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# The International Criminal Court And The Concept Of Mens Rea In International Criminal Law

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## I. Introduction

Legal historians have established that ancient or developing legal systems by and large have certain characteristics in common, for example great emphasis on common group interests rather than on individual rights, a strong paternalistic strain with little regard for the rights and interests of women, and inflicting punishment for wrongful acts irrespective of the subjective accountability of the perpetrator.[1]

The criminal-law system in underdeveloped communities is specially noted for laying stress on the external act that constitutes the *actus reus* of a crime while almost entirely disregarding the subjective element of fault as a condition of criminal liability. Punishment is founded on the *talio* principle (an eye for an eye) and is based on vengeance for the damages or harm suffered by the victim of a wrongful act.

It is a salient principle of legal ethics that a person ought not to be punished for wrongful acts unless the perpetrator's conduct was attended by a blameworthy state of mind (fault). The principle encapsulated in the maxim *actus non facit reum, nisi mens sit rea* (an act does not render the perpetrator culpable unless there is a criminal intention) thus represents a moral directive of the legal idea. Although almost all the developed legal systems of the world recognize instances of absolute or strict liability, those instances would, in ethically-based criminal justice systems, remain restricted to highly exceptional instances of technical misdemeanors or where possession of or control over objects that are inherently dangerous or likely to be used for criminal purposes would merit invoking the notion of risk

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[1] *See* F.J. VAN ZYL & J.D. VAN DER VYVER, INLEIDING TOT DIE REGSWETENSKAP, 277-78 (1982).

liability.

The degree of emphasis on culpability as an essential element of criminal liability and as a decisive consideration for establishing the nature and severity of punishment has also become a dividing factor between the (Anglo-American) common-law criminal justice systems and those based on the (Romanistic) civil-law tradition. The latter systems tend to be quite dogmatic, identifying and meticulously defining all the elements that constitute a crime in general and (neatly classified) specific crimes in particular. There is a strong tendency toward logical consistency in holding everyone criminally answerable for conduct that fits the textbook designation of a wrongful act and the fixed criteria of culpability. The Anglo-American approach, on the other hand, seems more casuistic, seeking to uphold a just outcome in the individual case rather than striving toward scholarly uniformity. It seeks to uphold equity in the Aristotelian sense in the isolated cases where application of a general rule would cause an injustice.[2] As far as the concept of fault is concerned, Anglo-American jurisprudence has no problem with applying logical inconsistencies such as entering a verdict of "guilty but insane" or proclaiming that ignorance of the law is no excuse. The Anglo-American criminal justice systems are also less committed to the general adage of "no liability without fault" than their civil-law counterparts.

The Statute of the International Criminal Court (ICC Statute) upholds the principle of no liability without fault and

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[2] In the *Rhetoric*, Aristotle defined equity as a form of justice that goes beyond the written law and applies (a) in cases not foreseen by the legislator (*casus omissus*), and (b) in instances where the legislator was unable to formulate a general rule that would fit all cases. In the latter context, Aristotle explained that even though the general rule will serve justice in most of the cases, there will almost invariably be isolated instances where application of the general rule would not serve justice, for—in the words of Aristotle himself—"a lifetime would be too short to enumerate all the possible cases." Here, equity is applied as a corrective of general justice in order to restore justice in the individual (hard-luck) case. ARISTOTLE, RHETORIC Bk. 1, ¶ 13, at ch. X111.

furthermore includes in its circumscription of *mens rea,* a restricted manifestation of intent that has to be applied as a general rule. The concept of fault to be applied by the ICC has almost exclusively been adopted from the civil-law criminal justice systems. Accordingly, the ICC regime is founded on notions and principles that are not familiar to common-law countries and is based on a vocabulary that many lawyers schooled in the common-law might find foreign to their own legal usage. While the influence of Anglo-American perceptions of the subjective element of criminal liability has filtered through in some judgments of the International Criminal Court for the former Yugoslavia (ICTY), those precedents cannot be followed in the International Criminal Court (ICC). Also worth noting is the fact that the Anglo-American perceptions of the subjective element of criminal liability did not to the same degree influence the judgments of the International Criminal Tribunal for Rwanda (ICTR).

This article introduces the reader to the language and reasoning pertinent to the concept of *mens rea* designed for ICC purposes. This also happens to be the language and reasoning which one might expect will, under influence of the ICC, become the norm of international criminal law. The article furthermore addresses some of the difficulties that inevitably emerged from the general imperfections of language as a means of encapsulating the exact meaning of legalistic concepts as well as those to be expected from a document that had to be negotiated between delegations representing extremely diverse criminal justice systems and within considerable time constraints.

Section A of the article defines concepts denoting the different manifestations of fault. Section B gives an overview of the general requirement of *mens rea* for ICC jurisdictional purposes. Implementation of *mens rea* as an element of the crime of genocide, crimes against humanity, and war crimes is dealt with separately and respectively in Sections C, D and E. The article finally, in Section F, analyses subjective attributes of the perpetrator (mental disorder, intoxication, and juvenile status) and a mental disposition (mistake) that exclude intent

and/or knowledge, and as such serve as grounds for exculpation.

The article seeks, within the general confines aforementioned, to find an answer to several problems that are not expressly addressed in the ICC—problems that therefore must be resolved on basis of the general principles of criminal justice that are basic to the ICC regime. The constitutive elements of fault (intent and knowledge) only apply unless otherwise provided by the ICC Statute. Therefore, it becomes important to identify the specific crimes within the subject-matter jurisdiction of the ICC where a conviction will be dependent on a more stringent, or may be based on a lesser, form of fault. It is also important to distinguish between crimes where intent to engage in the criminal conduct is all that has to be proved as far as *mens rea* is concerned (conduct oriented or general intent crimes) and those crimes where accountability is also dependent on an intent to bring about a certain consequence of the criminal conduct (consequence oriented or special intent crimes). The ICC Statute gives no clear answer to the question of whether or not a military commander can be convicted of genocide in cases where the element of fault on his or her part is confined to a negligent neglect to control the conduct of the troops under his or her command. It is also important to be reminded of judgments of the Nuremberg Tribunal instructing those engaged in the administration of justice not to second guess value judgments made by a commanding officer in a combat situation but to be sensitive to the special conditions and often split-second pressures under which those judgments have to be made and acted upon.

Jurisprudence of the ICTY and ICTR provide useful guidance, for example, in identifying rape as a very special manifestation of genocide. When dealing with murder as a crime against humanity or a war crime, the ICC is precluded by the *mens rea* doctrine preferred by drafters of the ICC Statute from following Anglo-American precedents that afford sanction to a conviction for murder in cases where the perpetrator intended to cause grievous bodily harm while knowing that death might ensue in the ordinary course of events, or in reckless disregard of the possible fatal consequences of the assault (and

death of the victim did set in). The implications of including words denoting intent in the definitions of some of the crimes against humanity and war crimes, while not in others, alongside a general requirement of "intent and knowledge" applying to all crimes "unless otherwise provided" require careful scrutiny. Including in the chapeau of the crimes-against-humanity definitions a reference to "knowledge of the attack" constituting the crime against humanity, while only referring to "knowledge" and not to "intent", is particularly problematic, since it may be taken to exclude the element of intent that would otherwise constitute a vital component of *mens rea*, and this in turn could apply to crimes against humanity in general or only to the attack constituting the crime against humanity.

### A. The Conceptual Framework

The notion of fault is comprised of either intent (*dolus*) or negligence (*culpa*). [3] A wrongful act is committed intentionally if the perpetrator contemplated the illegality and/or harmful consequences of the act. Negligence denotes the mental disposition of a person who commits a wrongful act, and although the person who committed the act did not intend to act illegally or to cause the harmful consequences of the act, in doing so he or she deviated from conduct expected of a reasonable person within the same circumstances. While the person who acts intentionally foresees the illegality and harmful consequences of his or her act, the person who acts negligently does not appreciate the illegality or the harmful consequences of his or her action, while a reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act.

Donald Piragoff was quite right in asserting that

[3] The American legal system deals with the element of fault with a different arsenal of concepts, focused upon acting purposely, knowingly, recklessly or negligently. *See* MODEL PENAL CODE (American Legal Institute), § 2.02(2) (1962); *see also* Margaret McAuliffe deGuzman, *The Road to Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 394-98 (2000).

"'intent' . . . connotes some element, although only minimal, of desire or willingness to do the action, in light of an awareness of the relevant circumstances." [4] However, intent does not necessarily include a desire to bring about the consequences of the act. The mental component attending human conduct (i.e., the *what* and the *why* of conscious acts and omissions) involves several distinct modalities of reason, two of which qualify and distinguish various manifestations of intent. Both entertain the *what* question of human conduct, not the *why*:

- Deliberately *contemplating* the act or omission and its consequences in the sense of acting or omitting to act knowingly, and *foreseeing* the consequences of the act or omission; and

- *Desiring* or setting out to accomplish the consequences of the act or omission, or *wanting* those consequences to occur.

Whereas the first is an essential element of intent, the second is not but serves to distinguish the first and the second degree of intent.[5]

Intent can take on one of three forms, to be distinguished in view of the presence or absence of a desire to bring about the harmful consequences that emanated from the act or omission:

- ***Dolus directus***, in which event the illegality and/or harmful consequence of the act was foreseen and desired by the perpetrator (A desires the death of B and foresees

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[4] Donald K. Piragoff, *Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 527, 533 (Otto Triffterer ed., 1999) [hereinafter *Commentary on the Rome Statute*].

[5] *See* Steffen Wirth, *Gegen Völkermord und Vertreibung: Die Überwindung des zwanstigsten Jahrhunderts*, *in* 28 ARGUMENTE UND MATERIALIEN ZUM ZEITGESCHEHEN 59, 61 n.5 (herausg. v. Bernd Rill) (2001).

that his act will bring about B's death: if A in these circumstances commits the act and B dies in consequence of that act, then A will be judged to have acted with direct intent to kill B);

- ***Dolus indirectus***, in which event certain (secondary) consequences in addition to those desired by the perpetrator of the act were foreseen by the perpetrator *as a certainty*, and although the perpetrator did not desire those secondary consequences he or she nevertheless committed the act and those consequences did set in (A desires the death of B and foresees that if he were to put poison in B's food, other guests at B's table will most certainly also die; knowing that C will be joining B for dinner, A nevertheless poisons the food and in so doing causes the death of both B and C; in regard to the death of C, A acted with indirect intent); and

- ***Dolus eventualis***, in which event the perpetrator foresees consequences other than those desired *as a possibility* (including a likelihood of the consequences setting in) and nevertheless went ahead with the act (A desires the death of B and foresees that if he were to shoot B while B is driving his car, other passengers in the car may possibly also be injured or even killed; if B nevertheless goes ahead and shoots B while B is driving the car with C as his passenger, A will be held liable for the injuries, or the death, of C under the rubric of *dolus eventualis* even though he might not have wished C any harm).

*Dolus eventualis* differs from negligence. In the case of *dolus eventualis,* the perpetrator foresees that (secondary) consequences might result from the wrongful act; in the case of negligence, the person does not foresee those consequences while a reasonable person situated in the same circumstances would have been expected to foresee the possibility of those consequences resulting from the wrongful act.

