MENTAL ELEMENTS UNDER ARTICLE 30 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMPARATIVE ANALYSIS

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Abstract The Rome Statute of the International Criminal Court is the first international instrument that includes a general provision on the mental element required before criminal responsibility for an international crime attaches (Article 30). This article analyses that provision from a comparative perspective, drawing on common law and civil law understandings of intent. It analyses the jurisprudence and commentary concerning Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it.

I. INTRODUCTION

Prior to the Rome Statute of the International Criminal Court (Rome Statute),[1] no international statute, code or charter included a general provision on the mental element required before criminal responsibility for an international crime would attach. The Nuremberg and Tokyo Charters,[2] which governed the trials of the major German and Japanese war criminals following the Second World War, contained no such provision. Nor did Control Council Law No 10,[3] which governed the subsequent trials of war criminals in post-war occupied Germany. The Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR)[4] did not contain such a provision, nor did the various Draft Codes of Crimes against the Peace

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[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[2] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter); Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, 4 Bevans 20 (Tokyo Charter).

[3] Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (adopted 20 December 1945) in Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946, 50–5 (Control Council Law No 10).

[4] Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, annexed to UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY Statute); Statute of

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and Security of Mankind prepared by the United Nations International Law Commission.[5] This omission was not repeated with the Rome Statute, which includes a specific provision (Article 30) on the mental element required for crimes within the jurisdiction of the International Criminal Court (ICC). This makes Article 30 the first of its kind.

Article 30 of the Rome Statute provides that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Thus, Article 30 represents an ambitious attempt at codification of the rules relating to the mental element in international criminal law. As Pisani states, it is 'designed to bring some consistency into this area of the law'.[6] First, it aims to set a default rule that applies, in principle, to all crimes included in the Rome Statute. It therefore requires that, unless otherwise provided, the material elements of a crime be committed with 'intent and knowledge'. Second, it seeks to provide a comprehensive definition of these concepts of 'intent' and 'knowledge' in the two subsequent paragraphs.

While the mere presence of Article 30 in the Rome Statute is a step forward compared to previous international statutes, codes and charters that did not include any such provision, the article has been subject to criticism from all corners of academia. Cassese describes it as 'confusing and ambiguous',[7] while Werle and Jessberger state that it 'raises more questions than answers'.[8] Satzger describes it as 'an extremely complex rule' that is 'quite clearly a

the International Criminal Tribunal for Rwanda, adopted 8 November 1994, annexed to UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute).

[5] See, eg, International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-eighth Session' (6 May–26 July 1996) UN Doc A/51/10.

[6] N Pisani, 'The Mental Element in International Crime' in F Lattanzi and WA Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente 2004) 125.

[7] A Cassese, '*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 New England LR 1015, 1025.

[8] G Werle and F Jessberger, ' "Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 J Int'l Crim Justice 35, 37.

compromise between continental and Anglo-American criminal law'.[9] Eser, on the other hand, while recognizing that Article 30 'can certainly not be called a masterpiece of legal architecture', considers that 'it provides sufficient building blocks for a meaningful construction of "intention" '.[10]

This article analyses Article 30 of the Rome Statute from a comparative perspective, by drawing on the different approaches taken by two broad groupings of States: the common law grouping, and the civil law grouping. The primary systems drawn on as examples of the common law grouping are the United States, the United Kingdom and Australia,[11] while that drawn on as an example of the civil law grouping is Germany.[12] The article begins with a general introduction to the concept of intent, as it is understood in both civil law and common law domestic legal systems. This is necessary in order to understand the approach taken at Rome because, as Kelt and von Hebel explain, Article 30 'necessarily consisted of compromises between different concepts or norms from various legal systems'.[13] Part III examines the provisions of Article 30 in detail, and attempts to draw some conclusions as to what aspects of the common law and civil law concepts of intent are covered by it. Part IV discusses the exceptions to Article 30, and the article concludes with some opinions on the appropriate direction of future jurisprudence and a possible amendment to the Rome Statute.

[9] H Satzger, 'German Criminal Law and the Rome Statute: A Critical Analysis of the New German Code of Crimes against International Law' (2002) 2 Int'l Crim LR 261, 269.

[10] A Eser, 'Mental Elements: Mistake of Fact and Mistake of Law' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002) 907.

[11] Despite the US not being a State Party to the Rome Statute, it has nevertheless had a great influence on the drafting of the statute, and on the development of international criminal law more generally. The US made a significant contribution to the early development of international criminal law through its influence on the Nuremberg and Tokyo Trials, and the trials before the US Nuremberg Military Tribunals. With respect to the Rome Statute specifically, the Model Penal Code prepared by the American Law Institute had considerable impact on the drafting of Article 30 of the Rome Statute and on the 'purposive' element of aiding and abetting under Article 25(3)(c). This article also draws on domestic criminal law principles derived from the United Kingdom and Australia, as the text of Article 30 bears striking resemblance to the equivalent provisions of the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code.

[12] Like US law, German law has had a great influence on the development of international criminal law, with a number of German criminal law professors establishing themselves in the field, and acting as judges of international courts or tribunals (for example, Albin Eser and Hans-Peter Kaul). More importantly, German criminal law theory 'enjoys widespread influence in the civil law world': M Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 Amer J Comp L 679, 679. Dubber notes, however, that criminal law in common law countries has, until fairly recently, developed largely independently of German influence (ibid). German law therefore provides a good example against which to compare general principles of law that are recognized across common law systems.

[13] M Kelt and H von Hebel, 'General Principles of Criminal Law and the Elements of Crimes' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 22.

II. THE CONCEPT OF INTENT IN COMMON LAW AND CIVIL LAW

A. Gradations of Intent

In all domestic criminal law systems, the general rule (although it is not without exceptions) is that conduct must be committed with 'intent' in order for it to constitute a crime.[14] Conduct that is unintentional, or that is committed negligently, will constitute a crime only in limited circumstances (usually, but not always, where specifically provided for by statute). While all systems require 'intent', the definition of intent varies widely depending on the particular domestic system in question. Furthermore, it is rare for a single definition of intent to be applied to every crime. Rather, domestic criminal law systems recognize different *gradations* or *degrees* of intent. The same goes for international criminal law. Each gradation or degree has two components: a cognitive component (the element of awareness) and a volitional component (the element of desire).[15] What sets each gradation or degree of intent apart is the relative level of each component.

Generally speaking, common law systems recognize three gradations of intent: direct intent, oblique intent and recklessness. In addition, certain crimes can be committed negligently, or even unintentionally (eg strict or absolute liability offences). Civil law countries similarly recognize three gradations of intent: *dolus directus* in the first degree, *dolus directus* in the second degree and conditional intent (generally referred to as *dolus eventualis*). In addition, civil law countries recognize two forms of negligence (advertent and inadvertent). Furthermore, both common law and civil law systems recognize some form of special (or additional) intent for particular crimes.[16]

Table 1 represents my attempt to provide a visual comparison of the different gradations of intent recognized in the domestic criminal justice systems of common law and civil law countries, in descending order of culpability.[17] Inevitably, it only gives a broad outline of these gradations, as there is no one 'common law' or 'civil law' approach to intent. In fact, approaches differ considerably among civil law countries (and, to a lesser extent, between common

[14] The term 'intent' is used here in the broad sense, to refer to any mental state that is higher than negligence. Negligence is excluded from the concept of 'intent' in this context, because it is characterized by the absence of any volitional or cognitive component (see Table 1 below). On this point, see G Williams, *Criminal Law: The General Part* (2nd edn, Stevens & Sons 1961) 31. See also GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 508–10.

[15] See, eg, *Prosecutor v Bemba Gombo* (Confirmation Decision) ICC-01/05-01/08, PT Ch II (15 June 2009) para 357 (Bemba Confirmation). See also Eser (n 10) 905; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 475.

[16] The concept of special or additional intent is discussed below in Part IV.

[17] I have not been able to find any similar visual representation of the differences between the gradations recognized in common law and civil law countries. The hope is that a visual representation will assist the reader in understanding how the different gradations in these two systems roughly compare.

Table 1. *Gradations of intent under common law and civil law*

Common law	Civil law
Special (additional) intent	**Special (additional) intent** (*besondere Absicht* or *dolus specialis*)
Direct intent V = Very High C = Low	**Direct intent in the first degree** (*Absicht* or *dolus directus* in the first degree) V = Very High C = Low
Oblique intent V = Low C = High	**Direct intent in the second degree** (*direkter Vorsatz* or *dolus directus* in the second degree) V = Low C = Very High
	Conditional intent (*bedingter Vorsatz* or *dolus eventualis*) V = Low C = Moderate
Recklessness V = Low C = Low/Moderate	**Advertent (conscious) negligence** (*bewusste Fahrlässigkeit*) V = Low C = Low
(Inadvertent/unconscious) negligence V = None C = None	**Inadvertent (unconscious) negligence** V = None C = None

law countries).[18] While some countries recognize every gradation listed, others do not recognize them all.[19] Similarly, while some countries define certain gradations in a particular way, other countries adopt very different definitions.[20] Therefore, the borders between each gradation should not be viewed as clear

[18] As Clark has put it, 'the civil law is not a monolith; the common law is not a monolith': RS Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 Crim L Forum 291, 294.

[19] For example, according to van Sliedregt, France does not recognize *dolus eventualis* as a form of intent: E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press 2003) 46. See also ME Badar, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 New Crim LR 433, 455–6; C Elliott, 'France' in K Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 218.

[20] This is particularly the case for *dolus eventualis*, where even scholars *within* some countries hotly debate the definition of this gradation of intent (eg in Germany).

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lines, but rather as boundaries that move, depending on the particular domestic legal system one is examining and the time at which it is examined.

In the same way, there is no one view on how the various gradations of intent recognized by common law and civil law systems line up when compared directly. Commentators disagree, for example, on whether recklessness (in common law) and *dolus eventualis* (in civil law) are really different, and in what way. Thus, the placement of certain common law gradations next to (or above or below) certain civil law gradations should not be viewed as definitive, but rather as a starting point for the following discussion. In fact, it is questionable whether it is even possible to compare the different gradations directly, as the concepts are so different. Instead of comparing *concepts*, it may therefore be more accurate to view the following table as comparing the likely *outcomes*; in other words, comparing whether an individual in a particular case would be considered to fulfil the definition of the relevant gradation if that same individual was to come before each domestic criminal justice system.

