no convincing reason against holding him responsible for the intentional commission of the crime.

Even on such a partial extension of intention to the area of *dolus eventualis*, however, one can hardly go as far as the Preparatory Commission did by letting it suffice that, instead of knowing, the perpetrator merely ‘should have known’ that the victim concerned was within the protected age²¹⁷ or that certain symbols are protected from abuse.²¹⁸ By using the words ‘should have known’, the borderline between *dolus eventualis* and recklessness is clearly transgressed, and so the Preparatory Commission’s Elements are in this respect hardly reconcilable with the ICC Statute.²¹⁹

J. Mental Element and Complicity

As a general norm on the mental element, Article 30 of the ICC Statute is not only applicable to the perpetrator, but to other participants in terms of Article 25(3)(a)–(e) of the ICC Statute as well. This means that, in principle, the mental requirements for an accomplice are neither higher nor lower than those for the perpetrator, therefore a participant can in particular not be held responsible for mere recklessness or negligence either. Nevertheless, there are some particularities of complicity to be observed.

In general, due to the accessorial nature of complicity,²²⁰ the accomplice must have a ‘double intent’, both with regard to his own conduct and with regard to the intent and knowledge of the principal.²²¹ In both relations the requirements of intent and knowledge are basically the same as with regard to a single perpetrator.

²¹⁶ Arts. 6(e), 8(2)(b)(xxvi) and (e)(vii) ICC Statute.

²¹⁷ Cf. Preparatory Committee Elements, pp. 8, 37, 46 to Art. 6(e), 8(2)(b)(xxvi) and (e)(vii), respectively.

²¹⁸ Preparatory Commission Elements, pp. 26 and 27 to Art. 8(2)(b)(vii). Strangely enough, the Elements are not satisfied with ‘should have known’ in all alternatives of the aforementioned war crime, but only with alternative (2) on improper use of a flag and alternative (4) on improper use of the distinctive emblems of the Geneva Conventions, but not with regard to alternative (1) on improper use of flag of truce and alternative (3) on improper use of a flag of the United Nations, without any explanation given for this different treatment.

²¹⁹ See also the criticism by Schabas, *supra* note 57, 212.

²²⁰ As to this structure underlying the ICC Statute’s regulation of perpetration and participation, see Ch. 20 above, V.A.2.

²²¹ For details, see Ch. 20 above, V.D.4, E.2, F.2, G.3.

This general line is not without exceptions, however, which in particular concern two groups: one being aiders and abettors who, beyond their general double intent, must act ‘for the purpose of facilitating the commission of [such] a crime’ according to Article 25(3)(c) of the ICC Statute,²²² and the other being accomplices in group crimes, who, beyond their ordinary double intent, must have a special intention according to Article 25(3)(d) of the ICC Statute.²²³

V. Mistake of Fact and Mistake of Law according to Article 32 of the ICC Statute

A. Main Approaches

As already indicated in the introductory review of the reluctant recognition of mistake of fact and, even more controversial, mistake of law,²²⁴ Article 32 is perhaps one of the most enigmatic impediments of the ICT Statute’s general elements of criminal responsibility. Its evaluation very much depends on the penal-political preparedness for recognizing misperceptions of the perpetrator as a defence and on the conceptual ways of regulating this. In disregarding various nuances of innumerable opinions on mistake of fact and law, the regulation of Article 32, before going into details, may be reflected upon from two opposite approaches.

On the one hand, from the traditional common law perspective,²²⁵ Article 32 may draw applause both for leaving as little room as possible for mistake of law²²⁶ and for constructing a mistake, in order to be recognizable, as negation of the mental element in terms of intent and knowledge.²²⁷

On the other hand, from more modern perceptions prevailing in civil law jurisdictions and theories, the aforementioned strengths are in fact the very weaknesses of the ICC regulation; for, first, when accepting a mistake (of fact or of law) only if it negates the mental element,²²⁸ Article 32 is repetitious—and, thus, appears superfluous²²⁹—in merely restating the mental element as a requirement of criminal responsibility according to Article 30(1) without giving any further information as

²²² For details, see Ch. 20 above, V.E.2(a).

²²³ For further details, see Ch. 20 above, V.E.2(a).

²²⁴ Cf. *supra*, I and II with references to the various documents and drafts.

²²⁵ Cf. *supra*, I at note 3.

²²⁶ Even this narrow gate, however, appears too broad for some as in particular Cassese, *supra* note 210, 155 f., if compared with the traditional adherence of international case law to the principle of *ignorantia legis non excusat*.