In Anglo/American legal systems, *dolus eventualis* is

usually defined as a manifestation of fault in cases where the perpetrator acted "recklessly" in regard to the (undesired) consequences of the act.[6] In legal systems where "recklessness" features prominently in the circumscription of fault, the distinction between *dolus eventualis* and negligence becomes blurred.[7] Antonio Cassese, for example, uses language indicating that recklessness is something other than intent (referring to recklessness and negligence as forms of *mens rea* "other than intent") but in the very same paragraph circumscribes *dolus eventualis* (a certain manifestation of intent) as "advertent recklessness".[8]

Antonio Cassese has criticized the ICC Statute for not recognizing "recklessness" as the basis of liability for war crimes.[9] However, if one takes into account the resolve to

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[6] In *Prosecutor v. Blaškić*, the ICTY defined "recklessness," citing Belgian authors CHRISTINE HENNAU & JACQUES VERHAGEN, DRIOT PENAL GÉNÉRAL (2d ed., 1995) (1991) in much the same terms as those applying to *dolus eventualis*: "the action is foreseen by the perpetrator as only a probable or possible consequence," or "taking a deliberate risk in the hope that the risk does not cause injury." Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, ¶ 249 (3 March 2000).

[7] The American *Model Penal Code* distinguishes between recklessness and negligence along the following lines: the person acting recklessly, "consciously disregards a substantial and unjustifiable risk that the material element [of an offense] exists or will result from his conduct" and disregarding the risk "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation"; the person acting negligently, "should be aware of a substantial and unjustifiable risk that the material element [of an offense] exists or will result from his conduct" and taking the risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." MODEL PENAL CODE, *supra* note 3, § 2.02(2)(c) and (d).

[8] Antonio Cassese, *Crimes against Humanity*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 353, 364 (Antonio Cassese, et al. eds., 2002) [hereinafter the *Commentary on the ICC*].

[9] Antonio Cassese, *The Statute of the International Criminal Court:*

confine the jurisdiction of the ICC to "the most serious crimes of concern to the international community as a whole,"[10] it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.

### B. *Mens Rea* as Defined in the ICC Statute

The ICC Statute upholds the principle of no liability without fault to the letter:

> 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.[11]

The conjunctive requirement of intent and knowledge[12] is further defined in the ICC Statute. Article 30(2) defines intent as follows:

> 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.

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*Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 153-54 (1999).

[10] STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183/9, art. 1, *opened for signature* July 17, 1998 (*entered into force* July 1, 2002), *reprinted in* 37 I.L.M. 1002 (1998) [hereinafter ICC Statute].

[11] *Id.* art. 30(1).

[12] LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM, 210 (Transnat'l Publ. ed., 2002).

"Knowledge" is defined in the ICC Statute as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[13] This definition covers *dolus directus* and *dolus indirectus* only.[14] Therefore, even if one were to hold that "intent" in relation to conduct, as defined in the ICC Statute, includes *dolus eventualis*, this form of intentional conduct will be excluded by the provision requiring intent *and* knowledge, read with the above definition of "knowledge".

In terms of Article 30(1) of the ICC Statute, the requirement of "intent and knowledge" applies "[u]nless otherwise provided." This introductory phrase makes allowance for deviations from the general requirement of intent and knowledge (*dolus directus* or *dolus indirectus*) in particular instances expressly provided for in the ICC Statute.

At the one end of the spectrum, the ICC Statute in some cases makes allowance for liability based on a lesser form of fault. For example, command responsibility in a military setting can be based on negligence, namely if forces under the effective command, authority or control of the accused have committed a crime within the jurisdiction of the ICC as a result of the commander's failure to exercise proper control over such forces and he or she, "owing to the circumstances at the time," did not actually know but "should have known" that the forces were committing or were about to commit the crime.[15] A superior other than a military commander can likewise be held responsible for crimes committed by his or her subordinates if, *inter alia*, he or she did not actually know but "consciously disregarded" information indicating that the subordinate was committing or was about to commit the crime.[16] Here,

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[13] ICC Statute, *supra* note 10, art. 30(3).

[14] Piragoff, *supra* note 4, at 534. According to Piragoff, this phrase denotes *dolus eventualis*. That, in this writer's respectful opinion, is not correct. "Awareness that . . . a consequence *will occur*" denotes *dolus indirectus*. Emphasis added.

[15] ICC Statute, *supra* note 10, art. 28(1)(a).

[16] *See id.* art. 28(2)(a). According to Donald Piragoff, this is an instance of liability based on "recklessness." Piragoff, *supra* note 4, at

negligence will not suffice. Liability can, on the other hand, be based on intent in the form of *dolus directus, dolus indirectus* or *dolus eventualis*. The superior who consciously disregarded information (willful blindness) will be liable if the information he disregarded indicated as a certainty or as a possibility that his or her subordinates were up to no good.

At the other end of the spectrum, a special form of intent might be required. For example, whereas liability under the ICC Statute can in general be based on *dolus directus* as well as *dolus indirectus*, the war crime constituted by extensive destruction and appropriation of property not justified by military necessity, having to be carried out "wantonly", will require *dolus directus*.[17]

### 1. Constructive Knowledge

The question whether or not "constructive knowledge" would render a person liable for any of the crimes within the subject-matter jurisdiction of the ICC will depend on the exact meaning given to the concept of constructive knowledge.

In *Prosecutor v. Tadić (Judgment)*, the Trial Chamber held "if the perpetrator has knowledge, either actual or constructive . . . that is sufficient to hold him liable for crimes against humanity."[18] Similar statements of the law were subsequently repeated in almost all the cases dealing with crimes

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the text accompanying note 20. *See also* Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 189, 206 (Roy S. Lee ed., 1999). In civil law systems, this would be construed as an instance of liability based on *dolus eventualis* or perhaps even *dolus indirectus*. Although *dolus indirectus* as well as *dolus eventualis* require actual knowledge (either as a certainty or as a possibility or likelihood that the harmful consequences will/may ensue, respectively), deliberately not wanting to know will be construed as knowledge of at least the possibility that the crime will be committed.

[17] ICC Statute, *supra* note 10, art. 8(2)(a)(iv).

[18] Prosecutor v. Duško Tadić (Judgment), Case No. IT-94-1-T, ¶ 657 (7 May 1997), *reprinted in* 112 I.L.R. 2

against humanity,[19] without any effort ever having been made to define the exact meaning of "constructive knowledge." If "constructive knowledge" means attributing to the perpetrator knowledge which he or she did not in fact possess, such "knowledge" cannot be equated to "awareness" as contemplated in the general definition of "intent and knowledge" of the ICC Statute. It should be borne in mind, however, that "intent and knowledge" in that special sense is not required when "otherwise provided" in the ICC Statute, and in cases where a lesser form of intent (*dolus eventualis* or negligence) would suffice to render a perpetrator liable—which do not include any of the crimes against humanity—instances of "constructive knowledge" in that sense might well become relevant. But then, again, actual knowledge is also part and parcel of *dolus eventualis,* albeit only in the form of foreseeing the consequences as a possibility or likelihood. Moreover, since actual knowledge is not an element of negligence at all, constructing knowledge on the part of the perpetrator would in any event be superfluous for purposes of establishing accountability for the crime constituted by negligent conduct.

If, on the other hand, "constructive knowledge" was intended to denote cases where knowledge cannot be proved by direct evidence but may be construed on basis of the surrounding facts and circumstances—where, therefore, "constructive knowledge" is a matter of evidence and not of substantive law—reliance on such knowledge to substantiate a conviction for a crime against humanity cannot be faulted. In *Tadić*, the ICTY in that sense confirmed that knowledge can be "implied from the

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[19] In the ICTR, *see* Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, ¶ 206 (27 Jan.1999); Prosecutor v. Clément Kayishema, Case No. ICTR-95-1-T, ¶ 134 (21 May 1999); Prosecutor v. George Rutaganda, Case No. ICTR-96-3-T, ¶ 71 (6 Dec. 1999); Prosecutor v. Georges Ruggiu, Case No. ICTR-93-32-T, ¶ 20 (1 June 2001). In the ICTY, *see* Prosecutor v. Zoran Kupreškic & Others, Case No. IT-95-16-T, ¶ 557 (14 Jan. 2000); Prosecutor v. Blaškić, *supra* note 6, ¶ 249; Prosecutor v. Dario Kordić & Another, Case No. IT-95-14/2-T, ¶ 185 (26 Feb. 2001).

circumstances."[20] Not every perpetrator of genocide, crimes against humanity or war crimes boast about their evil deeds, though many do. Courts are often obligated to construe a certain mental disposition based on secondary evidence. Provided the possession of guilty knowledge is a *sine qua non* (beyond reasonable doubt) of the surrounding facts and circumstances, a conviction for the crime based on intent and knowledge would be fully justified.

### 2. General Intent and Specific Intent

By distinguishing between intent in relation to conduct and intent in relation to a consequence, the ICC Statute addresses a question that is puzzling in some criminal justice systems: Can a person be held criminally liable for a crime requiring intent if he or she deliberately committed *the act* with which he or she is being charged, or must the intent of the accused in addition be aimed at *the harmful consequences* which emanated from the wrongful act? In some legal systems, once it has been proven that the accused intended to do, or to refrain from doing, that which constitutes the *actus reus*, he or she will be held criminally liable for all the reasonable consequences of the act notwithstanding the fact that he or she may not have intended to bring about (some of) those consequences. For example, A plants a bomb in the parking lot of an abortion clinic. B, a cardiac, is walking down the street when the bomb explodes and, being startled by the explosion, suffers a heart attack and dies. Can A be held criminally liable for the death of B?

In the Nuremberg Trials, the distinction between conduct crimes (general intent) and crimes where criminal liability is dependent upon the act serving as a means of bringing about certain specified consequences (special intent) was upheld, and it was there noted that the special intent required for the latter category of crimes may not be presumed as a consequence of the

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[20] Prosecutor v. Tadić, *supra* note 18, ¶ 657; *see also* Rodney Dixon, *Crimes Against Humanity, Introduction/General Remarks*, *in* COMMENTARY ON THE ICC, *supra* note 8, 121, at 128 n.49.

act but must be proved.[21]

The ICC Statute likewise makes allowance for both categories of crimes. Intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities [22] thus renders the act punishable irrespective of the consequences, whereas certain inhumane acts will only constitute a crime against humanity if it causes great suffering or serious injury to body or to mental or physical health.[23] In the former instance, intent and knowledge pertain to the act as such, in the latter the consequence of causing great suffering or serious injury must also be within the contemplation of the perpetrator. There are certain crimes where the *actus reus* and *mens rea* interact, for example in the case of willful killings.[24] Here intent and knowledge are geared toward the act that causes death and which is essentially tied up in its fatal consequence.[25]

The distinction made in the ICC Statute in regard to the mental element pertaining to conduct and the mental element pertaining to a consequence of the conduct, respectively, is significant. Taken separately, these two components of intent signify different manifestations of intent. The phrase designating the mental element in the former context (the accused "means to engage in the conduct") would, according to general principles of criminal law, include *dolus directus*, *dolus indirectus*, and *dolus eventualis*. The phrase designating the mental element that must exist in relation to the consequences of the act (the accused "means to cause the consequence or is aware that it will occur in the ordinary course of events") covers *dolus*

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[21] *See, e.g.*, The United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach & Others, *in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, 1378 (U.S. Gov. Printers) (1950).

[22] ICC Statute, *supra* note 10, art. 8(2)(b)(i).

[23] *Id.* art. 7(1)(k).

[24] *Id.* art. 8(2)(a)(i).

[25] *See* Piragoff, *supra* note 4, at 533.

*directus* and *dolus indirectus* only.[26] Taken together, they therefore exclude *dolus eventualis*.

The crime of genocide requires a distinct manifestation of *dolus specialis*: the acts constituting genocide must be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[27] The "intent to destroy" leaves scope for *dolus directus* only. However, a conviction for complicity in genocide, according to the judgment of the ICTR in *Akayesu*, can be based on either *dolus directus* or *dolus indirectus*.[28] Since in terms of the ICC Statute the element of *mens rea* can in general include both of these forms of intent for any of the modes of participation in a crime stipulated in Article 25(3),[29] the ICC could, and should, uphold this jurisprudentially sound position.