Before examining Table 1, a few more explanations are required. First, in addition to the English terms for each of the civil law gradations of intent, I have provided both the German and Latin terms, which are more commonly used by commentators and courts. Second, beneath the name of each gradation, an indication has been given of the relative level of the volitional (V) and cognitive (C) components required for each. As will be seen, both the volitional and cognitive components are present for all gradations, except for (inadvertent) negligence.

B. Direct Intent (in the First Degree)

Putting aside the question of special or additional intent, the highest gradation or level of intent for both civil law and common law systems is characterized by the perpetrator's *purposeful will* to bring about the prohibited result. This gradation is captured by the following example:

> *P* (the perpetrator) is a sniper who wishes to kill *V* (the victim). *V* is standing inside a building a significant distance away. *P* shoots in the direction of *V* when *V* passes in front of the window of the building. The bullet shatters the window, and hits *V*. *V* dies as a result of the gunshot wound.

In this example, *P* has a strong desire to kill *V*; thus, the volitional component is very high. He is not sure whether, by his conduct, he will succeed in killing *V* (that is, whether he can hit his target at such a distance), but this does not matter, as this gradation of intent is still satisfied even where the cognitive component is low.

This gradation is generally known in civil law systems as direct intent (or *dolus directus*) in the first degree. In German law, direct intent in the first degree (*Absicht*) requires that the perpetrator 'have the completion of the

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offence (element) as his purpose'.[21] The perpetrator will be deemed to have this level of intent 'also with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his primary purpose' (eg shattering the window in the example above).[22] As to the cognitive component, in German law it is not necessary that the perpetrator be certain that the prohibited result will occur (that is, it is not necessary that the perpetrator be certain that he will succeed in killing *V*).[23]

This gradation is known in some common law systems (eg the US) as acting 'purposely', while other common law countries (eg the UK and Australia) refer to it simply as acting 'intentionally'. To avoid confusion, I have adopted the more academic title for this gradation: direct intent. As to the content of this gradation in common law, the US Model Penal Code provides that a person acts 'purposely' when it is his or her 'conscious object' to engage in conduct or cause a result.[24] Similarly, the Commonwealth Criminal Code in Australia provides that a person acts with 'intention' if he or she 'means to' engage in conduct or to bring about a result.[25] Under English common law, this gradation covers cases where an individual acts 'in order to bring about a result'.[26] As with the same gradation under civil law, where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result (eg shattering a window), he or she must be held to intend to cause that other result (whether it be a pre-condition for, or a necessary concomitant of, the first result).[27]

C. Oblique Intent, or Direct Intent in the Second Degree

The second gradation or level of intent for both civil law and common law systems does not require the same purposive degree as the first gradation. This gradation is captured by the following example:

> *P* wishes to kill *V* by bombing the building in which *V* is located. *P* is aware that there are other individuals in the building, and that they will almost certainly be killed as well. While *P* does not want these other individuals to be killed (and in fact he hopes fervently that they will somehow escape death), he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

[21] M Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 63–4. See also Pisani (n 6) 126 ('The accused must have acted with the precise scope or desire to bring about that particular result . . .').

[22] Bohlander (n 21) 64.

[23] ibid. See also ME Badar, '*Mens Rea*: Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 Int'l Crim LR 203, 222. See also Pisani (n 6) 126–7, 128.

[24] US Model Penal Code § 2.02(2)(a)(i).

[25] Criminal Code Act 1995 (Australia) s 5.2(1).

[26] See A Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009) 171–2.

[27] See, eg, Law Commission (England), *A Criminal Code for England and Wales: Volume 1, Report and Draft Criminal Code Bill* (Report No 177, 1989) 192.

In this case, *P* will be held to have fulfilled the second gradation or level of intent with respect to the deaths of the *other* individuals who were in the building with *V*. So, with this second gradation of intent, the volitional component is weaker (*P* did not *wish* to kill these other individuals); it is the cognitive component that dominates (*P* was almost certain that these individuals would die as a result of his conduct in bombing the building).

This gradation is generally known in civil law systems as direct intent (or *dolus directus*) in the second degree. In such cases, the perpetrator foresees *as a certainty* or *as highly probable* that certain consequences will flow from his or her conduct.[28] As Van der Vyver explains, despite the perpetrator not having any desire for those consequences to occur, the perpetrator nevertheless engages in the conduct.[29] According to Badar, he or she acts indifferently with regard to the consequences, and is therefore *deemed* to have desired those consequences.[30] Similarly, the German Federal Supreme Court of Justice states that 'a perpetrator who foresees a consequence of his conduct as certain is considered to act *willfully* with regard to this consequence, even if he regrets its occurrence'.[31]

This gradation is known in some common law systems (eg the US) as acting 'knowingly', although in others (eg the UK and Australia) it is still referred to as acting 'intentionally'.[32] Again, I have adopted the more academic title of oblique intent in Table 1. The US Model Penal Code provides that a person acts 'knowingly' with respect to a result when he or she is 'practically certain' that his or her conduct will cause such a result.[33] Similarly, under English common law, the concept of oblique intent covers cases where a consequence is 'virtually certain'.[34] According to Williams, '[t]here are twin consequences of the act, *x* and *y*; the doer wants *x*, and is prepared to accept its unwanted twin *y*'.[35] In other jurisdictions, the test is not as high. For example, in the Australian Commonwealth Criminal Code, a person acts with this type of intention with respect to a result where he or she 'is aware that it will occur in

[28] Badar, '*Mens Rea*' (n 23) 224.

[29] Van der Vyver describes this form of intent as '*dolus indirectus*', rather than 'direct intent in the second degree': J Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' (2004) 12 Univ Miami Int'l & Comp LR 57, 63. I would submit, however, that he is referring to the same concept.

[30] Badar, '*Mens Rea*' (n 23) 224.

[31] ME Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 Crim L Forum 473, 486 (emphasis in original).

[32] While civil law systems make a clear distinction between the two degrees of direct intent (direct intent in the first degree and direct intent in the second degree), this distinction is not as clear when it comes to common law systems. Generally, the first two gradations are referred to simply as 'intention', a category that covers two possible instances: where an individual acts purposely (direct intent) and where an individual acts knowingly (oblique intent). It is for this reason that the dividing line between the two concepts on the common law side of Table 1 is indicated with a dotted line.

[33] US Model Penal Code § 2.02(2)(b)(ii).

[34] See Ashworth (n 26) 174, discussing the House of Lords decision in *R v Woolin* [1999] AC 82.

[35] G Williams, 'Oblique Intention' (1987) 46 CLJ 417, 421.

the ordinary course of events'.[36] This provision was based on[37] clause 18(b)(ii) of the Draft Criminal Code Bill prepared by the English Law Commission.[38] The Law Commission intended this phrase to cover cases where a result was 'a virtual certainty' (ie a result that would occur 'in the absence of some wholly improbable supervening event').[39] It admitted in its report, however, that it was possible, under this definition, that 'juries will, in a few cases, find intention to be proved where, under the existing law [which required foresight of the *virtual certainty* of the result], they might not have done so'.[40] For this reason, in Table 1 the 'oblique intent' category (in the common law column) extends lower than the 'direct intent in the second degree' category (in the civil law column). This is an attempt to demonstrate that depending on the jurisdiction (for example, in Australia), this category may capture more cases (on the lower end of the scale) than the equivalent civil law category. This is because the test for acting with oblique intent in a common law system may require only that the result occur in the ordinary course of events, whereas the test for acting with 'direct intent in the second degree' in a civil law system will require that a consequence be foreseen as a certainty or as highly probable. Nevertheless, in both common law and civil law systems, this gradation of intent is characterized by a low volitional component, and a high cognitive component.

D. Recklessness and Dolus Eventualis

In the third gradation or level of intent, the volitional component remains weak and the cognitive component still dominates; however, the cognitive component is weaker than in the second gradation. Let us consider a slightly modified version of the last example:

> *P* wishes to kill *V* by bombing the building in which *V* is located. This building is in a busy street. *P* is aware that there is a risk that, in the explosion, other individuals may be injured or even killed. While *P* does not want these other individuals to be injured or killed, he nevertheless bombs the building. Both *V* and a number of other individuals are killed in the blast.

In this example, while *P* is not certain that other individuals will be killed in the blast, he is aware of a *risk* that this might occur. Thus, the cognitive component

[36] Criminal Code Act 1995 (Australia) s 5.2(3).

[37] Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Australia), *Model Criminal Code: Chapters 1 and 2, General Principles of Criminal Responsibility: Report* (December 1992) 25.

[38] See Law Commission (England), *Criminal Code, Volume 1* (n 27). Clause 18(b)(ii) provided that a person acts intentionally with respect to a result 'when he acts either in order to bring it about or being aware that *it will occur in the ordinary course of events*' (emphasis added). This Draft Bill was never enacted into law.

[39] See Law Commission (England), *A Criminal Code for England and Wales: Volume 2, Commentary on Draft Criminal Code Bill* (Report No 177, 1989) 192.

[40] ibid 193.

is weaker than in the last example. Again, *P* does not wish to kill the other individuals, so the volitional component is low.

In civil law systems, this gradation is occupied by the concept of *dolus eventualis* or conditional intent. There is no one test or definition for *dolus eventualis*. Different tests or definitions have been put forward by commentators and adopted by courts at different times and in different jurisdictions.[41] Broadly speaking, *dolus eventualis* exists where a person 'is aware that a material element included in the definition of a crime . . . may result from his conduct and "reconciles himself" or "makes peace" with this fact'.[42] As Bohlander explains, the major schools of thought generally agree that the perpetrator must have been aware of the fact that his or her actions *might* lead to particular consequences; the disagreement centres mainly on the volitional component.[43] Some theories do not require any volitional component (but differ as to the required level of awareness of the possibility or probability of the result occurring), while others do require a volitional component (but differ as to whether this should constitute approval/mental consent to the result, or whether an attitude of indifference would suffice).[44] According to Bohlander, the German courts have adopted a 'watered-down approval theory'.[45] By this theory, a perpetrator will act with *dolus eventualis* where he or she foresees the consequences of his or her actions as possible (but not inevitable), and approves of them (in the sense that he or she has reconciled him- or herself to those consequences for the sake of achieving his or her goal).[46] The approval of the perpetrator does not need to be explicit, and the perpetrator need not morally approve of the result; it is sufficient if he or she nevertheless accepts it in order to reach his or her ulterior goal.