²²⁷ Although the present wording of Art. 32 ICC Statute was finally proposed by Saland (in Lee, *supra* note 89, 210), its basic contents has earlier sources (cf. *supra*, II.C at note 33).

²²⁸ According to Art. 32(1) and (2) (sentence 2), respectively.

²²⁹ See Schabas, *supra* note 62, 426, Triffterer, in Triffterer, *supra* note 4, margin No. 11.

to when and how a mistake may negate the mental element.²³⁰ Second, by almost completely closing the door to mistake of law in requiring legal ignorance to nullify a mental element essentially focused on facts, the Rome Statute disregards growing sensitivity to the principle of culpability, particularly with regard to consciousness of unlawfulness (as distinct from and in addition to the fact-oriented intention), and third, in limiting intent and knowledge to the positive material elements of the crime, the Statute forecloses the possibility of mistakes with regard to (negative) grounds excluding criminal responsibility. From this perspective, it is no wonder that the ICC regulation of mistake, in particular with regard to that of law, has been described as 'archaic'.²³¹

The best way of analysing the main contents of this regulation seems to be starting with (B) a short survey of misperceptions of the perpetrator which might be possible at all, then distinguishing between recognized (C) and disregarded mistakes (D), and finally reflecting on solutions, if considered desirable (E).

B. Conceivable Objects and Ways of Misperceptions

Before looking into what mistakes have been recognized or rejected by the ICC Statute, one must be aware of the variety of objects about which and ways in which the perpetrator can err. Not being aware of the broad spectrum of conceivable errors may be one of the reasons why discussions on mistake of fact or law, particularly if conducted beyond borders and different legal cultures, are so often impaired by conceptual and terminological misunderstandings, fixations about specific points and possible political antagonism. Although it is, of course, impossible to give a comprehensive picture of all the problems involved,²³² at least the following types and possible objects of error may be outlined here.

First, although the basic distinction between mistakes of *fact* (paragraph 1) and *law* (paragraph 2) appears clear, this, if at all, only holds true with regard to elements of the crime completely perceivable by the human senses such as, for instance, identifying a living person as the victim of a killing. As soon as the question arises, however, as to whether this person belongs to a protected ethnical group, some sort of normative judgement may be required as has been demonstrated with regard to the awareness of normative elements according to Article 30(3) of the ICC Statute.²³³ This entails the question of whether an erroneous evaluation with regard to a normative implication, as given in the example of the

²³⁰ For further deficiencies of this sort, see *supra* I.

²³¹ T. Weigend, 'Zur Frage eines internationalen Allgemeinen Teils', in B. Schünemann *et al.* (eds.), *Festschrift für Claus Roxin* (2002) 1392. For further criticism see Kress, *supra* note 119, 7.

²³² As a first, though still not comprehensive analysis of potential errors cf. Fletcher, *supra* note 87, 146 ff., furthermore refined in his *Basic Concepts of Criminal Law* (1998) 149 ff.

²³³ For details, see *supra*, IV.F.2 and 3.

mistaken denial of the victim's protected status due to a normative misjudgement, is a mistake of fact, thus negating the mental element according to paragraph (1), or rather a mistake of law according to paragraph (2), and thus not necessarily excluding the mental element—a question which is not explicitly answered by the ICC Statute, therefore requiring further elaboration.

Second, corresponding to the previously mentioned distinction between descriptive and normative elements of the crime, mistakes can result from (a) *not recognizing a fact* which is present or assuming a fact which is not present or (b) from *erroneous evaluations* due to the unawareness of or misinterpretation of an existing norm, or the assumption of a non-existing norm.²³⁴

Third, both types of misperception can occur with regard to all *sorts of elements* or their position within the structure of the crime. They can concern:

- (positive) material elements in terms of Article 30(1) of the ICC Statute, as in the case that the object the perpetrator is shooting at is not, as he believed, an animal, but a human being or that he recognized it as such, but was not aware of its protected status, or
- (negative) grounds of excluding responsibility in erroneously assuming an attack which would allow the perpetrator to invoke self-defence or, in the case of an actual attack, in misjudging the permissible proportionality of his defence,²³⁵ or
- exemptions from punishability and jurisdiction, as in the case of a Head of State's unawareness of the irrelevance of his official capacity (according to Article 27 of the ICC Statute) or the perpetrator's misjudgement of the relevant age presupposed for the jurisdiction of the Court (according to Article 26 of the ICC Statute).²³⁶

Fourth, particularly with regard to *evaluative* mistakes, these can be due to:

- the misinterpretation of a normative element (as, for instance, the understanding of 'inhumane acts'²³⁷), or
- the unawareness of a protective norm (as with regard to the age of the victim),²³⁸ or
- the ignorance of referential norms (such as 'fundamental rules of international law' violated by imprisonment),²³⁹ or

²³⁴ As to this distinction cf. the scheme in Eser and Burkhardt, *supra* note 83, Vol. I, p. 179.