Special intent also qualifies certain crimes against humanity. The crime of apartheid, for example, must be committed "with the intention of maintaining" a racist regime,[30] and the crime of enforced disappearance of persons requires that the arrest, detention or abduction of the victims must have been executed "with the intention of removing them from the protection of the law for a prolonged period of time."[31] A special mental disposition is added to the requirement of intent and knowledge in the case of the war crime of "treacherously" killing or wounding persons belonging to a hostile nation or

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[26] *Id.* According to Piragoff, the combination of "intent" and "knowledge" as contemplated in the ICC Statute denotes *dolus directus*. This writer respectfully disagrees. It is not the knowledge of, but the desire to bring about, the harmful consequences of one's act that qualifies intent to become *dolus directus*.

[27] ICC Statute, *supra* note 10, art. 6.

[28] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ¶¶ 538-40, 543-44, 724 (2 Sept. 1998), Prosecutor v. Ignace Baglishema, Case No. ICTR-95-1A-T, ¶ 60 (7 June 2001).

[29] *See* Piragoff, *supra* note 4, at 529-31.

[30] ICC Statute, *supra* note 10, art. 7(2)(h).

[31] *Id.* art. 7(2)(i).

army.[32]

There is yet another instance of special intent regulated by the ICC Statute that requires emphasis. In terms of the principle of complementarity that is fundamental to the exercise of jurisdiction by the ICC, the first right and duty to bring perpetrators of crimes within the subject-matter jurisdiction of the ICC to justice vest in the national courts of states with a special interest in the matter. The ICC jurisdiction can only be invoked if the national state is either unwilling or unable to conduct an investigation into, and if needs be to prosecute, the crime.[33] Inability is defined in terms of the total or substantial collapse or unavailability of the national judicial system.[34] "Unwillingness" within the meaning of the ICC Statute is founded on the special intent of national authorities to conduct sham proceedings, to take faked decisions, or to cause unjustified delays in their investigation or prosecution of the crime. The ICC Statute encapsulates the special intent that applies in this regard as one aimed at "shielding the person concerned from criminal responsibility," or one that is "inconsistent with an intent to bring the person concerned to justice."[35] It is not only a matter of conducting questionable proceedings, taking suspect decisions, or causing inexplicable delays. There must be the added purpose of shielding the suspect from prosecution in the ICC or a decided resolve not to bring him or her to justice.

### 3. *Versari in re Illicita*

In terms of the *versari* doctrine, a person committing a wrongful act is held responsible for all the harmful consequences of the act, irrespective of his or her participation in the act as such or fault on his or her part with regard to those other consequences. For example, A robs a groceries store, and B, the

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[32] *Id.* art. 8(2)(b)(xi), read with art. 8(2)(e)(ix).
[33] *Id.* Fourth and Tenth Preambular Principles and art. 17(1).
[34] *Id.* art. 17(3).
[35] *Id.* art. 17(2).

shop owner, fires a shot at the robber in defense of his property. However, B misses the robber and accidentally shoots and kills his own wife. In terms of the *versari* rule, the robber can be held criminally liable for the death of B's wife.[36]

The *versari* rule is frowned upon in legal systems where criminal liability is strictly based on fault in respect of the harmful consequences of the criminal act.[37] The circumscription in the ICC Statute of the "mental element" as a precondition for criminal liability, clearly excludes *versari in re illicita.*

*Versari in re illicita* must not be confused with *aberratio ictus* (deflection of the blow). If A fires a shot with intent to kill B, misses and kills C in the process, A will be criminally liable for the death of C in virtue of his or her intent to take a human life.

### 4. Malice Aforethought

The requirement in some criminal justice systems of malice as, supposedly, a constituent element of intent for purposes of criminal liability for certain offences is also not part of the ICC's theoretical make-up. Malice is a component of the motive that prompts certain conduct and is not an ingredient of fault. Intent, a certain manifestation of fault, has to do with the guilty knowledge of the perpetrator (i.e., *what* did the perpetrator contemplate with his or her act; did he or she foresee the consequences of his or her act, either as a certainty or as a possibility?). Malice, on the other hand, addresses the question as to *why* the perpetrator acted wrongfully. In *Prosecutor v. Jelesić*, the ICTY correctly emphasized the need to distinguish between intent and motive, but overstated the matter when it went on to proclaim the irrelevance of motive in criminal law.[38] Malice can, on the contrary, serve as proof of intent, and it can

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[36] For a discussion and application of the *versari*-rule in the United States, see Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979).

[37] *See, e.g.,* the Canadian case of R. v. Martineau, [1990] 2 S.C.R. 633 (striking down sec. 213(a) of the Criminal Code (R.S.C. 1970, c. C-34), which had sanctioned the *versari* rule).

[38] Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, ¶ 49 (5 July 2001).

be taken into account as an aggravating circumstance that would influence the sentence imposed by a criminal court. Malice is not, however, a component of intent as such.[39] Intentional homicide is not necessarily motivated by malice, ill-will or spite, it may be prompted by compassionate, and some might even profess noble, considerations, for example in the case of euthanasia.

There are an isolated number of offences of which malice is essentially a requirement—not as a manifestation of intent but as a distinct element in its own right of the offence. Cases of malicious prosecution or cases of murder with malice aforethought as a special category of criminal homicide may serve as examples in this regard.[40]

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[39] Wirth, *supra* note 5, refers to the element that distinguishes *dolus directus* (first degree *dolus directus*) from *dolus indirectus* (second degree *dolus directus*), namely the desire to bring about the consequences, as the "motive" of the perpetrator: "Die Zerstörung der Gruppe muss dem Motiv des Täters dienen. Nichts anderes ist aber gemeint, wenn man sagt, dass er für dolus directus ersten Grades genügt, dass der Täter den Taterfolg als Zwischenziel zu seinem—wie immer gearteten—Endzweck anstrebe" ["The destruction of the group (in the case of genocide) must serve the motive of the perpetrator. This is all that is meant when one says that for purposes of first degree *dolus directus* it would suffice if the perpetrator strives for making the consequence of the act as an interim purpose toward his final objective, however one looks at it."]. *Id.* at 66. The use of "motive" to denote the desire of the perpetrator represents an unfortunate choice of words.

[40] Note that "malice aforethought" has lost its meaning in English law and signifies neither malice nor prior knowledge. As an element of criminal homicide, malice aforethought denotes the intention to kill (express malice), or the intention to cause grievous bodily harm (implied malice) irrespective of whether the accused foresaw the possibility of death setting in or not. *See* Christopher K Hall, *Crimes Against Humanity, The Different Sub-Paragraphs*, *in* COMMENTARY ON THE ICC, *supra* note 8, 129, at 129.

### 5. Willful Blindness

In the Canadian Case of *Regina v. Finta*, Justice Cory, speaking for the majority, stated that "the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was willfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences."[41] The ICTY echoed this view in *Tadić (Judgment)*.[42]

Willful blindness is tantamount to knowledge.[43] The very concept indicates that the perpetrator knows—if not as a certainty in the sense of *dolus directus* or *dolus indirectus*, then at least of the possibility or likelihood—that a certain act has or may occur or that consequences for which he or she must take responsibility has or may transpire (*dolus eventualis*). Willful blindness denotes the mental disposition of someone who does not want to know that which he already knows or foresees, and fakes ignorance in order to escape liability.

Willful blindness will therefore be a strong indication of at least *dolus eventualis* or of recklessness and might found liability in cases where those forms of fault would suffice to establish accountability. Willful blindness is particularly relevant in the case of command responsibility.[44] The liability of a military officer for crimes within the jurisdiction of the ICC committed by forces under his or her effective command may be based on negligence,[45] in which event willful ignorance will not

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[41] R. v. Finta, [1994] 1 S.C.R. 701, 819; *see also* 1 S.C.R. at 765 (La Forest, J., dissenting).

[42] Prosecutor v. Tadić, *supra* note 18, ¶ 657; *see also* McAuliffe deGuzman, *supra* note 3, at 396, 400.

[43] Piragoff, *supra* note 4, at 535. *See also* the American MODEL PENAL CODE, *supra* note 3, § 2.02(7) (equating "knowledge" to awareness of a high probability of the existence of a particular fact, unless the perpetrator "actually believes that it does not exist.").

[44] *See* Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CR. L. F. 1, 18 (1999).

[45] ICC Statute, *supra* note 10, art. 28(1)(a): The military commander knew or "should have known" that the forces under his command were

be an issue since actual knowledge is immaterial for the purposes of establishing negligence. However, in the case of a non-military superior, liability for crimes committed by a subordinate due to the superior official's failure to exercise proper control, does require that the superior "knew, or consciously disregarded information which clearly indicates" that the subordinates were committing or were about to commit the crime.[46] Willful blindness could be evidence of actual knowledge, or then at least of the superior having deliberately turned a blind eye. Here, *dolus eventualis* would suffice to secure a conviction.

Willful blindness might also refute the defense of mistake.[47] If ignorance of the perpetrator is attributable to his or her willful blindness to the facts or the law, he or she cannot credibly claim ignorance as a defense.

### 6. Reduced Culpability

If the perpetrator of a crime committed the crime within the confines of the applicable *mens rea* requirement in circumstances that reduces his or her blameworthiness, the latter fact will be taken into account as a mitigating factor when it comes to sentencing. Reduced culpability will apply if, for example, a crime was committed pursuant to an order of a Government or of a military or civilian superior.[48]

The *Charter of the Nuremberg Tribunal* rejected superior order as a defense for the crimes within its purview: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."[49]

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committing or about to commit the crime.

[46] *Id.* art. 28(2)(a); *see* SADAT, *supra* note 12, at 206-07.

[47] *See infra*, ¶ F.4

[48] ICC Statute, *supra* note 10, art. 33.

[49] CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, art. 8, *in* 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG (14 November 1945 - 1 October 1946) 10 (Nuremberg: Int'l Mil. Tribunal) (1949), *reprinted in* 59 Stat.

In the *Trial of Wilhelm List*, the Military Tribunal noted that the rule that superior order is no excuse is a fundamental principle of criminal justice that has been extensively adopted by civilized nations.[50] Commenting on the attempted defense of superior order, the Nuremberg Tribunal proclaimed: "The true test . . . is not the existence of the order, but whether moral choice was in fact possible."[51]

The Nuremberg Trials also show that superior orders may apply to civilians, and that the rule against upholding a plea of superior orders was perhaps less rigorously applied where that was the case. In the *Trial of Robert Wagner*, Mr. Luger, a Public Prosecutor, successfully raised the defense of superior orders imposed upon him by Wagner, the Head of Civil Government in Alsace, France during the German occupation.[52] It is fair to conclude, though, that international law tended toward absolutely discarding superior orders as a ground of justification in cases involving the commission of an international crime. In *Prosecutor v. Erdemović*, McDonald and Yohrah, JJ. endorsed the following proposition:

> We subscribe to the view that obedience to superior

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1546, 82 U.N.T.S. 279 [hereinafter Charter of Int'l Military Tribunal]. See *also Principles of International Law Recognized in the Charter of the Nürnberg* [Nuremberg] *Tribunal and in the Judgment of the Tribunal*, Principle V, *reprinted in* 44 A.J I. L. Supp. 126 (1950); *see also* Otto Böhm, *Von Nürenberg nach Den Haag—Erfahrungen mit internationalen Tribunalen*, *in* JAHRBUCH MENSCHENRECHTE 109, at 110-11 (herausg. v. Gabriela von Arnim, et al.) (2000) (singling out rule that superior order is no defense ss one of the basic legal norms established by the Nuremberg Trials).

[50] United States v. Wilhelm List & Others (The Hostage Cases), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERENBERG [NUREMBERG] MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (0ctober 1946 - April 1949) 754, at 1263 (U.S. Gov. Printing Office) (1949).

[51] CHARTER OF INT'L MILITARY TRIBUNALS, *supra* note 49, at 224.