The broad equivalent of *dolus eventualis* in common law systems is recklessness. Essentially, recklessness is a form of 'conscious risk-taking',[47] as it involves a person taking an unreasonable and unjustifiable risk, of which he or she is aware. Under the Australian Commonwealth Criminal Code (which is based on the US Model Penal Code),[48] a person will be found to have acted

[41] Fletcher, *Rethinking Criminal Law* (n 14) 445–6; Bohlander (n 21) 64. For example, Weigend states that '[w]ords such as *dolus eventualis* have, at different times and in different legal systems, acquired different connotations, and it is thus far from clear that speakers from different backgrounds mean the same thing when they use the same Latin expression': T Weigend, 'Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges' (2008) 6 J Int'l Crim Justice 471, 482.

[42] Werle and Jessberger (n 8) 51–2.

[43] Bohlander (n 21) 64.

[44] For a detailed discussion of the various schools of thought, see Badar, '*Mens Rea*' (n 23) 228–32; Badar, 'Dolus Eventualis' (n 19) 458–62. See generally G Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346. For an analysis of the concept of *dolus eventualis* in Egypt, France, Italy and South Africa and under Islamic law, see Badar, 'Dolus Eventualis' (n 19) 452–64.

[45] Bohlander (n 21) 65.

[46] ibid. See also Taylor (n 44) 348; Badar, 'The Mental Element' (n 31) 490.

[47] See Law Commission (England), *Criminal Code, Volume 2* (n 39) 194.

[48] Criminal Law Officers Committee (Australia) (n 37) 27. The US Model Penal Code provides in § 2.02(2)(c): 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will

recklessly if that person was aware of a substantial risk that his or her conduct would cause a particular result, and, having regard to the circumstances known to him or her at the time, it was unjustifiable to take that risk.[49] Under Australian common law, the test for recklessness is foresight of probability in cases of murder, and foresight of possibility for all other crimes. Recklessness is defined in the Code in terms of a 'substantial' risk rather than in terms of probability or possibility because those terms 'invite speculation about mathematical chances'.[50] Regardless of the exact formulation, the cognitive element for recklessness is low. Unlike *dolus eventualis*, recklessness does not specifically require that a person reconcile him- or herself to, or accept the outcome of, his or her risk-taking. It simply requires a decision to take a substantial and unjustifiable risk.

Commentators disagree as to whether there is any real difference between the concepts of recklessness and *dolus eventualis*. Generally, those who believe there is a difference argue that *dolus eventualis* sets a 'higher threshold' than recklessness, because recklessness does not require as high a volitional component.[51] This appears to be the position taken by the ICTY Trial Chamber in the *Stakić* case,[52] as well as ICC Pre-Trial Chamber I in the

result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' The Australian Model Criminal Code (which became the Commonwealth Criminal Code) did not adopt the requirement of a 'gross deviation'.

[49] Criminal Code Act 1995 (Australia) s 5.4(2).

[50] Criminal Law Officers Committee (Australia) (n 37) 27. For a discussion of the law relating to recklessness in England, Canada and the US, see Badar, 'The Mental Element' (n 31) 488–9.

[51] This is the position taken by Ambos, who situates recklessness somewhere between *dolus eventualis* and conscious negligence: K Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Crim L Forum 1, 21. Similarly, Triffterer situates recklessness between *dolus eventualis* and negligence: O Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in K Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications 2003) 709. This is also the position taken by Eser, who views recklessness as being more the equivalent of conscious negligence. In his view, the volitional element in recklessness is entirely lacking: Eser (n 10) 906. Van Sliedregt (n 19) 46 views recklessness as being 'broader' than *dolus eventualis*. See also Wise, who states that '*dolus eventualis* demands that the accused have a particular subjective posture toward the possible consequences of his conduct, where common law terminology minimizes the relevance of the accused's desires, wishes, or wants': E Wise, 'General Principles of Criminal Law' (1998) 13 *Nouvelles Études Pénales: 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* 39, 53.

[52] As Badar notes, the ICTY Trial Chamber has held that the common law concept of recklessness is not equivalent to the civil law concept of *dolus eventualis*, because of the lack of any volitional component for recklessness. Badar states that the trial judgment in the *Stakić* case 'clearly shows that mere common law recklessness is not equivalent to the continental law *dolus eventualis*. The latter requires a cognitive element of awareness and a volitional element of acceptance of the risk, whereas mere recklessness lacks such a volitional element': ME Badar, 'Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 Int'l Crim LR 313, 332, citing *Prosecutor v Stakić* (Judgment) IT-97-24-T, T Ch II (31 July 2003) para 642. While I do not agree that there is *no* volitional

Lubanga case.[53] However, while the test for recklessness does not *explicitly* require as high a volitional component as the test for *dolus eventualis*, because the individual does not have to be shown to have 'accepted' or 'been reconciled with' the outcome, the fact that the individual decides to proceed with the relevant conduct despite knowledge of the substantial risk is evidence of some level of volition.[54] Whatever the differences may be between the two concepts, as Werle suggests, these gradations of the mental element would 'usually cover the same factual constellations'.[55] Nevertheless, in recognition of the fact that recklessness does not *specifically* require that a person reconcile him- or herself or accept the outcome of his or her risk-taking, recklessness is given a lower volitional element than *dolus eventualis* in Table 1.

Having introduced the concept of intent in common law and civil law domestic criminal justice systems and identified the various gradations of intent recognized in those systems, the next part of this article turns to Article 30 of the Rome Statute, and attempts to situate the concepts covered by it in relation to the gradations of intent set out in Table 1.

III. ARTICLE 30 OF THE ROME STATUTE

A. Intent and *Knowledge*

Paragraph 1 of Article 30 sets out the general rule that the material elements of an international crime must be committed with intent and knowledge. However, prior to the February 1997 session of the Preparatory Committee for the Rome Conference, there was debate as to whether these two terms should be disjunctive ('or') or conjunctive ('and').[56] Ultimately, a decision was made to use the conjunctive formulation. As both Pisani and Eser explain, it was felt that this formulation was necessary in order to emphasize, from a psychological-analytical point of view, the necessary co-existence of the cognitive and volitional components of intent, both of which can vary in different degrees for the different gradations (as depicted in Table 1

component required for the gradation of recklessness, I do consider that this volitional component is lower than that which exists in cases of *dolus eventualis*.

[53] See *Prosecutor v Lubanga Dyilo* (Confirmation Decision) ICC/01/04-01/06, PT Ch I (29 January 2007) at fn 438 (Lubanga Confirmation).

[54] Cassese seems to take this view, as he equates the two concepts and also states that recklessness requires a volitional act: A Cassese, *International Criminal Law* (2nd edn, OUP 2008) 66–7.

[55] G Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 153 (fn 90). See also Taylor (n 44) 348 (who describes *dolus eventualis* as 'tak[ing] the place of the missing concept of recklessness' in German criminal law) and Wise (n 51) 53 (who states that '[r]ecklessness and *dolus eventualis* are not identical, although, as a practical matter, they are likely to produce similar results in most cases').

[56] D Piragoff and D Robinson, 'Article 30: Mental Element' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2008) 854. See also Eser (n 10) 905.

above).[57] However, as is noted below, this does not mean that each particular material element must be committed with both 'intent' and 'knowledge', as those terms are defined in the subsequent two paragraphs of Article 30.

B. Element Analysis Approach

Unlike the statutes and codes that came before it, the Rome Statute takes an 'element analysis' approach, rather than a 'crime analysis' or 'offence analysis' approach.[58] 'Elements' are the basic 'building blocks' of a crime.[59] The Rome Statute recognizes two types of element: material elements (also known variously in domestic systems as the *actus reus*, physical elements or objective elements) and mental elements (also known variously in domestic systems as the *mens rea* or subjective elements). The material elements represent the 'external side of criminal conduct', while the mental elements represent the 'internal side'.[60] As Badar explains:

> Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence.[61]

The jurisprudence of previous military and international tribunals tended to take an offence analysis approach, and did not distinguish the various material elements of a crime and apply different mental elements to each. The ICC, however, is required by its Statute to analyse crimes in terms of their different types of material elements, which are each assigned a different mental element.

[57] Pisani (n 6) 129; Eser (n 10) 905, 907. However, the terms 'intent' and 'knowledge' as used in Article 30 do not themselves equate to 'volition' and 'cognition'. Rather, they are *legal* terms defined in paragraphs (2) and (3) of Article 30 respectively, while the terms 'volition' (ie desire) and 'cognition' (ie awareness) are the two *components* that must both be present in each of the gradations of 'intent'/'knowledge'.

[58] See, eg, Bemba Confirmation (n 15) para 355. This 'element analysis' approach was designed by the drafters of the US Model Penal Code: see US Model Penal Code § 1.13(9); P Robinson and J Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 Stanford LR 681. In fact, Heller states that Article 30's element analysis approach 'is similar to, and almost certainly based on, the approach taken by the Model Penal Code': KJ Heller, 'The Rome Statute of the International Criminal Court' in KJ Heller and MD Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books 2010) 603. See also Badar, 'The Mental Element' (n 31) 476. The element analysis approach has also been adopted by a number of model or draft criminal codes prepared in common law countries, for example, the English Law Commission's Draft Criminal Code Bill and the Australian Commonwealth Criminal Code: Law Commission (England), *Criminal Code, Volume 1* (n 27) 51–2 (clause 18); Criminal Code Act 1995 (Australia) Div 5.

[59] M Kelt and H von Hebel, 'What Are Elements of Crimes?' in RS Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 14.

[60] GP Fletcher, *The Grammar of Criminal Law* (OUP 2007) 43.

[61] Badar, 'The Mental Element' (n 31) 476. See also Robinson and Grall (n 58) which states (at 683) that under an 'offence analysis' 'one spoke of intentional offenses, reckless offenses, and negligent offenses . . . [whereas an 'element analysis'] recognize[s] that a single offense definition may require a different culpable state of mind for each objective element of the offense'.