²³⁵ According to Art. 31(1)(c) ICC Statute.

²³⁶ As to more details on the various elements and levels which might be reference points of misperception cf. the scheme of the general structure of the offence by Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 62.

²³⁷ According to Art. 7(1)(k) ICC Statute.

²³⁸ E.g. according to Arts. 6(e), 8(2)(b)(xxvi) and (e)(vii) ICC Statute.

²³⁹ According to Art. 7(1)(e) ICC Statute; to further instances, cf. *supra*, IV.F at note 172 f.

- the unawareness of the prohibition as such (as, for instance, to the improper use of flags or other protected symbols²⁴⁰), or
- the assumption of a justification which is in fact not recognized (as the ‘*tu quoque*’ argument), or
- the erroneous assumption of an excuse (as with regard to duress), or
- the case where the perpetrator is fully aware of his wrongdoing but believes it unpunishable or, even if so under national law, believes that the ICC lacks jurisdiction.

Fifth, not lastly in face of this great variety of conceivable errors of the perpetrator, the possible *consequences* are of crucial significance: whereas, in principle, mistake of fact leads to the exclusion of the intention and finally, if recklessness and negligence are not punishable (as is the rule in the ICC Statute), to the discharge of the defendant, mistake of law by contrast is only recognized, if at all, on narrower conditions. Therefore it is of consequential importance whether an error falls within this or that category of recognized or irrelevant mistakes.

C. Recognized Mistakes

1. With Regard to Facts (Article 32(1) of the ICC Statute)

When mistake of fact is commonly pronounced as a valid defence, with regard to the ICC Statute this statement may be correct in principle, but bound by a qualification not to be overlooked; for, since mistake of fact does not exclude criminal responsibility *per se* but ‘only if it negates the mental element’ (paragraph 1), it refers to the prerequisites of the mental element in terms of intent and knowledge (Article 30(1)) without which the perpetrator cannot be held criminally responsible. Although this consequence is already expressed in Article 30(1), thus letting Article 32(1) seem repetitious,²⁴¹ this provision has its own, though questionable, function in that it (i) combines (and thereby restricts) recognizable mistakes of fact to the material elements of the crime and (ii) requires a mistake capable of nullifying intent or knowledge. Reversed, this means that possible reference points of a mistake of fact can only include the nature of the conduct and, more frequently, its circumstances and consequences in terms of Article 30(3). This has, in particular, the following consequences.

(a) The sole clear category of recognizable mistakes of fact is that ‘about *factual* elements of the definition’²⁴² in terms of ‘descriptive elements’ of the crime, perceivable by means of the human senses.²⁴³ If the soldier, for instance, does not realize

²⁴⁰ According to Art. 8(2)(b)(vii) ICC Statute.²⁴¹ As already had been criticized within the Preparatory Committee; cf. *Report and Draft Statute and Draft Final Act*, p. 67 note 21 to Art. 30 (in Bassiouni, *supra* note 4, 145), furthermore Triffterer, in Triffterer, *supra* note 4, margin No. 11.

²⁴² As described by Fletcher, *supra* note 232 (Basic Concepts), 156.

²⁴³ Cf. *supra*, IV F 1.

that the body he is shooting at, is already dead or that the building which appears to be a military unit, had in fact been turned into a civilian kindergarten, he would lack the factual knowledge of elements material for a wilful killing or attacking civilian objects and, thus, could not be held criminally responsible under Article 8(2)(a)(e) or (b)(ii) of the ICC Statute.

The same holds true in cases where the perpetrator does not foresee the consequence of his conduct, as for instance, the deportation of people²⁴⁴ he had assembled assuming that they would be merely needed for clearing away the debris of a bombing.

To be certain, however, not every case of mistaken identity entails the negation of the mental element. If the perpetrator, for instance, intended to kill the person in front of him because he held the victim for his personal enemy *A* while in fact it was a neutral *B*, this mere *error in persona* would be irrelevant because the material element of killing a human being, regardless of its personal identity, would in any case be fulfilled. Therefore, as long as in case of mistaken identity both the envisaged and the actual victim fall within the same definitional category of the crime, the perpetrator's intent and knowledge is not affected by his mistaking the identity.²⁴⁵ Consequently, the confusing of persons or things entails the negation of the mental element only if the objects confused are not equivalent in terms of corresponding to the same material element of the crime, as in the case that a soldier shooting a human being takes it for an animal; this mistake of fact would negate his knowledge of a material element, and thus, his intention of murder.