[52] Trial of Robert Wagner & Six Others (Case No. 13), *in* 3 L. REP. TRIALS WAR CRIMINALS 23, 54-55 (1948).

> orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.[53]

By contrast, many national systems uphold the view, which dates back to the early part of the twentieth century,[54] that a subordinate can rely on a superior order that culminated in the commission of a crime, but then only (i) if the subordinate knew or should have known that the order was illegal, or (ii) the order was manifestly illegal.[55] This view also has some support as being the norm that applies in international law.[56]

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[53] Prosecutor v Dražen Erdemović, separate opinion of McDonald and Yohrah, JJ., , Case No. IT-92-22-A, ¶ 34 (7 Oct. 1997), *reprinted in* 111 I.L.R. 298. For a discussion of the case, *see* Olivia Swaak-Goldman, *Prosecutor v. Erdemović, Case No. IT-92-22-A*, 92 A.J.I.L 283 (1998).

[54] In a December 15, 1930 Judgment, an Austro-Hungarian military court upheld the view that superior orders would be no defense if the orders were manifestly illegal. *See* Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court* versus *Customary International Law*, 10 EUR. J. INT'L L. 172, 175 n.5 (1999). Subsequently, in *Hospital Ship "Dover Castle"* and *Hospital Ship "Llandovery,"* the court of Leipzig endorsed the principle that superior orders were not legally justified if the subordinate knew that those orders would involve committing a military crime or misdemeanor. Hospital Ship "Dover Castle," *reprinted in* 16 A.J.I.L. 704, 707 (1922) and Hospital Ship "Llandovery Castle," *reprinted in* 16 A.J.I.L. 708, 722 (1922).

[55] Yoram Dinstein, *The Defence of "Obedience to Superior Orders,"* 19 INTERNATIONAL LAW, 19 (1965). *See also* Gaeta, *supra* note 54, at 175-77.

[56] *See, e.g.,* Prosecutor v Erdemović, *supra* note 53, ¶ 15 (President Cassese, dissenting: "[I]f the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order," thereby suggesting that superior order would be a defense if the order was not manifestly illegal).

However, the Security Council of the United Nations upheld the Nuremberg precedent when it established the ICTY and ICTR. The respective Statutes of the two *ad hoc* Tribunals provide in almost identical terms that reliance by an accused person on an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[57] The *Torture Convention* likewise provides that "[a]n order from a superior officer or a public authority may not be invoked as a justification for torture."[58]

In Rome, the American delegation attempted to convince others that superior order ought to be accepted as a valid defense under the rules of international law, arguing that the position taken by the Nuremberg Tribunals in this regard was contingent upon the special circumstances that prevailed in Nazi Germany.[59] The American view was opposed by several delegations, notably those of Germany, New Zealand and the United Kingdom, who argued that a subordinate who has been instructed to perform an act which constitutes a crime within the jurisdiction of the ICC should not be excused but could in appropriate circumstances raise the defense of mistake or duress.

The two points of view—one asserting that superior order is no ground of justification at all and the other proclaiming it to be no defense except if the subordinate did not know and could not have known that the order was illegal and

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[57] STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA (ICTY), art. 7(4), Annex, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), *reprinted in* 32 I.L.M. 1192 (1993); STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR), art. 6(4), Annex, S.C. Res. 955 (1994), *reprinted in* 33 I.L.M. 1602 (1994).

[58] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 39 U.N. GAOR Supp. No. 51 (Dec. 10, 1984), at 197, U.N. Doc. A/39/51 (1984), *reprinted as modified in* 23 I.L.M. 1027 (1984) and 24 I.L.M. 535 (1985).

[59] Kai Ambos, *supra* note 44, at 30-31.

the order was not manifestly illegal—could perhaps be reconciled if one were to assume that orders to commit a crime to be prosecuted in an international tribunal would always be manifestly illegal, while this is not necessarily the case as far as crimes to be prosecuted in national courts are concerned. But this, according to some analysts, would amount to an attempt to "reconcile the irreconcilable." [60] The Rome Conference nevertheless succeeded at striking a balance between the two opposing points of view.

The provision in the ICC Statute represents a compromise between these extreme positions. Article 33 of the ICC Statute provides as follows:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
> (b) The person did not know that the order was unlawful; and
> (c) The order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Analysis of this provision will show that the ICC Statute does not recognize superior orders as an objective ground of justification at all,[61] because an order to commit an international

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[60] Gaeta, *supra* note 54, at 181-83.
[61] ICC Statute, *supra* note 10, art. 33.

crime is in itself unlawful.[62] Although two of the three requirements for upholding a plea of superior orders are factual or "material" (the legal obligation to obey orders, and the order being manifestly unlawful) and are therefore to be measured by objective standards, the remaining one (not knowing that the order was unlawful) is subjective or "mental."[63] The three requirements apply cumulatively, and successfully raising the defense of superior orders therefore depends in the final analysis on the "mental" component of that defense (guilty knowledge). The ICC Statute thus accepts superior order as a defense provided the order was executed by a subordinate in circumstances that excludes guilty knowledge and therefore negates the element of fault; and then also only in the case of a war crime. Superior orders can also be attended by threats that could substantiate the defense of duress.

The final outcome of the deliberations in Rome regarding superior orders has been applauded because (i) it rules out the plea of superior orders for the most egregious international crimes, and (ii) it proceeds on the assumption that superior orders are no excuse and then goes on to subjects that general rule to the one exception founded on the principle of guilty knowledge as an essential ingredient of fault.[64]

Superior orders have been recognized in the Nuremberg Trials as an extenuating circumstance for sentencing purposes.[65] In the *Belsen Trial*, Dr. Klein, who was instructed to separate prisoners deemed fit for work from those deemed not fit for work afforded a rather unique twist to the plea of superior orders

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[62] Otto Triffterer, *Superior Orders and Prescription of Law*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, at 573, 579, 587.

[63] Per Saland, *supra* note 16, at 210-11.

[64] *See* Gaeta, *supra* note 54, at 189-90.

[65] *See, e.g.*, The Hostages Cases, *supra* note 50, at 1236, 1238. *See also* Trial of Lieutenant-General Shigeru Sawada & Three Others (Case No. 25), *in* 5 L. REP. TRIALS WAR CRIMINALS 1, 13 (1948); Trial of Carl Bauer, Ernst Schrameck & Herbert Falten (Case No. 45), *in* 8 L. REP. TRIALS WAR CRIMINALS 15, 16 (1948).

in mitigation of sentence:[66] If a British soldier were to disobey an order, he would face a Court Martial where he would be given the opportunity of contesting the legality of his orders, while Dr. Klein enjoyed no such protection.

Prosecutions in Germany, following its reunification in November 1989, of persons responsible for the killing or wounding of refugees from East to West Berlin in the period 1961-1989[67] are also instructive in this regard. Between 1946 and 1961, approximately 3 million residents of the Deutsche Demokratische Republik (DDR) left East Germany to escape the economic hardship and repressive living conditions associated with Soviet-imposed socialist political control. In 1952, the DDR authorities began fencing off its territory in East Berlin with barbed wire in an attempt to block the continuing flow of border crossings to the West. In August 1961, the construction of the infamous Berlin Wall commenced as a desperate means of terminating once and for all the exodus of East German residents. Border troops were posted along the Wall with strict instructions to prevent at all costs the "escape" of East German refugees to "enemy" territory."[68] Between 1949 and 1961, more than 800 people were killed. Following the construction of the Berlin Wall, at least 200 refugees were shot dead while attempting to cross the Wall. Many more were killed, or were seriously wounded or injured, by land mines. The border troops consisted for the greater part of young servicemen, and those

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[66] Trial of Joseph Kramer & 44 Others (The Belsen Case), *in* 2 L. REP. TRIALS WAR CRIMINALS 79 (1947).

[67] For an overview and in-depth analysis of the facts and circumstances that prevailed at the time of those prosecutions, see H. Kreicker, *Gewalten an der deutsch-deutschen Grenze*, *in* STRAFRECHT IN REAKTION AUF SYSTEMUNRECHT 49 (herausg. v. Albin Eser & Jörg Arnold) (Freiburg i.B.: Max Planck Institut) (2000).

[68] The ethos that was to guide their action is encapsulated in the adage: "Besser der Fluchtling ist tot, als daß die Flucht gelingt." ["Better that the refugee be dead than that the escape succeeds."], 39 BGHSt 1, 3 (Nov. 3, 1992), *reprinted in* 46 NEUE JURISTISCHE WOCHENBLATT 141, 142 (1993).

who fired at the refugees were expressly praised for their deeds and received generous promotions.

Following the reunification of Germany in November 1989, criminal charges were brought against border troops, members of the National Defense Council and officials of the German Socialist United Party's Politburo. The *Bundesgerichtshof* (German Supreme Court) sanctioned the *Mauerschützen Entscheidungen* (Shooters at the Wall Decisions)—as those judgments came to be known[69]—in 1992.[70] The *Bundesverfassungsgericht* (Federal Constitutional Court) subsequently decided that the prosecutions did not involve any constitutional obstacles.[71]

The German criminal courts dealt particularly leniently with the DDR border troops, imposing fines and suspended sentences, while imposing terms of imprisonment of up to seven or eight years in the case of political leaders responsible, as mediate perpetrators, for sanctioning the shootings. The extenuating circumstances that prompted the lenient sentences of the border troops[72] included the fact that the accused were young servicemen (conscripts), the fact that they occupied positions of subordination at the lower levels of the military hierarchy, and the fact they received express instructions not to allow any border crossing to succeed and to kill, if necessary, the refugees.

Nothing is said in the ICC Statute about superior order being, or not being, a mitigating factor. That is left in the

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[69] "Mauerschützen" is not an accurate description of those prosecutions, since "Hintermänner" (i.e., the perpetrators who sanctioned or ordered the shootings) were also brought to trial. *See* Kreicker, *supra* note 67, at 49 note 1.

[70] 39 BGHSt 1, *supra* note 68.

[71] 95 BverfGE 96 (24 Oct. 1996), *reprinted in* 50 NEUE JURISTISCHE WOCHENBLATT, 929 (1997). It might be noted that the major issue that attended these prosecutions were based on the principle against retroactivity of criminal sanctions (the shootings were allegedly sanctioned at the time by lawful instructions). However, that issue is beyond the scope of this article.

[72] *See* Kreicker, *supra* note 67, at 97.

discretion of the Court.[73] In the final analysis, this factor depends on the extent to which the perpetrator's blameworthiness was affected by his or her subordination to the commanding officer or public official.[74]

### C. *Mens rea* Requirements for the Crime of Genocide

The element of fault prescribed for the crime of genocide is a variety of *dolus specialis* and as such qualifies the acts through which genocide is committed: the act must be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[75]

Special intent as an element of genocide will be confined to *dolus directus*;[76] that is, not only the will to bring about the genocidal consequences of the act but also a desire to do so. The mental element of crimes within the jurisdiction of the ICC that applies "unless otherwise provided," requires that the material elements of the crime be committed "with intent and knowledge."[77] In relation to the consequences of the unlawful act, intent is satisfied when "the person means to cause the consequences or is aware that it will occur in the ordinary course

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[73] Triffterer, *supra* note 63, at 579-80 and 585.

[74] Kai Ambos, *Impunity and International Criminal Law*, 18 HUM. RTS. L.J. 1, 9 (1997).

[75] *See* Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, ¶ 16 (4 Sept. 1998); Prosecutor v. Kayishema, *supra* note 19, ¶ 89, 91; Prosecutor v. Rutaganda, *supra* note 19, ¶ 59; Prosecutor v. Musema, *supra* note 19, ¶ 20; Prosecutor v. Baglishema, *supra* note 28, ¶ 60; Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, ¶ 571 (2 Aug. 2001). *See also* Antonio Cassese, *Genocide*, *in* COMMENTARY ON THE ICC, *supra* note 8, 335, at 338.