The Rome Statute contemplates three types of material element: conduct elements, consequence elements and circumstance elements;[62] it does not define the terms 'conduct', 'consequence' or 'circumstance'.[63] According to commentators:

- Conduct includes 'a prohibited action or prohibited omission that is described in the definition of a crime'.[64] As Werle notes, 'every international crime presumes some conduct that is more precisely delineated in the definition of the crime'.[65]
- Consequences 'can refer either to a completed result, such as the causing of death, or the creation of a state of harm or risk of harm, such as endangerment, for example'.[66]
- Circumstances 'qualify the conduct and consequences. They may, for example, describe the requisite features of the persons or things mentioned in the conduct and consequence elements'.[67] According to Heller, a circumstance element is 'an additional state of affairs that must exist for the prohibited conduct and consequence to be criminal' (which may be either factual or legal).[68]

Because the mental element is defined differently for different kinds of material elements, the classification of a material element as a conduct, consequence or circumstance element is critical: the relevant mental element cannot be determined until each material element of a crime is properly characterized.[69] However, as a number of commentators have pointed out, the dividing line between these types of material elements is not always

[62] This follows the approach of the US Model Penal Code, which recognizes 'conduct', 'result[s] of conduct' and 'attendant circumstances' as the possible elements of a crime: see US Model Penal Code § 2.02.

[63] The US Model Penal Code similarly did not provide any usable definitions for these terms, an omission that Robinson and Grall have described as having 'severely undercut' the usefulness of the defined mental elements: Robinson and Grall (n 58) 707.

[64] Piragoff and Robinson (n 56) 852. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 14. Similarly, Heller describes a conduct element as 'the positive act or omission prohibited by the crime in question': Heller (n 58) 602. According to Cassese, '[t]he conduct is described by the international rule that imposes a certain behaviour . . . and therefore criminalizes any act or omission contrary to such a rule': Cassese, *International Criminal Law* (n 54) 55.

[65] Werle (n 55) 144.

[66] Piragoff and Robinson (n 56) 852. Similarly, Heller describes a consequence element as 'the required result of the prohibited conduct' (which may involve 'either actual harm . . . or simply the possibility of harm'): Heller (n 58) 602. Werle describes a consequence as including 'all effects of the criminal conduct' and explains that they can consist of 'harm that has actually occurred . . . or merely of danger to a protected right': Werle (n 55) 144. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.

[67] Piragoff and Robinson (n 56) 852.

[68] Heller (n 58) 602. Werle explains that '[o]bjective circumstances can be of a factual nature . . . or they can concern normative characteristics': Werle (n 55) 145. See also Eser, who defines circumstances as '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)': Eser (n 10) 919. See also Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15.

[69] Robinson and Grall (n 58) 707.

clear.[70] Robinson and Grall argue that most of these difficulties can be avoided if 'conduct' elements are

> defined literally, and thus narrowly, to mean pure conduct, that is, to mean the actual physical movement of the actor. Thus, objective elements of an offense definition that might otherwise be classified as conduct elements, but which actually describe characteristics of the conduct—i.e., elements concerning the 'nature of conduct'—should be treated as circumstances.[71]

In a way, this would involve breaking down what would normally be considered one element (eg transferring, directly or indirectly, parts of the population of an Occupying Power into occupied territory)[72] into two or more separate elements (thus, in this example, transferring parts of a population into a territory as a conduct element, and the status of the territory as occupied territory and of the population as that of an Occupying Power as circumstance elements). According to this argument, whenever a phrase combines a conduct element with a circumstance element in the Rome Statute, the elements should be separated out.

Similarly, material elements that might otherwise be classified as conduct elements but that actually describe *results* following the conduct, should be treated as consequence elements. Again, this involves breaking down what would normally be considered one element (eg inflicting great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act)[73] into two or more separate elements (in this example, committing the inhumane act as a conduct element, and the requisite effect of the act, such as great suffering, as a consequence element). Again, according to this argument, whenever a phrase combines a conduct element with a consequence element in the Rome Statute, the elements should be separated out.

Robinson and Grall also note the fact that distinguishing circumstance elements from consequence elements can be difficult.[74] To resolve such problems, they suggest defining a consequence as 'a circumstance changed by the actor'.[75] All elements that do not fit this definition would be 'independent circumstance elements'.[76] Let us take the example of the war crime of starvation as a method of warfare, and the particular element of that crime of 'depriving civilians of objects indispensable to their survival': the actor creates the deprivation (a consequence element), but he or she cannot alter the status

[70] Kelt and von Hebel, 'What Are Elements of Crimes?' (n 59) 15. As Clark notes, there is often overlap between 'conduct' and 'circumstances', and many of those involved in the drafting of the Rome Statute 'thought of conduct as including causation and results': Clark, 'The Mental Element' (n 18) 306. The difficulty in drawing the dividing line between 'conduct' and 'circumstances' was also recognized in the Commentary to the Australian Model Criminal Code: Criminal Law Officers Committee (n 37) 7.

[71] Robinson and Grall (n 58) 719–20.

[72] See ICC, Elements of Crimes, Article 8(2)(b)(viii), Element 1(a).

[73] See ibid, Article 7(1)(k), Element 1.

[74] Robinson and Grall (n 58) 723.

[75] ibid 724 (emphasis omitted).

[76] ibid.

of the objects as indispensable to the survival of the civilians (a circumstance element).[77]

In conclusion, Robinson and Grall's suggestions create the following situation:

> In every offense, the conduct element, although perhaps linguistically merged with other elements, would simply perform the function of the act requirement. [Consequence] elements would be easy to detect; they would be circumstances changed by the actor. All other elements would be circumstance elements.[78]

Once a material element has been properly characterized as a conduct, consequence or circumstance element, paragraphs (2) and (3) of Article 30 provide the applicable definition of the mental element. For a conduct element, only intent is required, as knowledge is not defined with respect to conduct. Similarly, for a circumstance element, only knowledge is required, because intent is not defined with respect to circumstances. For a consequence element, however, both intent and knowledge must be proven, because Article 30 defines both those terms with respect to consequence elements. The definitions of 'intent' and 'knowledge' provided in Article 30, as they apply to the three different material elements, are set out in Table 2.[79]

Therefore, depending on whether a particular element is a conduct, consequence or circumstance element, the required mental element will be *either* intent *or* knowledge *or* both. This position is supported by the Elements of Crimes, which states that

> where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, for example, intent, knowledge *or both*, set out in article 30 applies.[80]

For this reason, although Article 30(1) provides that a person shall be criminally responsible only if the material elements are committed with intent and knowledge, as Werle and Jessberger explain, this part of the article 'cannot be interpreted as requiring that *all* material elements have to be committed with intent and knowledge'.[81]

Nevertheless, as all crimes under the jurisdiction of the ICC involve conduct and at least one other type of material element (whether it be a consequence element or a circumstance element), when the various elements of the crime are combined, one will end up with proof of both intent *and* knowledge.[82]

[77] See ICC, Elements of Crimes, Article 8(2)(b)(xxv), Element 1.
[78] Robinson and Grall (n 58) 724.
[79] As is the case with Table 1, Table 2 is my attempt to visually represent the definitions contained in Article 30, arranged with respect to the relevant material element.
[80] ICC, Elements of Crimes, General Introduction, 2 (emphasis added).
[81] Werle and Jessberger (n 8) 38. See also Werle (n 55) 151.
[82] See Triffterer (n 51) 704.

Table 2. *Definitions of 'intent' and 'knowledge' in Article 30*

	Intent	Knowledge
Conduct	means to engage in the conduct: Article 30(2)(a)	*None*
Consequence	means to cause the consequence OR aware that it will occur in the ordinary course of events: Article 30(2)(b)	aware that it will occur in the ordinary course of events: Article 30(3)
Circumstance	*None*	aware it exists: Article 30(3)

C. Definitions of 'Intent'

Article 30(2) defines two different levels or gradations of 'intent'. A person has 'intent' with respect to conduct or a consequence if he or she 'means to' engage in the conduct (Article 30(2)(a)) or cause the consequence (Article 30(2)(b) (first alternative)). A person also has 'intent' with respect to a consequence if he or she 'is aware that it will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)).

1. 'Means to'

The first level or gradation of intent ('means to' engage in conduct or cause a consequence) is defined using language identical to the wording found in the Australian Commonwealth Criminal Code, which was based on the English Draft Criminal Code Bill. In those Codes, this language was used to codify the concept of 'direct intent'. I submit, therefore, that this language covers what is known in the common law as direct intent, and what is known in civil law countries as *dolus directus* in the first degree (that is, the highest gradation or level of intent).[83] In my view, it should therefore be interpreted as covering cases characterized by the accused's *purposeful will* to engage in the conduct or bring about the prohibited consequence (ie where the volitional component is very high). In the language of the US Model Penal Code, engaging in the conduct or causing the result should be the perpetrator's 'conscious object'. This interpretation of the language 'means to' is supported by the jurisprudence of Pre-Trial Chambers I and II of the ICC, which have held that this language requires that the accused act with the 'concrete intent',[84] 'purposeful will'[85] or 'express intent'[86] to bring about the material elements of the crime.

[83] This is also the position taken by Badar, 'The Mental Element' (n 31) 482–3.
[84] Lubanga Confirmation (n 53) para 351.
[85] Bemba Confirmation (n 15) para 358.
[86] *Prosecutor v Katanga and Ngudjolo Chui* (Confirmation Decision) ICC-01/04-01/07, PT Ch I (30 September 2008) para 529 (Katanga Confirmation).

As is the case for this level or gradation of intent in domestic law, the perpetrator should also be taken to have this level of intent with regard to any fact that is a necessary or indispensable interim or ulterior consequence of his or her primary purpose (such as shattering the window in the example given above).

There will, in my view, be one significant difference between the 'means to' concept in Article 30 and the concept of direct intent or *dolus directus* in the first degree in common law and civil law systems respectively. That difference relates to the required cognitive component. In common law and civil law systems, the law relating to this gradation of intent generally does not require anything more than a low cognitive component to accompany the very high volitional component. Thus, it is not required that the perpetrator be certain that he or she will succeed in engaging in the conduct, or in bringing about the prohibited result. In fact, it would be sufficient for the perpetrator to believe that it is very unlikely that he or she will succeed. Take, for example, the case of an individual who shoots at a target that is some distance away. In this case, the perpetrator believes it unlikely that he or she will successfully kill the victim at such a great distance, but, if he or she succeeds, he or she will be considered to have fulfilled this gradation of intent, so long as it was his or her conscious object to kill the victim.