To a certain extent, a similar result is possible even in the case where a soldier knew he was attacking a human being without being aware, though, that the victim had a protected status as member of a peace keeping mission according to Article 8(2)(e)(ii) of the ICC Statute. In this case, he could only be held responsible for assault and battery according to national law, but not for the aforementioned war crime.²⁴⁶

(b) Different from the preceding mistakes, all of which are due to lack of factual knowledge or misperception, a mental element can also be found to be lacking through conceptual errors as, for instance, in the aforementioned example of a soldier not being aware of the protected status of his victim as member of a peace keeping mission. If this error was due to the fact that because the victim was

²⁴⁴ Art. 7(1)(d) ICC Statute

²⁴⁵ Although this position is not undisputed in that in the case of an *error in persona vel objecto* the perpetrator should be merely liable for negligence (which is not punishable in the area of the ICC Statute), the position taken here seems to prevail worldwide: cf. Jescheck and Weigend, *supra* note 85, 311; Smith and Hogan, *supra* note 2, 73 f; Mir Puig, *supra* note 80, 259, with regard to the explicit regulation in Arts. 60, 82 Italian Criminal Code, cf. Mantovani, *supra* note 130, 423 f.

²⁴⁶ Thus far on the same line the elements of the Preparatory Commission, p 42 (para 5) to Art. 8(2)(e)(iii)

dressed differently from other peace keeping personnel, the perpetrator held him for a person not belonging to this group, it would be a clear mistake of fact in terms of *supra* (a). If he had realized, however, that his victim was a member of the group concerned, but that he, through ignorance of the rules according to which certain persons gain the status of a protected group, mistook his victim as not protected, this mistake about *legal aspects* of the definition²⁴⁷ would not be a factual but an evaluative one as was demonstrated above with regard to the awareness of 'normative elements'.²⁴⁸ In the same way since such elements need and are open to a normative judgement, though not requiring more than a 'parallel evaluation in the layman's sphere'²⁴⁹ as suggested here, the mental element could be negated if the perpetrator was not aware of criteria giving certain individuals the status of a protected group. Should this position not be accepted because it involves a legal evaluation which the perpetrator should not be entitled to plead,²⁵⁰ his ignorance of protective criteria (as any other normative components of material elements) could find consideration, if at all, only as a mistake of law to be dealt with later.²⁵¹

(c) With regard to the erroneous assumption of facts, which, if given, would produce a ground for justification it is doubtful as well whether it could be considered a mistake of fact as, for instance, in the case where the perpetrator, if he was imminently and unlawfully attacked as he erroneously believed, would have been allowed to defend himself with deadly force. Although this is a clear 'mistake about the *factual* elements of justification', resembling the '*factual* mistake about elements of the definition',²⁵² thus certainly related to facts, this category of mistakes can hardly be covered by Article 30(1). Again, it is the requisite connection between the mistake and its negating effect on the mental element which causes problems. For, as according to Article 30(1) the mental element is (solely) related to the 'material elements' of the crime and if this must be understood as merely comprising the positive elements of the crime (as distinct from grounds negatively excluding criminal responsibility such as justifications) as generally assumed,²⁵³ then putative self-defence as with any other erroneous assumption of a justifying situation leaves the mental element untouched. Therefore, in these cases, the door to a recognizable mistake of fact could be opened only if the 'material elements' of

²⁴⁷ As termed by Fletcher, *supra* note 232 (Basic Concepts), 156.

²⁴⁸ Cf. *supra*, IV.F.2 and 3.

²⁴⁹ Cf. *supra*, IV.F.2(b).

²⁵⁰ As it seems also to be the position of the Preparatory Commission by not expecting a value judgement from the perpetrator (as, in principle, ruled by the Preparatory Commission Elements, Introduction, p. 5).

²⁵¹ For, if evaluations are declared irrelevant for the mental element, neither the complete lack of an evaluation nor normative misjudgements are capable of negating the mental element. This has to be remembered when talking about the (disputed) culpability of mistakes of law to negate the mental element. See *infra*, 2(a).

²⁵² As described by Fletcher, *supra* note 232 (Basic Concepts), 148 f.