[76] Steffin Wirth, *Zum subjektiven Tatbestand des Völkermordes—Zerstörungsabsicht und Vertreibungsverbrechen*, *in* 28 ARGUMENTE UND MATERIALIEN ZUM ZEITGESCHEHEN 59, at 62-63, 66-67, 71 (Herausg. v. Bernd Rill) (München: Akademie für Politik und Zeitgeschehen) (2001).

[77] ICC Statute, *supra* note 10, art. 30(1).

of events."[78] Knowledge in turn is only present if "awareness that . . . a consequence will occur in the ordinary course of events" can be demonstrated.[79] The verb used in these passages, "will occur", includes *dolus directus* and *dolus indirectus* but not *dolus eventualis*. However, the very special nature of genocide, and in particular its component of "intent to destroy," leaves no scope for liability for the principal act in cases of *dolus indirectus*.

Alexander Greenawalt has argued that the requirement of genocidal intent should include instances where "the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part"[80]—that is, in cases where *mens rea* takes on the form of *dolus indirectus*. Since special intent is an essential element of genocide and special intent will always require a certain manifestation of *dolus directus*, this proposed transformation of genocidal intent is way out of line.[81] Destruction of the group will always be the primary objective of the principal perpetrator, while *dolus indirectus* applies to secondary consequences beyond those actually desired by the perpetrator. *Dolus indirectus* can, however, lead to a conviction in cases of complicity in genocide.[82]

In terms of the ICC Statute, a military commander can be held vicariously liable for acts of genocide committed by members of the armed forces under his or her command. The criminal liability of the superior officer can, as a general rule, be based on mere negligence. William Schabas noted that in virtue of the rule applying to command responsibility, the ICC Statute seems to allow a lower level of *mens rea* as a precondition for

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[78] *Id.* art. 30(2)(b).
[79] *Id.* art. 30(3).
[80] Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2288 (1999).
[81] *See also* Prosecutor v. Krstić, *supra* note 75, ¶ 571.
[82] *See supra*, the text accompanying note 29.

convicting commanding officers for acts of genocide committed by their subordinates.[83] Antonio Cassese disagrees. He contends that one must distinguish between fault on the part of the actual perpetrators of genocide (intent to destroy in whole or in part) and fault attached to the commander's failure to control the conduct of persons under his or her command.[84] Schabas actually has the better argument in this regard (though not explained by him in this way): the commanding officer who did not know but should have known of the genocidal acts of his or her subordinates is held vicariously liable for *the crime of genocide* and not merely for his failure to exercise proper control over the persons under his or her command.

There thus seems to be a conflict between the requirement of special intent for genocide and basing vicarious command responsibility for acts of genocide on negligence. The ICC Statute provides that the definition of a crime shall be strictly construed, and in cases of ambiguity, the definition of a crime shall be interpreted in favor of the accused.[85] A strong argument can therefore be made for holding that, in view of this conflict, the general provision applying to command responsibility must give way to the more stringent element of fault applying to genocide. In other words, a commanding officer should not be held vicariously liable for acts of genocide unless he or she actually became a *socius criminis* through actual knowledge of, and a neglect to intervene in, the acts of genocide committed by persons under his or her command.

Although malice is not a distinct element of the crime of genocide,[86] it would by virtue of the very nature of genocide

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[83] William A. Schabas, *Genocide*, *in* COMMENTARY ON THE ICC, *supra* note 8, at 109.

[84] Cassese, *supra* note 75, at 348.

[85] ICC Statute, *supra* note 10, art. 22(2).

[86] Malice designates the motive that prompted the perpetrators' act—they sought the destruction, in whole or in part, of the victim group (intent) because they regarded that group as inferior (motive in the form of malice). Motive was deliberately eliminated as an element of genocide. *See* PIETER N. DROST, THE CRIME OF STATE: PENAL

invariably attach to the commission of that crime. Malice would thus have important evidentiary value in cases of genocide.

Genocidal intent is geared toward the destruction of a group in whole or in part. In a comment pertaining to its 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*, the International Law Commission (ILC) noted the obvious, namely that for purposes of genocide "[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe."[87] Genocidal intent, according to the ILC, requires a resolve to destroy at least a substantial part of the target group.[88] The ICTR endorsed these views,[89] noting in particular that "in part" would seem to imply "a reasonable significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership."[90] In order to come within the definition of genocide, individuals who fell victim to the atrocities must have been targeted *because of* their membership of the group whose destruction, in whole or in part, was the ultimate aim of the perpetrator.[91]

In 1982, the General Assembly of the United Nations condemned the large-scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps situated in Beirut by Israeli

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PROTECTION FOR FUNDAMENTAL FREEDOMS OF PERSONS AND PEOPLES, Bk. II GENOCIDE, 83-84, 85 (1959).

[87] Draft Code of Crimes Against the Peace and Security of Mankind (International Law Commission), *in Report of the International Law Commission on the Work of Its 48th Sess.*, U.N. Doc. A/51/10 (1996). 48th Sess., Supp. No. 10, 89, ¶ 8 (1996), See also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. Doc. S/1994/674 (1999).

[88] *Report of the International Law Commission on the Work of Its 48th Session*, U.N. Doc. A/51/10 (1996), ¶ 8; *see also* Prosecutor v. Krstić, *supra* note 75, ¶ 590; Wirth, *supra* note 76, at 67-68.

[89] Prosecutor v. Kayishema, *supra* note 19, ¶ 95-96.

[90] *Id.* ¶ 96.

[91] *Id.* ¶ 97. *See also* Prosecutor v. Baglishema, *supra* note 28, ¶ 61; Prosecutor v. Krstić, *supra* note 75, ¶ 561.

forces, calling it an act of genocide.[92] Since the Israeli forces were engaged in military action as a means of combating (or perhaps retaliating) acts of terror against its population, ascribing a genocidal intent to those killings is far-fetched. This is not to say that the attacks did not constitute criminal acts under the rules of international law, but not genocide.

Unfortunately, it is not uncommon for persons who (quite rightly) condemn criminal conduct perpetrated by state action to (unjustifiably) attach a label to that action which would give it as bad a name as one could possibly conceive, even where the conduct or condition being condemned does not fit the essential elements of the label. Proclaiming Zionism to be a manifestation of racism,[93] and apartheid to be a special instance of genocide,[94] serve as examples of such attempts to bring the censure of those practices within the confines of practices with an exceptionally strong emotional appeal, and thereby disregarding the true meaning of the concepts denoting those practices. Overburdening the reach of concepts such as "genocide" and "racism" may add emotional vigor to one's

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[92] G.A. Res. 37/123 D, 37 U.N. GAOR Supp. No. 51, at 38 (Dec. 16, 1982). *See also* Schabas, *supra* note 83, at 109-10; Cassese, *supra* note 75, at 336.

[93] *See* World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Draft Declaration, Proposal made by the Group of 21, U.N. Doc. A/CONF.189/PC.3/7, ¶ 62 (July 21, 2001) (proclaiming that "combating . . . [Zionist practices against Semitism] is integral and intrinsic to opposing all forms of racism . . ."). *See also Id.* ¶ 63 (referring to "the racist practices of Zionism"). These allegations were not included in the final Declaration of the United Nation's World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa on August 31 to September 8, 2001. *See* World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, ¶ 57-64, U.N. Doc.A/CONF.189/12 (Jan. 25, 2002).

[94] *See Violations of Human Rights in South Africa: Report of the Ad Hoc Working Group of Experts*, U.N. Doc. E/CN.4/1985/14 (Jan. 28, 1985).

condemnation of other types of evils but ought not to be taken seriously, for law enforcement purposes, by those charged with the administration of justice.

In cases where genocide consists of the killing of people, conviction is not dependent on the number of people actually killed.[95] Destruction of the group "in whole or in part" refers to the perpetrator's intent and not to the extent of destruction that actually occurred.[96] The Preparatory Committee for an International Criminal Court, recording the decisions taken at its session of February 1997, noted that "intent to destroy, in whole or in part . . . a group as such" was understood to refer to "the specific intention to destroy more than a small number of individuals who are members of the group."[97] Although the perpetrators' intention must aim at the destruction of a substantial number of the target group,[98] they cannot escape liability for genocide merely because their efforts have been stifled in the bud by effective law enforcement. If some members of the target group have indeed been exterminated, the perpetrators can be convicted of genocide, provided the requirements of genocidal intent have been proved. If no one has been killed, the persons engaged in the planning of genocide can be convicted of attempt to commit genocide.

Provisions in the *Elements of Crimes* proclaiming that

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[95] Prosecutor v. Karadźić & Mladić (Rule 61), Cases Nos. IT-95-5-R61 and IT-95-18-R61, ¶ 92 (11 July 1996); Prosecutor v. Krstić, *supra* note 75, ¶ 590; DROST, *supra* note 86, at 85-86. *But see contra*, Cassese, *supra* note 75, at 345, 349.

[96] Prosecutor v. Krstić, *supra* note 75, ¶ 584.

[97] Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, Annex I, ¶ [*3] Crime of Genocide, at 3 n.1, U.N. Doc. A/AC.249/1997/L.5 (March 12, 1997).

[98] Prosecutor v. Kayishema, *supra* note 19, ¶ 96-97. The statement in *Akayesu* that acts of genocide are committed against "one or several individuals" because of their group identity is, as it stands, misleading. Prosecutor v. Akayesu, *supra* note 28, ¶ 520. *See also* Cassese, *supra* note 75, at 348, 349.

the perpetrator killed,[99] caused serious bodily harm to,[100] inflicted conditions of life upon,[101] imposed certain measures upon,[102] or forcibly transferred[103] "one or more persons" must be interpreted accordingly. This does not mean that genocide will be committed if the perpetrator's intent was geared toward the killing, or the causing of serious bodily harm, etc. of only one victim. He or she, after all, was prompted by a desire to contribute toward the destruction, in whole or in part, of the group to which the victim belonged. To be convicted of genocide, according to the *Elements*, at least one person must actually have fallen victim to the conduct embarked upon by the perpetrator to achieve that objective. Short of that, the act may amount to attempt to commit the crime, provided the rather stringent requirements for attempt laid down in the ICC Statute[104] have been satisfied.

The proof of (special) intent on the part of the accused is always problematic. In *Prosecutor v. Karadžić & Mladić (Rule 61)*, the ICTY noted that special intent to commit genocide may be inferred from a number of facts, such as "the general political doctrine which gave rise to the acts ... or the repetition of destructive and discriminatory acts . . . the preparation of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group—acts which are not covered by the list in . . . [the definition of genocide] but which are committed as part of the same pattern of conduct."[105] In the case of *Akayesu*, the ICTR decided that:

> . . . it is possible to deduce the genocidal intent

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[99] Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (*adopted by* the Assembly of States Parties on Sept. 9, 2002) Part II B, art. 6(a)(1) (2000) [hereinafter *Elements*].

[100] *Id.* art. 6(b)1.

[101] *Id.* art. 6(c)1.

[102] *Id.* art. 6(d)1.

[103] *Id.* art. 6(e)1.

[104] ICC Statute, *supra* note 10, art. 25(3)(f).

[105] Prosecutor v. Karadžić & Mladić (Rule 61), *supra* note 95, ¶ 94.