Under Article 30, however, for a person to be held criminally responsible for a crime, the material elements must be committed with intent *and* knowledge. From the discussion above, we know that both intent and knowledge will only be required in relation to a consequence element, because this is the only element for which 'intent' *and* 'knowledge' are defined.[87] Therefore, with respect to a consequence element, it must be proven not only that the perpetrator 'meant to' cause a consequence, but that he or she also fulfilled the definition of 'knowledge' (that is, that he or she was aware that the consequence would occur in the ordinary course of events). Therefore, while only a low cognitive component is necessarily required by the definition of intent, the cognitive component for a consequence element is raised by the requirement that consequence elements be committed with knowledge. The effect of this is that whereas a perpetrator need not be certain that he or she will succeed in engaging in conduct (because there is no knowledge requirement for a conduct element), a perpetrator must be aware that he or she will succeed in bringing about a consequence 'in the ordinary course of events'. Therefore, this gradation of mental element in Article 30 of the Rome Statute is much more difficult to fulfil than the equivalent gradation in common law and civil law systems.

This position regarding the necessary cognitive component when applied to a consequence element is supported by ICC Pre-Trial Chamber I's decision in *Lubanga*, where the Chamber noted that Article 30 covered 'first and

[87] See Table 2 above.

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foremost' the concept of '*dolus directus* of the first degree'. It defined this concept as covering situations where the perpetrator:

> . . . (i) *knows* that his or her actions or omissions *will* bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime . . .[88]

Thus, the Chamber viewed this gradation of intent as requiring that the perpetrator 'know' that his or her conduct would bring about a certain consequence (a very high cognitive component).

In conclusion, while at first it might appear that the language 'means to' in Article 30(2)(a) and (b)(first alternative) incorporates the concept of direct intent or *dolus directus* in the first degree (as those concepts are defined in domestic law), the requirement that consequence elements also be committed with 'knowledge' means that this gradation in Article 30 is in fact much higher than its equivalent in domestic law. Unlike in domestic law, where this gradation is normally characterized by a very high volitional component and only a low cognitive component, under Article 30 the gradation is characterized by very high volitional *and* cognitive components (when it is applied to consequences).

To give an example of the practical impact this may have, consider the case of an accused who plants an improvised explosive device (or 'IED', which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator's conscious object to kill those civilians; however, unless it could be shown that he or she *knew* (at the time the device was initiated) that the device would explode successfully and thereby result in the death of those civilians, the perpetrator would not satisfy this gradation of intent. Regardless of how much he or she might desire to kill those civilians, and how much he or she might hope that the IED will initiate properly, this would not be sufficient if it could not also be shown that he or she had the required knowledge. This obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30.

2. 'Aware it will occur in the ordinary course of events'

The second level or gradation of intent defined in Article 30(2) exists where a person 'is aware that [a consequence] will occur in the ordinary course of events' (Article 30(2)(b)(second alternative)). As with the first level, this language is identical to the wording used in the Australian Commonwealth Criminal Code and the English Draft Criminal Code Bill. In those Codes, it was used to codify the concept of oblique intent. I submit, therefore, that this language broadly covers what is known in the common law as oblique intent,

[88] Lubanga Confirmation (n 53) para 351 (emphases added).

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and what is known in civil law countries as *dolus directus* in the second degree.[89] In such cases, the perpetrator foresees *as practically certain* or *as highly probable* that certain consequences will flow from his or conduct. While the perpetrator does not have any desire for these consequences to occur, he or she nevertheless engages in the conduct, and is therefore deemed to have desired them. This gradation does not require the same purposive degree as the first gradation defined in Article 30 (that is, it does not require the same high volitional component), but the cognitive component is high (that is, the perpetrator must see the relevant consequence as virtually certain or highly probable).[90] Therefore, as with the interpretation of the phrase 'in the ordinary course of events' under the English Draft Criminal Code Bill, I submit that this phrase in Article 30 should be interpreted to mean that the result would occur *in the absence of some wholly improbable supervening event*.[91] This is also the position taken by Werle and Jessberger and by Badar, who interpret the language to mean that the consequence would occur 'unless extraordinary circumstances intervened'.[92]

It is relatively clear that the language of Article 30(2)(b)(second alternative) covers the concept of oblique intent or *dolus directus* in the second degree. This has been confirmed by the jurisprudence of the Court to date. For example, in *Bemba*, ICC Pre-Trial Chamber II described this gradation as requiring that the accused be 'aware that [the material] elements will be the *almost inevitable outcome* of his acts or omissions'.[93] The more important question, however, is whether such language includes anything lower than this. In other words, do the words 'will occur in the ordinary course of events' also cover cases that would fall within the categories of *dolus eventualis* or recklessness, as they are understood in their respective domestic criminal law systems?

Provisions giving definitions of *dolus eventualis* and recklessness were present early on in the negotiations of a draft statute prior to Rome. According to Badar, the notion of *dolus eventualis* 'was last discussed in the 1996 Report of the Preparatory Committee and since then had vanished from all the subsequent reports and Statute drafts',[94] whereas, as Clark explains, the provision on recklessness 'was ultimately to vanish also from the Statute at

[89] This is the position taken by Eser (n 10) 914–15.

[90] See Bemba Confirmation (n 15) para 358 (stating that 'the volitional element decreases substantially and is overridden by the cognitive element'), and para 369 (stating that the standard is that of 'virtual certain[ty]').

[91] This was the meaning intended by the English Law Commission, which was the first body to use the phrase: see Law Commission (England), *Criminal Code, Volume 2* (n 39) 192.

[92] Werle and Jessberger (n 8) 41; Badar, 'The Mental Element' (n 31) 484–5; Badar, 'Dolus Eventualis' (n 15) 440. See also Pisani (n 6) 131.

[93] Bemba Confirmation (n 15) para 359 (emphasis added). See also Lubanga Confirmation (n 53) paras 351–2; Katanga Confirmation (n 86) para 530.

[94] Badar, 'Dolus Eventualis' (n 15) 452. Clark similarly states that the 1996 Report of the Preparatory Committee was 'the last time that the words *dolus eventualis* appear in any draft': R Clark, 'Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court' (2008) 6 NZ YB Int'l L 215.

Rome'.[95] In both cases, there was no formal decision to drop the relevant provisions,[96] leading commentators to speculate now with respect to the intentions of the drafters. For example, Clark explains that his understanding of the terms of the debate among States at the Rome Conference 'was that most of the players . . . were generally uncomfortable with liability based on recklessness or its civil law (near) counterpart *dolus eventualis*'.[97] Pisani argues that, while a formulation that clearly included *dolus eventualis* did not appear in the final formulation of Article 30, 'this consideration *on its own* would not constitute an obstacle to the application of international criminal responsibility based on [*dolus*] *eventualis*'.[98] She concludes, however, that:

> [t]he extensive debate amongst the various points of view as well as the preparatory drafts and the definitive choice adopted by the Statute to exclude recklessness as a form of responsibility are all unequivocal indications that those who drafted the Statute wanted to limit the subjective element to . . . direct intent . . . [and] oblique intent . . . It seems clear, then, that the word 'intent' must be interpreted as excluding recklessness as well as . . . *dolus eventualis*.[99]

Werle and Jessberger argue that 'the fact that a definition of recklessness provided for in the Draft Statute was removed during the negotiations at Rome does not militate against including recklessness as a basis for criminal responsibility under the ICC Statute'.[100] Other authors, such as Ambos, have interpreted this deletion as meaning exactly that.[101]

It is possible that a provision defining *dolus eventualis* was dropped early on because drafters viewed it as being already covered by the terms of Article 30. On the other hand, it is arguable that the fact that the provision defining recklessness was retained up until Rome suggests that this concept was *not* already covered by the terms of Article 30 (that is, the definitions of 'intent' and 'knowledge' contained therein); in other words, if the wording 'will occur in the ordinary course of events' left room for such a concept, there would have been no need for a separate provision defining it.

[95] Clark, 'The Mental Element' (n 18) 301. Clark has stated elsewhere that '*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus [at Rome]. If it is to be read into the Statute, it is in the teeth of the language and history': R Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the *Lubunga Dyilo* Confirmation Proceedings' (2008) 19 Crim L Forum 519, 529; Clark, 'Elements of Crimes' (n 94) 220.

[96] The provision defining recklessness was ostensibly dropped because the term did not appear anywhere in the final text of the Statute, so there was no need to define it. See W Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute' (Pt III) (1998) 6 EJ Crime, Crim L & Crim Justice 409, 420; W Schabas, *Introduction to the International Criminal Court* (3rd edn, CUP 2007) 224; Clark, 'Elements of Crimes' (n 94) 216; Werle and Jessberger (n 8) 52; Wise (n 55) 52.

[97] Clark, 'Drafting a General Part' (n 95) 525. See also Clark, 'Elements of Crimes' (n 94) 212, 216.

[98] Pisani (n 6) 132 (emphasis added).

[99] ibid. However, note that, in other places, Pisani seems to suggest that Article 30 *includes dolus eventualis* and recklessness (ibid 125, 134).

[100] Werle and Jessberger (n 8) 52.

[101] Ambos, 'General Principles' (n 51) 21.

With the drafting history providing little help, the dispute over whether recklessness and *dolus eventualis* are included within the meaning of Article 30 comes down to differing interpretations of the specific wording of that provision. With respect to recklessness, academics generally agree that this concept is not covered by Article 30, because it does not have the necessary volitional component required by the conjunctive use of 'intent and knowledge' in Article 30(1).[102] This was also the position adopted by ICC Pre-Trial Chamber I in the *Lubanga* case.[103] As the Chamber explained:

> The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.[104]

Thus, recklessness, which the Court regards as having a lower volitional component than *dolus eventualis*, is not, in the view of Pre-Trial Chamber I, covered by the terms of Article 30. Pre-Trial Chamber II also took the view in *Bemba* that recklessness is not captured by Article 30 of the Statute.[105]

As for the concept of *dolus eventualis*, the dispute comes down to the interpretation of the wording 'will occur'. On the one side, there are those who argue that such wording cannot be interpreted to include *dolus eventualis*. They argue that mere probability that a consequence may occur is insufficient, and that the wording requires that the perpetrator foresee the occurrence of the consequence as *certain*. For example, according to Werle and Jessberger, *dolus eventualis* is excluded by the wording 'will occur'; in their view, *dolus eventualis* (which requires only a *risk* that a consequence may occur, rather than a practical *certainty*) would only be covered if the language were 'may occur'.[106] This is also the view taken by Eser,[107] Ambos,[108] Heller[109] and van Sliedregt.[110]

[102] See, eg, Piragoff and Robinson (n 56) 860 (fn 67). See also Eser (n 10) 906. Despite this recognition, some academics clearly view the failure to allow for recklessness as a standard gradation of mental element in Article 30 as 'questionable', given its status under customary international law (and, in particular, the heavy reliance on recklessness as a sufficient gradation of mental element for serious crimes in the jurisprudence of the ad hoc Tribunals): see, eg, A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 158, 153.