²⁵³ Cf. *supra*, IV.C.

the crime were understood as comprising both the positive and negative components of unlawfulness, that is the definitional elements of the crime as one part and the (absence of) justification as the counterpart.²⁵⁴

(d) Even the last mentioned route to a mistake of law is closed, however, with regard to non-justificatory grounds for excluding criminal responsibility, such as mere excuses or other exemptions from punishability or jurisdiction under the ICC Statute.²⁵⁵ If, for instance, a soldier kills a civilian in fear of being himself killed for not giving into pressure from his comrades who, in fact, only wanted to test his resistance, his mental element to kill would certainly not be negated; neither would his intent to kill be nullified if he had acted under actual duress which would excuse him according to Article 31(1)(d) of the ICC Statute. Consequently, his mental element in knowingly killing would be negated even less if he erroneously assumed the situation of a duress.

(e) In sum, only cases in which the perpetrator did not become aware of or misperceived factual circumstances or consequences required as 'material elements' of the crime definition, are clear instances of a mistake of fact in terms of negating the mental element and, thus, exclude his criminal responsibility according to Article 32(1).

2. With Regard to Law (Article 32(2) of the ICC Statute)

In view of the great variety of normative implications a perpetrator may not have knowledge of, and of the evaluative misinterpretations which are open to him,²⁵⁶ it cannot be a surprise that mistake of law finds itself regulated in a more differentiated manner than mistake of fact for which apparently one short sentence sufficed. On closer inspection, however, Article 32(2) seems to be designed to leave as little room as possible for excluding criminal responsibility due to a mistake of law. Thus, in order to find out what is left for being invoked by the perpetrator, the following distinctions and restrictions have to be observed.

(a) In foreclosing mistakes of law as to 'whether a particular type of conduct is a crime within the jurisdiction of the Court' (sentence 1), it is made clear that mistake of law need not concern the international prohibition of the crime as such,²⁵⁷

²⁵⁴ For further details of this conception which, after having been developed in German theory (cf. with criticism as well, T. Lenckner, in Schonke and Schröder, *supra* note 85, § 13 prenotes 15 ff.), has also found followers in Italy and Spain; as to Italy cf. Mantovani, *supra* note 130, 158, as to Spain, Mir Puig, *supra* note 80, 416 f.

²⁵⁵ For further details as to the distinction between justification and excuse, cf. Ch. 24.1 below; Eser, in Eser and Fletcher, *supra* note 3, Vol. I, p. 34 ff. As to 'grounds of justification and excuse as distinguished from other grounds for denying culpability', cf. Roxin, in Eser and Fletcher, *supra* note 3, Vol. I, pp. 229–262; as to the proliferation of these distinctions in Romanic jurisdictions, see the contributions in Eser and Perron, *supra* note 3.

²⁵⁶ Cf. *supra*, V.B to D.

²⁵⁷ As perhaps misunderstood by Cassese, see *supra* note 210.

thus restricting the possible reach of mistakes of law to something more special although without naming it.

(b) The restrictiveness of this course is intensified by allowing mistake of law to exclude responsibility only 'if it negates the mental element' of the crime (sentence 2). As seen with mistake of fact,²⁵⁸ this has two implications: (i) the mistake has to have been capable of negating the mental element and (ii) this can be procured solely by the perpetrator's lack of knowledge of a material element of the crime. Whereas it was easier to conceive that the unawareness of a material fact affects the knowledge of this element, it is much harder to see a way in which the ignorance of a norm might eliminate the mental element with regard to a material element, the factual basis of which the perpetrator is aware of. As one should not assume that the drafters of sentence (2) wanted it to run idle, this 'cryptic' provision²⁵⁹ was perhaps meant to open the door for mistakes with regard to normative elements and evaluations.

Thus, insofar as one does not wish to resort to mistake of fact as shown above,²⁶⁰ with regard to normative references and elements of the crime,²⁶¹ evaluative misperceptions could be treated in the following manner: since his mental element can only be negated by mistake to the extent that the perpetrator must be aware of material elements, accordingly normative misjudgements are capable of ensuing from a mistake of law only to the extent that the mental element is open to (mis)judgements. As, in addition, the mental element does not require more than the perpetrator's awareness of the social significance of a definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation. Consequently, normative ignorance or evaluative misperceptions would constitute a mistake of law negating the mental element only if the perpetrator did not even realize the social everyday meaning of the material element of the crime. This, for instance, might be the case if he had no idea that certain letters on a car were to indicate the protected status of this personnel, but not, however, if he related these letters to another organization which would have had a protected status as well.

(c) Even if the mental element is negated by a mistake of law in the way described before, this does not necessarily lead to the exclusion of criminal responsibility though; for, as according to sentence (2) this 'may' merely be the case, it seems as if the ICC Statute wants to leave some *discretion* to the Court to either accept or ignore the mistake. Although the use of 'may' could perhaps simply mean that not every mistake of law negates the mental element,²⁶² the other interpretation

²⁵⁸ See *supra*, V.C.1.