> inherent in a particular act charged from the general context of the preparation of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[106]

In *Kayishema*, the ICTR laid special stress on the number of group members targeted by the perpetrator as a means of establishing a genocidal intent.[107] In *Prosecutor v. Nikolić (Rule 61)*, the ICTY regarded the extreme gravity of discriminatory acts against a distinct section of the community as indicative of a genocidal intent.[108] Other relevant considerations include "the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing."[109] A consistent pattern of conduct received emphasis in *Rutaganda* and in *Musema*.[110] In *Prosecutor v. Jelisić*, The Appeals Chamber of the ICTY singled out as indications of a genocidal intent, "the general context, the perpetration of other

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[106] Prosecutor v. Akayesu, *supra* note 28, ¶ 522; *see also* Prosecutor v. Rutaganda, *supra* note 19, ¶ 61; Prosecutor v. Musema, *supra* note 19, ¶ 166; Prosecutor v. Baglishema, *supra* note 28, ¶ 62.

[107] Prosecutor v. Kayishema, *supra* note 19, ¶ 93.

[108] Prosecutor v. Nikolić (Rule 61), Case No. IT-94-2-R61, ¶ 34 (20 Oct. 1995), *reprinted in* 108 I.L.R. 21 (1998).

[109] *Id.*; *see also* Prosecutor v. Rutaganda, *supra* note 19, ¶ 62.

[110] Prosecutor v. Rutaganda, *id.* ¶ 63; Prosecutor v. Musema, *supra* note 19, ¶ 163.

culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[111]

The objective of genocide as embodied in the requirement of special intent limits the kind of acts that would constitute genocide. However, the objective of genocide can also serve to bring into the confines of the *actus reus* a broad perception of killings, the causing of bodily or mental harm, inflicting conditions of life, preventing births, and transferring of children. The *actus reus* may indeed include acts not mentioned in the definition of genocide but which have been committed as part of the same pattern of conduct.[112] Massive deportation (ethnic cleansing) may be construed as a first step in a process of elimination; destruction of places of worship as a means of annihilating the religious group associated with those religious objects; destruction of libraries intended to annihilate the culture of the target group; systematic rape of women intended to transmit a new ethnic identity to the child conceived by that atrocious act—such acts may all become part of the *actus reus* if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.[113]

Depicting rape as "a form of genocide directed specifically at women"[114] has a certain emotional appeal but cannot serve as a directive for purposes of the juridical meaning of genocide. Rape can, however, become a constituent part of genocide provided it is committed as part of the genocidal *actus reus* and with genocidal intent.

The judgment of the ICTR in *Akayesu* illustrates the point. The tribunal held "rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were

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[111] Prosecutor v. Jelisić, *supra* note 38, ¶ 47.
[112] Prosecutor v. Karadžić & Mladić (Rule 61), *supra* note 95, ¶ 94.
[113] *Id.*
[114] Catherine A. McKinnon, *Crimes of War, Crimes of Peace*, 4 U.C.L.A. WOMEN'S L.J. 59, 65 (1993).

committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such."[115] In the special circumstances of that case, rape and sexual violence were committed as "an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[116] Rape and sexual violence *per se* are indeed not genocide, but where the physical and mental violence committed against women, who are selected solely because of their national, ethnic, racial or religious group affiliation, is committed with genocidal intent, it becomes part of the *actus reus* and therefore punishable as acts of genocide.

It is also important to note that the ICTR gave a broad definition of sexual violence and rape:[117]

> The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances [that] are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident . . . in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal noted that in this context the coercive circumstances need not be evidenced

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[115] Prosecutor v. Akayesu, *supra* note 28, ¶ 729.

[116] *Id.*

[117] *Id.* ¶ 686. *See also* Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L., 517, 532-36 (1997).

> by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.[118]

The General Assembly of the United Nations on several occasions also addressed the advent of rape and sexual violence committed by, among others, members of the Serbian Forces against Muslim women in Bosnia and Herzegovina as "a deliberate weapon of war in fulfilling the policy of 'ethnic cleansing'," holding that such acts constituted instances of genocide.[119]

## D. *Mens Rea* Requirements for Crimes Against Humanity

The element of fault pertaining to crimes against humanity is dealt with in the ICC Statute on three distinct levels: first, as a general condition of liability applying to all crimes within the jurisdiction of the ICC; secondly, as a special element of all manifestations of crimes against humanity; and thirdly, as part of the circumscription of particular instances of crimes against humanity.

### 1. The General Requirement of Fault

Article 30(1) of the ICC Statute makes criminal responsibility for any of the crimes within the subject-matter

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[118] Prosecutor v. Akayesu, *supra* note 28, ¶ 689 ("Interahamwe" refers to "armed local militia.").

[119] G.A. Res. 50/192 U.N. GAOR Supp. No. 49 at 225, U.N. Doc. A/50/49 (Dec. 22, 1995); *see also* G.A. Res. 47/121 , U.N. GAOR Supp. No. 49 at 44, U.N. Doc. A/47/49 (Dec. 18, 1992); G.A. Res. 48/143 , U.N. GAOR Supp. No. 49 at 263, U.N. Doc. A/48/49 (Dec. 20, 1993); G.A. Res. 49/205, U.N. GAOR Supp. No. 49 at 226, U.N. Doc. A/49/49 (Dec. 23, 1994).

jurisdiction of the Court conditional upon the material elements of the crime concerned having been committed "with intent and knowledge."

When applying the general requirements of fault to particular crimes against humanity, the ICC will have to take the judgments of other international tribunals with a pinch of salt. For example, jurisprudence of the ICTY pertaining to the requirement of *mens rea* for murder as a crime against humanity has not been consistent. In *Prosecutor v. Kupreškić*, the ICTY stated:

> It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.[120]

The passage relating to the causing of grievous bodily harm cannot be accepted as an accurate description of "intent and knowledge" required for murder as a crimes against humanity. A wrongful act intended to cause grievous bodily harm which causes the death of the victim will only warrant a conviction of murder if the perpetrator foresaw the death of the victim as an inevitable consequence of his or her act (*dolus indirectus*) or as a possible consequence of the wrongful act (*dolus eventualis*); and furthermore, to qualify as a crime against humanity for ICC purposes, *dolus eventualis* will not suffice. The perpetrator must at least be aware that the death of the victims "will occur" in the ordinary course of events (*dolus indirectus*).[121] The above citation is based on the notion of *versari in re illicita*, which ought to have no place in criminal justice systems founded on the principle of no liability without fault.

As noted earlier, the element of fault required by the ICC Statute for crimes against humanity includes *dolus directus* and

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[120] Prosecutor v. Kupreškić, *supra* note 19, ¶ 821.

[121] ICC Statute, *supra* note 10, art. 30(2)(b).

*dolus indirectus* only. Although "intentional" killing of a human being does encompass *dolus eventualis*, that form of intent will not suffice where a conviction for murder *as a crime against humanity* is at stake. Murder as a crime against humanity therefore requires that the perpetrator intended the death of the victim; or, alternatively, if his intention was confined to causing the victim grievous bodily harm, a conviction for murder as a crime against humanity will only be warranted if the evidence shows that the accused knew that death will inevitably result from his or her act, even though he or she might not have desired the victim's death.

An intention to inflict serious injury "in reckless disregard of human life"[122] can also not in itself be equated to "intent and knowledge" as required for crimes against humanity. The perpetrator's "reckless disregard of human life" would, however, provide almost irrefutable proof that he knew death would inevitably result from his wrongful act, thereby satisfying the demands of *dolus indirectus*.

In *Prosecutor v. Blaškić*, the ICTY preferred the French "*meurtre*" to "*assassinat*" as the proper meaning to be attributed to murder as a crime against humanity, and on that basis decided that the killing need not be premeditated.[123] It then went on to recognize *dolus eventualis* as an acceptable form of intent for purposes of *meurtre*, proclaiming that ". . . the accused or his subordinate must have been motivated by the intent to kill the victim or to cause grievous bodily harm in the reasonable knowledge that the attack *was likely to* result in death."[124]

The ICC is precluded by its circumscription of *mens rea* from following these precedents. Christopher Hall thought that it was possible, though not clear, that knowledge of circumstances combined with an awareness that those

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[122] Prosecutor v. Kupreškić, *supra* note 19, ¶ 823; *see also* Prosecutor v. Akayesu, *supra* note 28, ¶ 589; Prosecutor v. Zejnil Delalić & Others (Celebici Case), Case No IT-96-21-T, ¶ 430 (16 Nov. 1998) (defined in the context of war crimes).

[123] Prosecutor v. Blaškić, *supra* note 6, ¶ 216.

[124] *Id.* ¶ 217. Emphasis added.

circumstances would be likely to lead to death (*dolus eventualis*) might meet the ICC Statute's requirement of intent and knowledge for purposes of crimes against humanity.[125] The ICC Statute, on the contrary, is explicit and clear that intent in relation to the consequences of an act requires that the perpetrator was aware that those consequences "will occur" in the ordinary course of events (*dolus directus* or *dolus indirectus*, depending on whether the perpetrator meant to cause those consequences or not).[126] Even where "knowledge" takes on the form of "awareness that a circumstance exists"[127] and that circumstance is the fact that serious bodily harm intentionally inflicted on the victim *is likely* to lead to death—and that is the argument made by Hall—this will not in itself meet the *mens rea* requirement for murder as a crime against humanity, because a conviction for that crime is dependent on intent *and* knowledge,[128] and the intent component of this combined concept excludes *dolus eventualis*.

The ICTR did have it right in *Prosecutor v. Kayishema*:

> [T]he standard of *mens rea* required [for murder as a crime against humanity] is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose [*dolus directus*], or the actor is aware that it will occur in the ordinary course of events [*dolus indirectus*].[129]

Article 30(2) of the ICC Statute upholds the distinction made in

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[125] Christopher K. Hall, *Crimes against Humanity, The Different Paragraphs*, *in* COMMENTARY ON THE ICC, *supra* note 8, 129 at 130-31.

[126] ICC Statute, *supra* note 10, art. 30(2)(b).

[127] *Id.* art. 30(3).

[128] *Id.* art. 30(1).

[129] Prosecutor v. Kayishema, *supra* note 19, ¶ 139.

some legal systems between crimes founded on "general intent" and those—like genocide—of which "special intent" is a constitutive element.[130] The latter category of crimes requires an additional intent requirement beyond the (general) intent required for the *actus reus* as such. This additional requirement relates to the purpose for the commission of the act, an intent to accomplish a specific result, for example the publication of allegations intended to bring a particular section of the community into ridicule or contempt (hate speech). The result-oriented intent must not be confused with the motive for the act.[131] Intent in all its manifestations has to do with the WHAT of the perpetrator's mental disposition (i.e., *what* did the perpetrator foresee would be the consequences of his or her act, and in the case of specific intent, what purpose did he or she seek to achieve). Motive, on the other hand, has to do with the WHY of the perpetrator's conduct (*why* would he or she, in the case of hate crimes, want to bring the target group of his or her act into ridicule or contempt). It is a specific purpose of, and not the

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[130] *See* McAuliffe deGuzman, *supra* note 3, at 382-83.

[131] *Id.* at 384. This perhaps is a fundamental weakness in the overall commendable analysis by McAuliffe deGuzman of the element of *mens rea* applying to crimes against humanity. It is also wrong to assume that *Absicht* in German law necessarily means specific intent. *Id.* at 383. This form of intent merely indicates that the perpetrator did foresee and desired the consequence of his or her act (*dolus directus*, or in German usage, *dolus directus* in the first degree) in contradistinction to an alternative form of intent where the perpetrator did foresee the consequences of his act, either as a certainty (*dolus indirectus*, or in German usage, *dolus directus* in the second degree) or as a distinct possibility (*dolus eventualis*), and brings about those consequences even though he or she did not really desire that result. It is indeed inconceivable that specific intent would not manifest itself in the form of *dolus directus*, but *dolus directus* also applies to crimes other than those requiring a specific intent (the perpetrator wants to commit rape and he does it—general intent for the crime of rape—or the perpetrator wants to commit rape with a view to affecting the ethnic composition of a population—specific intent for the concerned crime against humanity).

motive for, the act that renders a specific intent crime punishable.[132]

It is also wrong to assume, as did Margaret McAuliffe deGuzman,[133] that crimes against humanity are in all instances general intent crimes. The ICC Statute makes allowance for crimes against humanity that fall in the category of general intent-crimes as well as crimes against humanity where criminal liability is dependent upon the act serving as the means for achieving a certain specified purpose. In the context of crimes against humanity, the following classification applies in this regard, provided in each instance the threshold requirements of the act having to be widespread or systematic and having to be aimed at any civilian population have been satisfied.