[103] Lubanga Confirmation (n 53) fn 438.

[104] ibid.

[105] Bemba Confirmation (n 15) para 360.

[106] Werle and Jessberger (n 8) 41, 53.

[107] Eser (n 10) 932–3 (and see also 915).

[108] Ambos, 'General Principles' (n 51) 21–2. See also K Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in LC Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 20–1. However, note Ambos' more recent statement below, which seems to contradict this position: see text accompanying n 118.

[109] Heller (n 58) 604.

[110] Van Sliedregt (n 19) 51–2.

On the other side, those in favour of the inclusion of *dolus eventualis* argue that this phrase requires only that the perpetrator be aware of the *probable* occurrence of the consequence. However, as Werle and Jessberger note, '[r]emarkably, the few commentators who advocate the inclusion of . . . *dolus eventualis* . . . hardly ever give any reasons for their position'.[111] Examples include Jescheck,[112] Mantovani,[113] Knoops,[114] Triffterer[115] and Cassese.[116] One exception is Piragoff and Robinson, who argue that if the concept of *dolus eventualis* is defined in terms of a substantial or high degree of probability (as opposed to merely a risk) that the consequence will occur, then it is covered by the terms of Article 30(2)(b)(second alternative); only those definitions of *dolus eventualis* that require merely a risk that a consequence will occur would be excluded.[117] Ambos seems to agree with Piragoff and Robinson, stating that 'there are other, more cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to a consequence) and these may indeed be included in Article 30'.[118]

Some of those commentators who argue *against* inclusion of *dolus eventualis* in Article 30(2)(b)(second alternative) have recognized that it would be possible for the ICC to interpret the phrase 'in the ordinary course of events' in a way that would include recklessness or *dolus eventualis*, but consider that such an interpretation may well conflict with the principle of strict construction.[119] Indeed, this is exactly what has occurred: Pre-Trial Chamber I, in the first substantive decision of a Chamber of the ICC to interpret Article 30, found that the wording 'will occur in the ordinary course of events' *does* include the concept of *dolus eventualis*. It stated that the concept of intention in Article 30 covers

> situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*).[120]

[111] Werle and Jessberger (n 8) 41 (fn 36).

[112] H-H Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 J Int'l Crim Justice 38, 45.

[113] F Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer' (2003) 1 J Int'l Crim Justice 26, 32.

[114] G-J Knoops, *Defenses in Contemporary International Criminal Law* (2nd edn, Martinus Nijhoff 2007) 5.

[115] Triffterer (n 51) 706.

[116] Cassese, *International Criminal Law* (n 54) 73.

[117] Piragoff and Robinson (n 56) 860.

[118] K Ambos, 'Critical Issues in the *Bemba* Confirmation Decision' (2009) 22 Leiden J Int'l L 715, 718. However, Ambos also states that he concurs with the exclusion of *dolus eventualis* from Article 30.

[119] Werle and Jessberger (n 8) 42. The 'principle of strict construction' refers to Article 22(2), which provides that '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy'. See also T Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and the ICC: An Overview' (2004) 19 *Nouvelles Études Pénales: Quo Vadis?* 319, 327 (fn 19).

[120] Lubanga Confirmation (n 53) para 352.

The Chamber went on to state:

> if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it 'will occur in the ordinary course of events'), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:
>
> i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and
> ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness.
>
> . . . Where the state of mind of the suspect falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realization of the objective elements, and hence would not meet the 'intent and knowledge' requirement embodied in article 30 of the Statute.[121]

Thus, it appears that Pre-Trial Chamber I viewed the definition of intent with respect to consequences (ie that a consequence 'will occur in the ordinary course of events') as being fulfilled where: (a) there is a 'substantial' risk that the consequence will occur; and (b) the accused is shown to have been aware of this risk, and to have proceeded with the conduct regardless. While the Chamber was devoted to the idea that a volitional element must be shown in the form of acceptance of the outcome, however, this definition does not appear all that different from the definition of recklessness. In reality, therefore, there may not be any difference in terms of outcome. In Weigend's view, whether or not Pre-Trial Chamber I is correct in its interpretation of the wording of Article 30(2)(b), 'the Court's more expansive interpretation of that clause certainly makes theoretical and political sense'.[122] While he does not explain what he means by this, it is likely that he is referring to the fact that both domestic legislation implementing provisions of the Rome Statute and the jurisprudence of the ICTY and ICTR have recognized liability for international crimes in cases where the perpetrator has only recklessness or *dolus eventualis*.[123]

More recently, in the *Bemba* case, ICC Pre-Trial Chamber II took the opposite position to Pre-Trial Chamber I regarding *dolus eventualis*, holding that the concept is *not* captured by Article 30.[124] The Chamber made this

[121] ibid paras 353–5.
[122] Weigend, '*Lubanga* Decision' (n 41) 482–3.
[123] See Werle and Jessberger (n 8) 42, 53–4.
[124] In the Katanga Confirmation, which was handed down between the Lubanga Confirmation and the Bemba Confirmation, Pre-Trial Chamber I stated that the majority of the Chamber (Judge Ušacka dissenting) 'endorse[d]' the previous finding in the Lubanga Confirmation that Article 30 incorporates *dolus eventualis*: Katanga Confirmation (n 86) fn 329. It stated, however, that '[f]or the purpose of the present charges in the present Decision, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus*': ibid, fn 329.

finding on the basis that the wording 'will occur' 'does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention)'.[125] Pre-Trial Chamber II stated further:

> by way of a literal (textual) interpretation, the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent[s] its occurrence.
>
> This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis*—namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words 'may occur' or 'might occur in the ordinary course of events' to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.[126]

Pre-Trial Chamber II found that this interpretation was supported by the *travaux préparatoires* of the Statute, which suggested that 'the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations' of the Statute.[127]

No decision has yet been made by the Appeals Chamber of the ICC to resolve the contradictory conclusions reached by Pre-Trial Chambers I and II with regard to *dolus eventualis*. Thus, it remains unclear whether this concept is covered by Article 30. In my view, however, the detailed analysis conducted by Pre-Trial Chamber II of the language and *travaux préparatoires* of the Statute lends greater weight to its finding that *dolus eventualis* is not covered by the language of Article 30. Furthermore, as a matter of policy, given the ICC's nature as a court of last resort and the principle of strict construction, an interpretation of Article 30 that does not include *dolus eventualis* is appropriate.

D. Definitions of 'Knowledge'

Article 30(3) provides two definitions of 'knowledge'. A person has 'knowledge' with respect to a circumstance if he or she has 'awareness that [it] exists', while a person has 'knowledge' with respect to a consequence if he or she has 'awareness that . . . [it] will occur in the ordinary course of events'.

See also at para 531, where the Chamber stated that it need not take a position on 'whether the concept of *dolus eventualis* has a place within the framework of article 30', because it did not intend to rely on this concept for the mental element in relation to the crimes charged.

[125] Bemba Confirmation (n 15) para 360.
[126] ibid paras 362–3.
[127] ibid paras 364–8.

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1. 'Awareness that a circumstance exists'

The first definition ('awareness that a circumstance exists') appears to require *positive* or *actual* knowledge of the relevant circumstance. The question is whether this requirement could be satisfied by proof of 'wilful blindness', as it is understood under the common law.[128] In other words, would it be sufficient to prove that an accused *suspected* that a circumstance existed, but *avoided* actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge.[129]

Piragoff and Robinson recognize that the specific definition in Article 30(3) may exclude such a concept and that actual awareness or cognizance may be required. They also recognize, however, that 'it may be open to the Court to interpret "awareness" to include wilful blindness in some situations'.[130] Eser seems to have come to the same conclusion, submitting that while a draft clause covering wilful blindness had been considered prior to Rome but was ultimately abandoned,[131] this does not necessarily mean that the language of Article 30 could not be interpreted to cover cases of 'implied' or 'constructive' knowledge.[132] Badar argues, on the other hand, that the wording of Article 30(3) 'limits the meaning of knowledge to "actual knowledge" as opposed to "constructive" knowledge'.[133] He states that '[e]ven knowledge of "high probability" of the existence of a particular fact" is insufficient.[134] He therefore concludes that the doctrine of 'wilful blindness' would only be covered by Article 30 'if the doctrine is understood to apply only in situations where the perpetrator is *virtually certain* that the fact exists'.[135] Thus, in his view, Article 30 could be argued to cover cases where the accused realized the high probability that the circumstance existed, but purposely refrained from obtaining the final confirmation because he or she wanted to be able to deny knowledge.[136]

In my view, in the context of international crimes, where criminal conduct is widespread and ongoing, actual knowledge will be extremely difficult to prove if some concept of wilful blindness is not permitted as a method of proof. For

[128] As Piragoff and Robinson explain, in domestic legal systems that recognize the concept of 'wilful blindness', it is treated as tantamount to actual knowledge: Piragoff and Robinson (n 56) 861.

[129] See, eg, Law Commission (England), *Criminal Code, Volume 2* (n 39) 191–2. See also Piragoff and Robinson (n 56) 861.

[130] Piragoff and Robinson (n 56) 861.

[131] A proposal for a draft provision on mental elements submitted to the Preparatory Committee in 1996 provided that: 'For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means: . . . (b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur]': *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/51/22 (13 September 1996) Volume II: Compilation of Proposals, art H(3)(b). This paragraph did not appear in any later draft provisions on the mental element.

[132] Eser (n 10) 931–2.

[133] Badar, 'The Mental Element' (n 31) 496.

[134] ibid.

[135] ibid (emphasis added).

[136] ibid, citing Williams, *Criminal Law* (n 14) 159.

this reason, Article 30(3) should be interpreted as allowing proof by at least a limited form of wilful blindness, as put forward by Badar. As such, proof that an accused was virtually certain that a circumstance existed should be taken to satisfy the definition of knowledge in that provision.