²⁵⁹ As described by Kress, *supra* note 119, 7.

²⁶⁰ *Supra*, V.C.1(b).

²⁶¹ As to their variety and types cf. *supra*, IV.F.2 and 3.

²⁶² As suggested by Weigend, *supra* note 231, 1391.

appears preferable. Not only is 'may' not referring to the negation of the mental element but rather to the exclusion of criminal responsibility (if the mental element is negated by the mistake of law), but the same reference to the exclusion of responsibility can be found in sentence (1), with one significant difference, however: whereas mistakes of law in terms of sentence (1) definitely not capable of excluding criminal responsibility, the principal admissibility of mistakes of law in terms of sentence (2) was intended perhaps to be limited, and therefore subjected, to the discretionary non-exclusion of criminal responsibility by the Court.²⁶³

Even more convincing in this direction from a legal policy point of view is the fact that, unlike national laws and former international drafts,²⁶⁴ the ICC Statute does not pay any attention to the (un)avoidability of the mistake, thus not providing a clause rejecting a mistake of law completely or merely allowing mitigation of the sentence, depending on the degree to which the mistake was avoidable for the perpetrator. This lack of flexibility corresponding to the degree of potential blameworthiness of the perpetrator is partly made up for by at least granting the Court discretion with regard to the exclusion of criminal responsibility.

(d) In complementing the general rules on mistake of law dealt with above, a special regulation²⁶⁵ is provided for *mistakes with regard to superior orders* according to Article 33(1)(b) and (c) of the ICC Statute. In recognizing the at times delicate situation in which a subordinate was ordered to carry out a command without having had the chance of examining the lawfulness of what he is going to do, the perpetrator, when committing the crime in obedience to superior orders or prescriptions of law, can be relieved of criminal responsibility if he did not know that the order was unlawful (subparagraph b), provided, however, that the order was not manifestly unlawful (subparagraph c).²⁶⁶

(e) In sum, aside from the special case of the ignorance of the (non-manifest) unlawfulness of a superior order, mistake of law, as required to negate the mental element, is of practical relevance solely with regard to normative implications of material elements or referential norms.²⁶⁷ Even within this narrow scope, however,

²⁶³ In the same sense Triffterer, in Triffterer, *supra* note 4, margin No. 38 f.

²⁶⁴ Cf. *supra*, *inter alia*, Freiburg Draft, Art. 33n (2) and the Updated Siracusa Draft Art. 33-15 (2), *supra* II.C, at note 40.

²⁶⁵ Referred to in the last phrase of Art. 32(2) to Art. 33 ICC Statute.

²⁶⁶ For further details, see Ch. 24.2 above; P. Gaeta, 'The Defence of Superior Orders', 10 *EJIL* (1999) 172–191 (188 f.). As to the practical unlikelihood of such a case of recognizable mistake, see Cassese, *supra* note 210, 157.

²⁶⁷ This principal disregard of the (non)consciousness of the prohibition as such is, incidentally, a fundamental difference from modern theories of error, also insofar as, with Arts. 30 and 32 ICC Statute, the demarcation of mistakes still runs between mistake of *fact* and of *law*, whereas the distinction between 'factual errors' (with regard to elements both constituting and negating the unlawfulness of the crime) and 'prohibitional errors' with regard to norms (whether constituting or excluding the unlawfulness) allows the orientation of culpability to the perpetrator's ability of realizing his wrongdoing; cf. § 9 (1) Austrian Strafgesetzbuch, § 17 German Strafgesetzbuch; in the

a mistake of law cannot be established by the perpetrator's claiming not to have known the legal provisions and/or their jurisprudential interpretation, but only by his not even having been aware of the social meaning or significance of the material element in a layman's perspective. And even if the perpetrator succeeds in proving this degree of normative ignorance, the Court will still have the discretionary power of rejecting the mistake completely or merely mitigating the sentence²⁶⁸ according to the degree to which the perpetrator would have been able to avoid his mistake.

D. Non-recognized or Disregarded Errors

With the exception of the case in which the perpetrator was unaware of the (non-manifest) unlawfulness of a superior order or prescription of law,²⁶⁹ both mistake of fact and of law are admissible only if they negate the mental element.²⁷⁰ As a consequence quite a few of the many conceivable misperceptions of the perpetrator²⁷¹ will fail to exclude criminal responsibility according to Article 32. Concentrating on the greater errors which are either explicitly rejected or conclusively disregarded by the ICC Statute, the following appear worthy of mention.