**a. General Intent Crimes**

Emphasis is on the act constituting a crime against humanity in the case of murder (the killing of people); enslavement (exercising the entitlement of ownership over a person, including the trafficking in persons); deportation or forcible transfer of population (displacement of persons by coercive means from the area in which they are lawfully present); imprisonment (including other means of severely depriving persons of their physical liberty); and some of the gender-specific crimes (namely rape, sexual slavery, enforced prostitution, enforced sterilization, or other forms of sexual violence).

In these instances, the mental element required for criminal liability is constituted by the accused having meant to engage in the conduct in question.[134]

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[132] Prosecutor v. Tadić (Judgment), *supra* note 18, ¶ 247-70, 272. *See also* Dixon, *supra* note 19, at 128; Antonio Cassese, *Crimes against Humanity*, *in* COMMENTARY ON THE ICC, *supra* note 8, 353, at 369.

[133] McAuliffe deGuzman, *supra* note 3, at 379, 381, 388-94.

[134] ICC Statute, *supra* note 10, art. 30(2)(a).

**b. Specific Intent Crimes**

A certain conduct, as well as a distinct purpose, constitute the essence of the following crimes against humanity: extermination (here the deprivation of access to food and medicine or similar life-sustaining resources must be calculated to bring about the destruction of part of a population); torture (the act constituting torture, which must be inflicted on the victim by a person in whose custody or under whose control the victim finds himself or herself, must bring about severe physical or mental pain or suffering); forced pregnancy (the unlawful confinement of a woman who has been forcibly made pregnant must be calculated to affect the ethnic composition of a population or must be aimed at carrying out other grave violations—in the plural—of international law); persecution (severely depriving persons belonging to a particular group or collectivity of fundamental rights must be prompted by political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognized as impermissible under international law);[135] the crime of apartheid (the inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over another are only punishable as crimes against humanity if such acts are committed with the objective of maintaining the racist regime); and enforced disappearance of persons (the acts consisting of (i) the arrest, detention or abduction of persons, (ii) executed by, or with the support or acquiescence of, a state or political organization, and (iii) attended by a refusal to acknowledge the arrest, detention or abduction of the disappeared or to provide information as to their whereabouts, must be designed to deprive the disappeared from the protection of the law for a prolonged period of time).

In these instances, the mental element required for criminal liability must be established in relation to both the act

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[135] Cassese seems to suggest that only persecution is a special intent crime against humanity. That is not correct. Cassese, *supra* note 132, at 364.

and the designated purpose of the act: in relation to the conduct, it must be demonstrated that the accused meant to engage in the conduct;[136] and in relation to the consequence of the act, it must be proved that the accused meant to cause the consequence or was aware that the consequence will occur in the ordinary course of events.[137] According to Antonio Cassese, existing case law has established that the agent of a government or organization whose policy underscored the commission of a crime against humanity and who is not directly and immediately involved in causing the inhumane consequences that constituted the crime need not anticipate all the specific consequences of his or her deed, as long as he or she was aware of the risk that his action might bring about severe consequences for the victim or victims of the crime.[138] The ICC Statute does not support this position. Having to be aware that the consequences *will occur* in the ordinary course of events (*dolus directus* or *dolus indirectus*) sets a higher standard of cognizance than merely an awareness of the risk that certain consequences might ensue from the criminal act (*dolus eventualis*).

The distinction made in the ICC Statute in regard to the mental element pertaining to conduct and the mental element pertaining to a consequence of the conduct, respectively, is quite significant. The phrase designating the mental element in the former context (the accused "means to engage in the conduct") would, according to general principles of criminal law, include *dolus directus*, *dolus indirectus*, and *dolus eventualis*. The phrase designating the mental element that must exist in relation to the consequences of the act (the accused "means to cause the consequence or is aware that it will occur in the ordinary course of events") covers *dolus directus* and *dolus indirectus* only. This could be interpreted to mean that the crimes against humanity listed in (a) above can in principle be committed by someone who did not actually desire to engage in the conduct under

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[136] ICC Statute, *supra* note 10, art. 30(2)(a).
[137] *Id.* art. 30(2)(b).
[138] Cassese, *supra* note 132, at 362-63.

indictment and did not foresee as a certainty that the act engaged in will entail the conduct which constitutes the crime against humanity (as long as the occurrence of the crime against humanity was foreseen as a possibility within the meaning of *dolus eventualis*).

There might, however, be another explanation for this variation in formulation: the concepts of, and distinction between, *dolus directus*, *dolus indirectus*, and *dolus eventualis* applies only to intent with regard to *the consequences* of criminal conduct, and wording based on those concepts and distinction would consequently be out of place in the subsection dealing with the mental element in relation to conduct *per se* (in contradistinction to a consequence of criminal conduct). That this interpretation is to be preferred appears from the following subsection of the Article dealing with the "mental element".

Under its general provisions, that Article requires that all crimes within the jurisdiction of the ICC must, "unless otherwise provided," be committed "with intent and knowledge." [139] "Knowledge" is defined in the Statute as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[140] This definition covers *dolus directus* and *dolus eventualis* only. Even if one were to hold that "intent" in relation to conduct, as defined in the ICC Statute, includes *dolus eventualis*, this form of intentional conduct will be excluded by the provision requiring "intent" *and* "knowledge," read with the above definition of "knowledge".

### 2. The Particular Requirement of Fault in the Context of Crimes Against Humanity

Crimes against humanity are committed against a civilian population, "pursuant to or in furtherance of a State or organizational policy;"[141] and to be held criminally liable for

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[139] ICC Statute, *supra* note 10, art. 30(1).
[140] *Id.* art. 30(3).
[141] *Id.* art. 7(2)(a).

execution of that policy through any of the particular offenses listed in the ICC Statute as crimes against humanity, the perpetrator must be shown to have had "knowledge of the attack." [142] We have established thus far that the general requirement of fault pertaining to all offences within the subject-matter jurisdiction of the ICC must be committed "with intent and knowledge," but that this only applies "[u]nless otherwise provided."[143] Must omission of any mention of intent in the general definition of crimes against humanity be taken to denote that only "knowledge" and not "intent" is in general required for a crime against humanity?

That this could have been the drafters' intention might also appear from the fact that intent is expressly mentioned as an element of some of the crimes against humanity (extermination, torture, forced pregnancy, persecution, apartheid, enforced disappearance of persons, and other inhumane acts of a similar character and causing great suffering, or serious injury to body or to mental or physical health), but not others (murder, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, and gender-specific crimes other than forced pregnancy). Seemingly, therefore, the crimes in the first category must be committed with intent and knowledge, while those in the latter category requires knowledge but not intent.

There is a certain fallacy in this line of reasoning. The definition of knowledge ("awareness that a circumstance exists or a consequence will occur in the ordinary course of events"[144]) presupposes intent and applies language that will cover *dolus indirectus* ("awareness that a consequence will occur in the ordinary course of events"). It makes sense to proclaim that criminal liability may in certain instances be based on *dolus directus* or *dolus indirectus* and in other instances on *dolus directus* only. It does not make sense to conclude that criminal

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[142] *Id.* art. 8(1).
[143] *Id.* art 30(1).
[144] *Id.* art. 30(3).

liability in certain instances depends on *dolus directus* and *dolus indirectus* but that in other instances *dolus indirectus* is to be insisted upon and *dolus directus* will not suffice. *Dolus directus* includes *dolus indirectus*, but the opposite is not true. Intent is furthermore implied, as an essential element, of certain crimes ("murder," for example, is *per se* intentional manslaughter), and it would therefore not be feasible to conclude that such crimes require knowledge but not intent.

It is therefore respectfully submitted that intent in the form of *dolus directus* or *dolus indirectus* is an essential element of all crimes against humanity. The reference to "knowledge of the attack" in the *chapeau* of Article 7(1) must, in a word, not be taken as a substitute for the general provisions of Article 30. In the case of general intent crimes, the perpetrator must be shown to have meant to bring about the act or to have been aware that it would occur in the ordinary course of events (*dolus directus* or *dolus indirectus*) and in the case of special intent crimes, the additional objective specified in the circumscription of the crime must also be proved.

In terms of the general dictates of Article 30, the crimes within the jurisdiction of the ICC, including crimes against humanity, must, to support a conviction, be committed with "intent and knowledge" relevant to [all] "the material elements" of the crime. In light of this provision, reference in the *chapeau* of the Article defining crimes against humanity to "knowledge of the attack"—that is, the widespread or systematic attack directed against any civilian population—seems tautological. It has been argued, though, that the *chapeau* was not intended to impact upon the *mens rea* requirement, but was inserted in the text as a jurisdictional directive, intended to confine the ICC's competence to hear only the more serious cases—those that are widespread or systematic.[145]

Requiring that the attack against a civilian population must be widespread or systematic,[146] and adding that the crime

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[145] *See* McAuliffe deGuzman, *supra* note 3, at 354, 399.

[146] ICC Statute, *supra* note 10, art. 7(1).

against humanity must comprise a course of conduct involving the multiple commission of the acts constituting the *actus reus* in furtherance of a state or organizational policy,[147] serve that purpose. But adding that the *actus reus* must be committed "with knowledge of the attack"[148] again confuses the issues. It would appear that the perpetrator must have positive knowledge that the act constitutes a widespread or systematic attack against the civilian population as well as the "intent and knowledge" relevant to the crime in general.[149] The only question that remains is how much detailed knowledge of the attack, its widespread or systematic occurrence, and/or the state or organizational policy, a perpetrator of crimes against humanity will be required to have in order to meet the requirement of fault.

In *Tadić*, the ICTY stated somewhat loosely that the accused must know "the broader context in which his act occurs,"[150] explaining that the perpetrator must be aware that there is an attack on the civilian population and know that his or her acts fit in with the attack.[151] In *Prosecutor v. Kayishema*, the ICTR in similar vein spoke of "actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan."[152] It has also been held (in the ICTY) that the accused need not have sought to achieve all the elements of the context in which the act was committed as long as he or she "knowingly took the risk of participating in the implementation of that context."[153]

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[147] *Id.* art. 7(2)(a).

[148] *Id.* art. 7(1).

[149] *See* Kai Ambos, *Der neue Internationale Strafgerichtshof: Die schwierige Balance zwischen effizienten Strafverfolgung und Realpolitik*, 39 ENTWICKLUNG UND SAMMENWIRKUNG 224, 225 (col. 2) (1998).

[150] Prosecutor v. Tadić, *supra* note 18, ¶ 656.

[151] *Id.* ¶ 659.

[152] Prosecutor v. Kayishema, *supra* note 19, ¶ 134.

[153] Prosecutor v. Blaškić, *supra* note 6, ¶ 251; *see also* Prosecutor v.

The *ad hoc* tribunals seem to confuse the requirement of knowledge as such with the problem of *proving* that the perpetrator actually had knowledge of the act being part of a widespread or systematic attack against a civilian population. The concept of "constructive knowledge" belongs to the domain of evidence. As noted in *Prosecutor v. Baškić*, knowledge of the context in which the offence was committed can be established with a view to external considerations, such as the historical and political circumstances in which the act or violence occurred, the functions and responsibilities of the accused at the time the crime was committed, the scope and gravity of the acts, and the degree to which the commission of the crime was a matter of general knowledge.[154] That does not detract one inch from the requirement of knowledge in regard to all the constitutive elements of the crime and not merely of, for example, "some kind of policy or plan." "Knowledge of the attack," as a requirement of crimes against humanity for ICC purposes, means knowledge that the attack is widespread or systematic and is directed against a civilian population.[155] "Knowledge" means awareness that those circumstances exist,[156] not merely taking the risk of the attack turning out to be widespread or systematic and directed against a civilian population.