2. 'Awareness that . . . a consequence will occur in the ordinary course of events'

The second definition of knowledge is formulated in exactly the same terms as the second gradation of intent defined in Article 30(2)(b)(second alternative). The issue of whether *dolus eventualis* is covered by this wording therefore applies equally to this definition of knowledge.

Having examined the default rule in Article 30 and the meaning of the terms intent and knowledge, the final substantive part of this article considers exceptions to that default rule.

IV. EXCEPTIONS TO ARTICLE 30 OF THE ROME STATUTE

A. Interpretation of 'Unless otherwise provided . . .'

As indicated by the phrase '[u]nless otherwise provided' in Article 30(1), there are exceptions to the rule that the material elements of all crimes must be accompanied by knowledge and intent. Article 30 merely sets out a general or default rule that applies unless another rule provides for a departure from the general rule by requiring a different mental element.[137]

The issue of what sources of law may provide for a deviation from Article 30 in accordance with paragraph (1) was not settled at the Rome Conference, and commentators also hold differing opinions. Some argue that only provisions of the Rome Statute can provide an alternative mental element to that required by Article 30. For example, Weigend submits that the principle of legality means that 'expansions of the definition of the mental element in art. 30 of the ICC statute would have to be found in the statute itself, not in outside sources'.[138] Eser is more specific: he argues that a deviation from Article 30 'may be found elsewhere in the Statute, for instance within the specific definition of crimes or general principles of criminal law'.[139] Ambos goes further, however, arguing that 'deviations from Art. 30 can only arise directly from Art. 6–8' (the provisions which set out the crimes within the ICC's jurisdiction).[140] This view is untenable, because Article 28, which relates to superior responsibility, is

[137] See, eg, Bemba Confirmation (n 15) paras 136, 353 (describing the language of Article 30(1) as establishing a 'default rule'). [138] Weigend, 'Harmonization' (n 119) 327.
[139] Eser (n 10) 898. Triffterer also appears to favour this line of reasoning: Triffterer (n 51) 699–700.
[140] K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 789, cited in Werle and Jessberger (n 8) 43.

clearly a provision within the Statute that provides an alternative (and less strict) mental element. Schabas argues that '[i]t would seem to be going too far to suggest that the Article 30 standard in the Statute could be amended if an exception is provided for in the Elements of Crimes', although he notes that this is exactly what they have done.[141] Similarly, Kreβ has stated his opinion that the Elements of Crimes cannot '*by themselves* "provide otherwise"'.[142]

Others argue that the terms of Article 30(1) may encompass rules arising from the Elements of Crimes and other sources of international law under Article 21 of the Statute.[143] According to Article 21(1) (which sets out the applicable law that governs the Court), the Court shall apply, in the first place, the Statute and the Elements of Crimes. In the second place, it may apply, 'where appropriate', applicable treaties and rules of customary international law. A final subsidiary source of law is 'general principles of law derived by the Court from national laws of legal systems of the world'.

The argument that sources outside the Statute may 'otherwise provide' for a mental element is based on a literal interpretation of the language of Article 30. As this argument goes, the wording of Article 30(1) does not specify that the default rule requiring intent and knowledge applies 'unless otherwise provided for *in this Statute*'; rather, a comparison of that wording with other wording in the Statute suggests, according to Werle and Jessberger, 'that the range of norms referred to in this case is much wider':[144]

> When other provisions in the Statute itself are referenced, the reference is generally made explicit; thus, a comparable clause in Article 31(1) ICCSt. on the grounds for exclusion from punishment explicitly refers to 'other grounds for excluding criminal responsibility *provided for in this Statute*'.[145]

While Werle and Jessberger recognize the argument that the principle of legality requires that any expansion of the definition of the mental element in Article 30 'would have to be found in the Statute itself and not in outside sources', they view the 'uniform interpretation and application of the ICC

[141] Schabas, *Introduction* (n 96) 225. In light of the recent jurisprudence of the Court (see below n 152), Schabas appears to have changed his position in his more recent book, where he states that 'article 21 lists [the Elements] as a source of applicable law, and to the extent that [alternative mental elements] are "provided" by such a source, they may be deemed "otherwise provided"': Schabas, *Commentary* (n 15) 475.

[142] C Kreβ, 'The Crime of Genocide under International Law' (2006) 6 Int'l Crim LR 461, 485 (emphasis in original).

[143] See, eg, Clark, 'The Mental Element' (n 18) 321 (submitting that an alternative mental element 'might be based on the general law, and in particular applicable treaties, customary law and general principles of law'); Badar, 'The Mental Element' (n 31) 500 (stating that Article 30(1) 'enables the Statute to absorb the corresponding rules of international humanitarian law'); Cassese, *International Criminal Law* (n 54) 74. For an explanation of the approach taken by the Preparatory Commission in the Elements of Crimes, see Mauro Politi, 'Elements of Crimes' in Cassese, Gaeta and Jones (n 10) 461; Kelt and von Hebel, 'General Principles' (n 13) 29.

[144] Werle and Jessberger (n 8) 45.

[145] ibid 46 (emphasis in original).

Statute and customary international law' as a more important objective in the context of international criminal law.[146]

Debate on this issue continued at the negotiations by the Preparatory Commission of the Elements of Crimes.[147] As Piragoff and Robinson explain:

> Some delegations were of the view that the Elements could not call for a deviation from article 30, as the Elements document is subsidiary to the Statute. Other delegations, while conceding that the Elements could not override the Statute, argued that some deviations were necessary to make the crimes workable and to faithfully reflect the intent of the Statute as well as the jurisprudence.[148]

The latter view was eventually accepted, and the General Introduction to the Elements of Crimes indicates that any exceptions to the standard of Article 30 that are found in the Elements of Crimes are based 'on the Statute, *including applicable law under its relevant provisions*'.[149] Piragoff and Robinson further state that:

> This formulation recognizes the primacy of the Statute, and indicates that exceptions must directly or indirectly flow from the Statute, but also recognizes that the Statute itself, through article 21 (applicable law), allows reliance on other sources, including treaties, general principles and the Elements. Thus, the approach seems to avoid suggesting that States Parties could *legislate* a deviation through the Elements, but allows them to *codify* a deviation where necessary to reflect their intent when drafting the Statute or to reflect the relevant treaties and jurisprudence.[150]

This position is consistent with rules of interpretation applicable to treaties, whereby a subsequent agreement among all treaty parties (eg the Assembly of States Parties to the Rome Statute) concerning the application or interpretation of a treaty (in this case, the Statute) may be taken into account in interpreting the treaty (ie may be taken into account by the Court itself when it interprets its Statute).[151]

While the ICC Pre-Trial Chambers have thus far accepted that the Elements of Crimes can provide for a deviation from the Article 30 standard,[152] it

[146] ibid.
[147] See Piragoff and Robinson (n 56) 856.
[148] ibid.
[149] Elements of Crimes, General Introduction, 2 (emphasis added).
[150] See Piragoff and Robinson (n 56) 856.
[151] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3).
[152] See Lubanga Confirmation (n 53) paras 356–9, where Pre-Trial Chamber I of the ICC accepted that the Elements of Crimes—which required only negligence with respect to the age of the victims in the case of Article 8(2)(b)(xxvi) (War crime of using, conscripting or enlisting children)—represented 'an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute': at para 359. However, as Clark notes, '[w]hether the negligence exception is consistent with the Statute, as understood in Article 9(3), is a question that will no doubt be argued by the defence [in the *Lubanga* case] at a later stage': Clark, 'Elements of Crimes' (n 94) 222. See also Bemba Confirmation (n 15) paras 136, 353, where Pre-Trial Chamber II stated that 'it must be established that the material elements of the respective crime were committed with "intent and knowledge", unless the Statute *or the Elements of Crimes* require a different standard of fault' (emphasis added).

remains unclear whether, in the absence of a clear indication in the Elements of Crimes, the Court can have reference to sources of law outside the Statute to found a deviation from that standard. For example, when determining what mental element is applicable to the modes of liability set out in Article 25(3) of the Statute (the elements of which were not elaborated in the Elements of Crimes), could the Court rely on customary international law to found a deviation from the Article 30 standard?

The argument put forward by Werle and Jessberger—that uniform interpretation and application of the Rome Statute and customary international law is a more important objective than strict adherence to the principle of legality—is compelling.[153] While it is desirable to have clarity and precision in codification in order to give fair notice of the scope of prohibitions, it is perhaps more desirable for the law that is to be applied by a newly established and permanent international criminal court to be consistent with customary international law, as has been developed over a significant period of time prior to its establishment. Therefore, in my view, Article 30(1) should be interpreted to allow the Court to balance the potentially competing aims of the principle of legality and consistency with customary international law, by allowing the Court to have recourse to sources outside the Statute when determining the applicable mental element in a particular case, where the Elements of Crimes are silent (or where there are no Elements of Crimes, as in the case of modes of liability under Article 25 of the Statute).

B. Types of Exceptions to Article 30

Determining whether the language of a provision establishes an exception to the general rule set out in Article 30 must be done on a case-by-case basis.[154] According to both Eser and to Werle and Jessberger, provisions that 'otherwise provide' for a mental element can do one of three things:

(i) impose a mental element that is *less* stringent than that provided for in Article 30;
(ii) impose a mental element that is *more* stringent than that provided for in Article 30; or
(iii) impose a mental element *in addition to* that provided for in Article 30 (ie a *special* or *additional* mental element).

Examples from the first category broaden or expand criminal responsibility, by requiring anything from recklessness or *dolus eventualis* to negligence.[155] The second and third categories narrow criminal responsibility.

[153] Although it is heavily criticized by Clark: Clark, 'Drafting a General Part' (n 95) 525 (fn 18); Clark, 'Elements of Crimes' (n 94) 214 (fn 14).

[154] Werle and Jessberger (n 8) 44, 46–7. See also Eser (n 10) 901.