(a) As by nature leaving the mental element related to material elements of the crime untouched, mere *ignorance of legal norms or their misinterpretation* can, in principle, not establish a valid mistake of law, the only major exception being the misperception of normative elements or references, provided that the perpetrator is not even aware of the social significance of the normative implications concerned.²⁷²

(b) The ICC Statute's disregard of ignorance of law is expressed with particular regard to the prohibition as such. Although Article 30(2) sentence (1) explicitly excludes mistake of law only 'as to whether a particular type of conduct is a crime within the jurisdiction of the Court', this is not merely to be understood in terms of a procedural error of the perpetrator; for due to the double structure of the Rome Statute in providing both the procedural jurisdiction of the Court and the definition of the prohibited international crimes,²⁷³ the perpetrator's ignorance of the Court's jurisdiction can, at the same time, imply his ignorance of the international prohibition. Consequently, in precluding the jurisdictional mistake, Article 32(2) sentence (1) excludes the *ignorance of the prohibition* as

same sense, see Art. 14(3) (Spanish Código Penal, Arts. 29 f. Polish Kodeks karny); as to evidentiary requirements of Art. 122-3 French Code Pénal, see Merle and Vitu, *supra* note 99, No. 587.

²⁶⁸ According to Art. 78 ICC Statute.²⁶⁹ Cf. *supra*, V.C(d) to Art. 33(1)(b) and (c) ICC Statute.

²⁷⁰ Cf. *supra*, V.C.2 and 3(b).

²⁷¹ *Supra*, V.B.

²⁷² *Supra*, V.C.2(b).

²⁷³ Cf. Ch. 20 above, I.

well.²⁷⁴ Thus, unlike various recent national penal codes prepared to recognize the 'mistake of prohibition', if unavoidable, as a special type of mistake of law,²⁷⁵ in this fundamental issue the ICC Statute adheres to the old principle of '*ignorantia juris (criminalis) non excusat*'.

(c) Accordingly, it cannot come as a surprise that the ICC Statute does not take notice of the *mistaken assumption or misinterpretation of justifying norms* either. Therefore, both in the situation where the perpetrator believes his torturing of war prisoners was justified by a (in fact not recognized) ground of 'military necessity' or that he erroneously extends his right of self-defence beyond its recognized limits, he cannot defend himself by invoking mistake of law.²⁷⁶ The same holds true with regard to the erroneous assumption of *excusing or otherwise exemptory norms*, as for instance, in the case that an accused Head of State was not aware of the irrelevance of his official capacity according to Article 27 of the ICC Statute. Even if he would be believed, he could not be heard with this defence.

(d) Errors disregarded by the ICC Statute may not only be found with regard to the law, but with regard to facts as well. Perhaps of greatest practical relevance concerns in particular the *mistake about the factual elements of justification*, as, for instance, in the case where the perpetrator would have been justified for self-defence if he had, as he erroneously assumed, in fact been attacked.²⁷⁷ If the material element which the perpetrator must be aware of is limited to the positive definitional elements of the crime, thus not comprising justificatory grounds for excluding responsibility, factual mistakes with regard to grounds of justification are precluded. This is even more true with regard to non-justificatory grounds of excluding criminal responsibility, such as *excuses* or *other exemptions* from punishability.²⁷⁸

E. Possible Solutions

Although the emotional abhorrence of crimes as serious as those in question here may argue against the attempt to find further loopholes by widening the door for errors, from the legal point of view, defendants charged with international crimes should not be denied the general principles and defences that are valid for 'normal' everyday criminality. Just as a person accused of killing his neighbour may defend

²⁷⁴ This exclusion of a mistake, at least according to Art. 32(2), seems to have been overlooked by Cassese, *supra* note 210, 155, in his example of a serviceman, not being aware of his violating an international law prohibition. As to whether the result may be different in case of a superior order, believed by the serviceman to be lawful, cf. Gaeta, *supra* note 267, 188 f.

²⁷⁵ As, *inter alia*, Art. 14 Spanish Codigo Penal; Art. 122-3 French Code Pénal; § 17 German Strafgesetzbuch. Though probably arriving at the same end, § 9 Austrian Strafgesetzbuch recognizes mistake of law if the perpetrator cannot be blamed for his actions ('nicht vorzuwerfen ist').

²⁷⁶ As to the same conclusion cf. Ambos, *supra* note 38, 29 f.

²⁷⁷ Cf. *supra*, V.C.1(c).