[155] For an example of recklessness, see, eg, Article 8(2)(a)(iv), where the use of the term 'wantonly' reduces the level of the required mental state to recklessness. For an example of negligence, see, eg, Article 28(a)(i), which provides that a commander shall be criminally

1. Less stringent mental elements

In addition to examples of the Statute itself providing for a less stringent mental element than that imposed by Article 30,[156] there are various examples of the Elements of Crimes providing for a less stringent mental element with respect to one of the crimes it considers.[157] These less stringent mental elements were imposed because, in the view of the Preparatory Commission that drafted the Elements of Crimes (and the Assembly of States Parties that adopted them), a less stringent mental element was justified in those cases (perhaps on the basis of a rule under some other 'applicable law'). It will be up to the Court to decide whether it agrees with this assessment, and whether it will therefore uphold the imposition of a less stringent mental element than that required by Article 30.[158]

2. More stringent mental elements

It is not entirely clear what the difference is between the second and third categories of provisions that 'otherwise provide' for a mental element (ie the category that imposes a mental element that is *more stringent* than that provided for in Article 30, and the category that imposes a *special* or *additional* mental element). In fact, Eser cites some of the same examples (eg aiding and abetting) for both categories,[159] and Werle and Jessberger do not provide any example of the category of more stringent mental requirements.[160] It is perhaps for this reason that Piragoff and Robinson recognize only two categories (the first (less stringent mental elements) and the third (special or additional mental elements).[161]

In my view, because Article 30 incorporates what is understood to be the highest gradation of mental element in both common law and civil law systems (direct intent or *dolus directus* in the first degree), there is simply no room for other provisions to impose a more stringent mental element. There is, of course, room to impose *additional* mental elements (as is the case with genocide). However, in order to impose a *more stringent* mental element, the only possibility would be to require, for example, that the accused 'meant to' cause a consequence (thereby removing the lesser alternative included in

responsible for crimes committed by forces under his or her command not only when that military commander knew but also where the commander 'should have known' that such crimes were being committed. See also the Elements of Crimes for Article 8(2)(b)(xxvi) (the war crime of using child soldiers), which provides that the Prosecution need only prove that an accused 'should have known' that a soldier was a minor.

[156] See the example of Article 28 cited in n 155 above.

[157] See above n 155.

[158] Pre-Trial Chamber I has accepted such an example in Lubanga Confirmation (n 53) paras 356–9 (concerning the war crime of using child soldiers).

[159] Eser (n 10) 899, 900.

[160] Werle and Jessberger (n 8) 48.

[161] Piragoff and Robinson (n 56) 856–8.

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Article 30(2)(b) of being aware that a consequence 'will occur in the ordinary course of events'). There are no such examples of a *more stringent* mental element in the Statute or the Elements of Crimes.

3. Additional mental elements

As Piragoff and Robinson explain, an additional mental element exists where the Statute states that conduct must be committed for an ulterior purpose, or in pursuance of a specific goal (ie 'with intent to', 'with the intention of' or 'for the purpose of' achieving certain ends).[162] This special intent, they state, is an element that must be proved *in addition* to any intent imposed by Article 30: 'It is a separate mental element that is not linked to any material element that must be proved or to which . . . article 30 would apply'.[163] Similarly, Werle and Jessberger view an additional mental element as one that does 'not necessarily refer to a material element of the crime, such as conduct, consequence or circumstance'.[164] This may be where the difference lies between this category and the second category discussed above: where a more stringent mental element is required *with respect to* a particular material element, such a case would fall within category (ii) above;[165] where an additional mental element is required that is *not* linked to any material element, such a case would fall within category (iii) above.

The fact that an additional mental element is not linked to any material element means that the accomplishment of the consequence that is the focus of that additional mental element—because the additional mental element is almost always directed at a particular consequence, rather than a circumstance or conduct—does not have to be proven.[166] According to Triffterer, it does not even have to be proven that the particular consequence could *ever* be achieved.[167]

Examples of additional mental elements that are commonly cited are: the intent to inflict pain or suffering for such purposes as 'obtaining information or a confession, punishment, intimidation or coercion or for any reason based on

[162] ibid 857. See also Cassese, *International Criminal Law* (n 54) 65.

[163] Piragoff and Robinson (n 56) 858. Kelt and von Hebel also agree that such additional mental elements have no particular material element connected to them: 'General Principles' (n 13) 31, 32. See also Triffterer (n 51) 703.

[164] Werle and Jessberger (n 8) 48. On the concept of additional mental elements, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide refers to these additional mental elements as 'ulterior intentions', and explains that they 'characteristically take the form of a prohibition against engaging in conduct *with intention to* achieve some further objective' (emphasis in original). It further explains that while liability in these crimes 'is determined by the offender's objective, the achievement of that objective is not itself a physical element of the offence.'

[165] However, as noted above, given that Article 30 imposes such a demanding test for both intent and knowledge, it is unlikely that there is any room left for this category.

[166] Badar, 'The Mental Element' (n 31) 484; Cassese, *International Criminal Law* (n 54) 66.

[167] Triffterer (n 51) 703.

discrimination of any kind' for the war crime of torture under Article 8(2)(c)(i);[168] the intent to maintain the 'institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups' for the crime against humanity of apartheid under Article 7(1)(j); the intent to destroy 'in whole or in part, [a] national, ethnical, racial or religious group, as such' for the crime of genocide under Article 6;[169] the intent to discriminate on 'political, racial, national, ethnic, cultural, religious, gender . . . or other grounds' for the crime of persecution under Article 7(1)(h);[170] the intent to 'deprive the owner of the property and to appropriate it for private or personal use' for the war crime of pillaging under Article 8(2)(b)(xvi) or 8(2)(e)(v);[171] and the intent to 'facilitat[e] the commission of . . . a crime' for the purposes of aiding and abetting under Article 25(3)(c).

One interesting question is whether the definitions of 'intent' and 'knowledge' contained in Article 30 apply to *additional* mental elements, or whether a higher or lower gradation of intent or definition of knowledge might apply. As an additional mental element is, by definition, a mental element that has no corresponding material element, it would appear that Article 30 does *not* apply, as Article 30's definitions of 'intent' and 'knowledge' are required only with respect to the material elements of a crime. If it is accepted that Article 30 does not regulate the mental element with respect to *additional* mental elements (that is, that there is a gap in the Statute), then the Court would be permitted to turn to *other* sources of law to provide the necessary contents of those mental elements. For example, the Court would be permitted to turn to customary international law (and the rich jurisprudence of the ICTY and ICTR before which that law has developed) in order to determine the meaning of the 'intent to destroy' requirement for genocide. Thus, it would be possible for the Court to adopt a different gradation of intent (ie one that includes the concept of *dolus eventualis*) or a different definition of knowledge (ie one that includes a more expansive concept of wilful blindness) for the purposes of such additional mental elements, if there is a basis to do so in another source of law to which the Court can have reference under Article 21.[172]

[168] This was identified as a 'specific intent' requirement in Bemba Confirmation (n 15) paras 293–4.

[169] This was identified as an 'additional subjective element', 'specific intent' or '*dolus specialis*' requirement in *Prosecutor v Al Bashir* (Decision on Application for an Arrest Warrant) ICC-02/05-01/09, PT Ch I (4 March 2009) para 139.

[170] This was identified as a 'specific intent' or '*dolus specialis*' requirement in ibid para 141.

[171] This was identified as a '*dolus specialis*' requirement in Katanga Confirmation (n 86) para 332, and a 'specific intent' or 'additional special intent' requirement in Bemba Confirmation (n 15) paras 320, 331.

[172] For an example of the approach taken by a domestic legal system on this point, see Commonwealth Attorney-General's Department (Australia), *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 61. The Guide explains that, since 'ulterior intentions' are not defined in the Code, the content of the mental element in these contexts 'is determined by

V. CONCLUSION

This article has demonstrated that some of the criticisms of Article 30 made by academics may be well founded. Article 30 does establish an extremely complex rule,[173] requiring that material elements be classified as conduct, consequence or circumstance elements, and then requiring that a different definition of 'intent' or 'knowledge' or both be applied to each. Certain aspects of Article 30 are indeed confusing and ambiguous.[174] For example, the lack of any definition of the terms 'conduct', 'consequence' and 'circumstance' (given the critical importance of accurately classifying material elements in order to determine what definition of 'intention' or 'knowledge' applies) is a clear failure on the part of the drafters of the Statute. Furthermore, the provision's attempt to define the concept of intent in Article 30(2)(a) is not entirely satisfactory, as the requirement that consequence elements be committed with intent and knowledge means that the gradation of mental element established under this sub-paragraph is higher than that of direct intent or *dolus directus* in the first degree under common law and civil law systems respectively. As noted above, this obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30. Moreover, the use of the phrase 'will occur in the ordinary course of events' in Article 30(2)(b) and (3) clearly 'raises more questions than answers',[175] as it has led to conflicting opinions among both academics and the different Pre-Trial Chambers of the Court with respect to *dolus eventualis*. Finally, the definition of knowledge with respect to a circumstance in Article 30(3) appears to set too high a standard.

Nevertheless, I agree with Eser that Article 30 'provides sufficient building blocks for a meaningful construction of "intention"'.[176] Some creative jurisprudence from the Chambers of the Court (in particular, from the Appeals Chamber on the issue of *dolus eventualis*) would go a significant way towards addressing these failures of drafting. In my view, the Court should:

1. Adopt definitions of the different types of material elements along the lines of those suggested by Robinson and Grall. Thus, conduct elements would be defined literally and narrowly to mean pure conduct; consequence elements would be defined as circumstances changed by the actor; all elements that do not fit these definitions would be independent circumstance elements.
2. Clearly exclude *dolus eventualis* from the definition of intent under Article 30(2)(b) and (3), along the lines of the decision in *Bemba*.

ordinary usage and common law'. The Guide notes, however, that the definition of 'intent' provided in the Code, while not directly applicable, would provide a 'persuasive analogy' (at 63).

[173] Satzger (n 9) 269.
[174] Cassese, '*Mens Rea*' (n 7) 1025.
[175] Werle and Jessberger (n 8) 37.
[176] Eser (n 10) 907.

3. Allow for knowledge of a circumstance to be satisfied by proof of 'wilful blindness' (that is, by proof that the accused was virtually certain that a circumstance existed, but avoided actual knowledge by deliberately shutting his or her eyes to an obvious means of knowledge).
4. Interpret Article 30(1) to allow for recourse to sources outside the Statute when determining whether the applicable mental element in a particular case is 'otherwise provided', in circumstances where the Elements of Crimes are silent.

Finally, in my view it would be desirable for Article 30(1) of the Rome Statute to be amended by the Assembly of States Parties to replace the conjunctive 'and' with the disjunctive 'or', to avoid the difficulties involved with requiring both knowledge *and* intent with respect to consequence elements (and to prevent the perpetrator who plants an unpredictable IED from escaping liability).