²⁷⁸ See *supra*, V.C.1(d)

himself by having reasonably believed in being seriously attacked, the soldier in an armed conflict must be given the same chance if he believed himself attacked by a civilian from behind. Similarly, even if the crimes prohibited by the ICC Statute are of a nature and gravity commonly known as unlawful, even the soldier who has been informed of the contents of the Geneva Conventions may not be aware of the variety and reach of all relevant prohibitions, particularly insofar as they are of formal character.²⁷⁹ Therefore, it appears appropriate to reflect on ways in which some of the shortcomings of the Rome Statute's regulations on mistake of fact and law may be improved. This appears necessary in at least in two respects.

(a) With regard to the *mistake about factual elements of justification*²⁸⁰ it appears appropriate to apply Article 32(1) by analogy.²⁸¹ This is particularly true in view of the fact that it can be a matter of accident whether a material element is formulated in a positive or a negative way. If, for instance, sexual offences are defined as acting 'against the victim's will', thus granting the perpetrator a mistake of fact if he reasonably believed in the victim's agreement with the molestation, it would hardly be understandable to disregard his mistake if the crime definition did not require acting 'against the victim's will' but instead granted a justification if the victim consented. Since in both configurations the perpetrator's intention, or his mistake, were essentially the same, his criminal responsibility cannot differ between being excluded in the first instance and remaining in the other. As mistakes of this sort have apparently been missed by the ICC Statute, it would be up to the Court to make use of its power to have recourse to principles derived from national laws according to Article 21(1)(c) of the ICC Statute.

(b) Even in recognizing the fact that international crimes, as in general of the gravest nature, are universally known as unlawful and highly reprehensible, there may be situations in which the perpetrator is without fault unaware of the criminal character of his conduct.²⁸² The more the principle of culpability is recognized as an essential requirement of criminal responsibility, the less an international penal code can afford, particularly if it wishes to function as a model of enlightened criminal law, to completely ignore lack of culpability *by unavoidable mistake of prohibition*.²⁸³ As the recognition of such a ground for excluding criminal responsibility

²⁷⁹ This is particularly true with regard to rules of warfare the knowledge of which cannot just simply be expected of any ordinary soldier (cf. Weigend, *supra* note 231, 1392, with reference to Art. 8(2)(b)(xiv) and (e)(xii) ICC Statute). In this respect, the situation has hardly changed for the better since Y. Dinstein, in *The Defence of Obedience to 'Superior Orders' in International Law* (1965) 33, declared that 'one should take into account the relative uncertainty of laws of war and other branches of international law'.

²⁸⁰ Cf. *supra*, V.C.1(c), D(d).

²⁸¹ To the same end, though not explicitly taking recourse to analogy, see Triffterer, in Triffterer, *supra* note 4, margin No. 14.

²⁸² Cf. A. Eser, 'Defences' in War Crimes Trials', 24 *JYHR* (1995) 202, at 216 f.

²⁸³ As to the same view, see Ambos, *supra* note 38, 30; see also Nill-Theobald, *supra* note 11, 347 f. with references to Pre-Rome voices to the same end.

would function in favour of the perpetrator, it could be introduced and applied by the Court without violating the principle of *nullum crimen sine lege* (Article 22 of the ICC Statute).

(c) Should the Court not be prepared to follow the aforementioned suggestions for recognizing mistakes which exclude criminal responsibility, it should at least consider adequate *mitigation* in the determination of the sentence by taking into account that, due to a mistake, the gravity of the crime may be diminished according to Article 78(1) of the ICC Statute.

VI. Concluding Assessment

The ambivalent impression, mentioned at the beginning, was amply demonstrated in the end.

On the one hand, the Rome Statute provides a rather high threshold for subjecting a person to criminal responsibility for an international crime. Not only, is it the case that with few exceptions, recklessness and negligence cannot render a perpetrator responsible for prohibited acts, but even intention is determined by high standards barely even met by *dolus eventualis*.

On the other hand, however, as soon as this threshold to an intentional crime is transgressed, the Rome Statute is very reluctant to pay consideration to errors and misperceptions of the perpetrator, even if they are unavoidable for him. This seems to be due to the fact that the underlying philosophy of criminal responsibility is still not free from result-oriented remnants of 'strict liability': international crimes appear so abhorrent that the perpetrator may not be allowed to plead excuses. Yet, as understandable as the ideal of a strong international criminal justice may be, particularly if it expects to be looked up to as an exemplary challenge for criminal justice in general, it cannot leave behind principles recognized throughout the world as fundamental for criminal responsibility. This is true in particular for the principle of culpability, an essential prerequisite of which is the consciousness of unlawfulness. This requirement is not met so long as errors with regard to the prohibition or a justification are deemed irrelevant even if they were truly unavoidable for the perpetrator and for which he, thus, cannot be blamed. *Ultra posse nemo tenetur*—an old Roman principle a modern code of international criminal law justice not exempt itself from.

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