In his analysis of decisions of the ICTY pertaining to the mental element required for crimes against humanity in regard to the threshold requirements for those crimes, Cassese correctly asserted that negligence would not suffice. However, he then went on to acknowledge *dolus eventualis* as a legitimate form of intent in relation to the threshold requirements of crimes against humanity: "The awareness, in the agent, of the *possibility* of being or becoming instrumental in the execution of a governmental policy of inhumanity or of a systematic practice of

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Kordić, *supra* note 19, ¶ 183.

[154] Prosecutor v. Blaškić, *supra* note 6, ¶ 251; Prosecutor v. Kordić, *supra* note 19, ¶ 183.

[155] *See* ICC Statute, *supra* note 10, art. 7(1).

[156] *Id.* art. 30(3).

atrocities . . . a case of advertant recklessness or *dolus eventualis*;" or, as "another possible instance of *dolus eventuals*," "[t]he awareness of the possibility that one's actions are very likely to result in the preparation of atrocities."[157] Professor Cassese noted that the ICC Statute deviated from these statements of the law. In light of the threshold requirements set by the ICC Statute for crimes against humanity, said he, "the requisite *mens rea* must include the awareness that the individual criminal act is part of a widespread or systematic attack on a civilian population."[158] Here, again, the ICC Statute requires more than merely knowledge of the possibility or likelihood that execution of a governmental or organizational policy would result in any of the atrocities constituting a crime against humanity.

Since the *chapeau* of Article 7(1) was intended to be a jurisdictional provision and not to detract from or add anything to the *mens rea* requirement of crimes against humanity, and based on her (erroneous) premise that crimes against humanity are in all instances general intent crimes and not special intent crimes, McAuliffe deGuzman argued that crimes against humanity merely require knowledge of the connection between the individual act and a widespread or systematic attack against a civilian population;[159] they do not require a specific intent to participate in the broader attack.[160] The knowledge of the perpetrator pertaining to the attack need not be detailed in any way:

> [I]t is sufficient for the perpetrator to know about the existence of an attack directed against civilians. Culpability for crimes against humanity does not require that the perpetrator have any specific knowledge about the contents

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[157] Cassese, *supra* note 132, at 364-65.
[158] *Id.* at 373.
[159] McAuliffe deGuzman, *supra* note 4, at 391-92.
[160] *Id.* at 379.

> of the attack. The perpetrator need not know that the attack is pursuant to or in furtherance of a policy, nor must the perpetrator know that the policy is that of a state or organization. Rather, the elements elaborated in paragraph 2(a) of Article 7 are jurisdictional elements intended to aid judges in determining whether an attack reaches the level required for a crime of universal jurisdiction.[161]

The *Elements of Crimes* do permit some flexibility in this regard. Knowledge of a widespread or systematic attack against the civilian population, according to those directives, does not require proof that the perpetrator had knowledge of all the circumstances of the attack or the precise details of the plan or policy under which it was executed.[162] Persons participating in the attack at its early stages will be held liable if they intended to further the attack.[163]

### 3. The Requirement of Fault in Particular Instances of Crimes Against Humanity

Intent is mentioned by name as a distinct element of some of the crimes against humanity. Here, the language of the ICC Statute is in some instances also entirely superfluous, but in others might be quite useful to denote a particular consequence singled out as an essential component of the crime concerned.

There was no need, for example, to state that extermination includes "the intentional" infliction of conditions of life calculated to bring about the destruction of part of a population.[164] Intent, as we have seen, is already required by virtue of the general provisions relating to the mental element of

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[161] *Id.* at 380.
[162] Elements, *supra* note 99, ¶ 2, at art. 2.
[163] *Id.*
[164] ICC Statute, *supra* note 10, art. 7(2)(b).

crimes within the jurisdiction of the ICC, and its mention here adds nothing to the concept of the crime of extermination. The same applies to the circumscription of torture as "the intentional" infliction of severe physical or mental pain or suffering upon a person in the custody or under the control of the accused.[165]

References to intent does on the other hand make sense in the case of forced pregnancy, because the *actus reus* will in this instance only qualify as a crime against humanity in respect of which the ICC will exercise jurisdiction if it was committed "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."[166] Persecution by the same token requires, as a matter of definition, a discriminatory intent directed against a group founded on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law.[167] The inhumane acts constituting the crime of apartheid are only actionable in the ICC if they were committed "with the intention of maintaining . . . [a certain racist] regime."[168] Enforced disappearance of persons is intimately linked to "the intention of removing them from the protection of the law for a prolonged period of time."[169] And finally, under the open-ended clause of the provisions on crimes against humanity, other inhumane acts will only qualify for ICC jurisdiction if they are found to be of a similar character than those mentioned in the ICC Statute and if they have been committed with the intention to cause "great suffering, or serious injury to body or to mental or physical health."[170]

### E. *Mens Rea* Requirements for War Crimes

The *mens rea* requirements for war crimes raise several intricate questions, due largely to the fact that drafters of the ICC

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[165] *Id.* art. 7(2)(e).
[166] *Id.* art 7(2)(f).
[167] *Id.* art 7(1)(h), read with art. 7(2)(g).
[168] *Id.* art 7(2)(h).
[169] *Id.* art 7(2)(i).
[170] *Id.* art 7(1)(k).

Statute were more set on maintaining the exact wording of treaties in force from which the particular war crimes derived than on maintaining consistency of formulation as required by the demands of statutory construction.

In spite of a general provision defining *mens rea* for ICC purpose, words signifying the element of intent are repeated in many of the definitions of particular war crimes, and this again raises the question as to the significance to be attached to that phenomenon. Special rules apply to the liability of military commanders for crimes committed by members of the armed forces under their control. There is an overlap between several of the crimes against humanity and war crimes, and one must therefore seek to ascertain whether or not the meaning to be attached to the crime under the one heading is the same as that applying to the same crime under the other heading.

### 1. Deviations from the General Requirement of Intent and Knowledge

Section 30 of the ICC Statute bases liability for any of the crimes within the subject-matter jurisdiction of the ICC on intent and knowledge, "[u]nless otherwise provided," and therefore requires close scrutiny of each one of the war crimes definitions in order to establish whether or not any one of them falls within the exception to the rule.

#### a. Redundancies in References to the Requirement of Intent

Words denoting intent ("willful", "willfully", "intentionally")[171] are repeated in some of the definitions of particular war crimes. In view of the presumption against the superfluous use of words in statutory instruments, the question arises as to the significance to be attached to this seemingly repetitious usage.

The adverb "willful", "willfully" or "intentionally" is

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[171] *See* Piragoff, *supra* note 4, at n.19.

repeated in the definitions of the following war crimes:

- willful killing;[172]
- willfully causing great suffering, or serious injury to body or health;[173]
- intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities;[174]
- intentionally directing attacks against civilian objects;[175]
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;[176]
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;[177]
- willfully depriving a prisoner of war or other protected person of the right to a fair and regular trial;[178]
- intentionally directing attacks against buildings

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[172] ICC Statute, *supra* note 10, art. 8(2)(a)(i).
[173] *Id.* art. 8(2)(a)(iii).
[174] *Id.* arts. 8(2)(b)(i) and 8(2)(e)(i).
[175] *Id.* art. 8(2)(b)(ii).
[176] *Id.* arts. 8(2)(b)(iii) and 8(2)(e)(iii).
[177] *Id.* art. 8(2)(b)(iv).
[178] *Id.* art. 8(2)(b)(vi).

dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected,[179]

- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law,[180]

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival.[181]

Michael Bothe has stated that repetition of words denoting intent in the definitions of particular war crimes denotes that "not only the actual conduct (e.g. the dropping of a bomb), but also the consequences (e.g. hitting a civilian object) must be covered by the intent,"[182] thereby suggesting that these are special intent crimes. This assertion is incorrect. In fact, no one of the war crimes listed above are special intent crimes, and the conclusion seems inevitable that repeating the element of intent in these cases add nothing to the general requirement of fault.[183]

Another possible explanation would have it that the war crimes where the element of intent is included in the definition of the crime could possibly fall under the exceptions provided for in the general requirement of intent and knowledge that applies to all crimes "[u]nless otherwise provided."[184] Must one assume that in the above instances intent is required but not knowledge? This would really make no sense, because the

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[179] *Id.* arts. 8(2)(b)(ix) and 8(2)(e)(iv).
[180] *Id.* arts. 8(2)(b)(xxiv) and 8(2)(e)(ii).
[181] *Id.* art. 8(2)(b)(xxv).
[182] Michael Bothe, *War Crimes*, *in* 1 COMMENTARY ON THE ICC, *supra* note 8, 370, at 389.
[183] *See* SADAT, *supra* note 12, at 162, 210-11.
[184] ICC Statute, *supra* note 10, art. 30(1).

essential element of knowledge (being aware that a circumstance exists or a consequence will occur in the ordinary course of events)[185] explicates *dolus indirectus,* which is already included in the definition of intent (being aware that a consequence will occur in the ordinary course of events).[186]

It is therefore submitted that the element of intent is here redundantly repeated in the definition of the war crimes concerned and that this redundancy is entirely attributable to definitions being taken from existing treaties in force and the drafters' resolve to retain that language as far as possible.

**b. Command Responsibility**

Military commanders can be held liable for war crimes, which they themselves committed. They can also in certain circumstances be held vicariously liable for war crimes committed by the troops under their command.

Criminal liability of a commanding officer for personally committing a war crime is subject to the general *mens rea* requirement of intent and knowledge or the alternative manifestation of fault that applies to the particular crime. Applying the law to the facts in any particular case requires special circumspection. There are a number of war crimes, namely, that are not merely founded on objective facts of empirical reality but which require evaluation of a situation and subjective judgments of the appropriate course of action. Those crimes include extensive destruction and appropriation of property "not justified by military necessity";[187] launching an attack that would cause incidental loss of life or injury to civilians or collateral damage to civilian objects "which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated";[188] and widespread, long-term and severe damage to the natural environment "which would be

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[185] *Id.* art. 30(3).
[186] *Id.* art. 30(2)(b).
[187] *Id.* art. 8(2)(a)(iv); *see also id.* arts. 8(2)(b)(xiii) and 8(2)(e)(xii).
[188] *Id.* art. 8(2)(b)(iv).

clearly excessive in relation to the concrete and direct overall military advantage anticipated."[189] Judgments made by military officers as to a "military necessity" or a "military advantage anticipated" and calculations of the proportionality of the loss of civilian lives or injuries, or the damage to civilian objects or the natural environment, must never be evaluated in hindsight,[190] in the rational setting of arm-chair reasoning, or through the dispassionate neutrality of a court-room setting. In *The Hostage Case*, the Military Tribunal stated that in establishing the guilt or innocence in this context of an army commander "the situation as it appeared to him must be given the first consideration,"[191] and later on in the judgment went on to say:

> There is evidence in the record that there was no military necessity for this destruction and devastation [of villages, bridges and highways, and of communication lines and postal installations in Norway]. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.[192]

As far as vicarious liability is concerned, the ICC Statute distinguishes between two categories of superiors who might be held liable for crimes committed by a subordinate.[193] The first

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[189] *Id.*

[190] William J Fenrick, *War Crimes, Article 8,Para. 2(a)*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, 180, at 183.

[191] The Hostages Cases, *supra* note 50, at 1245-46.

[192] *Id.* at 1296.

[193] ICC Statute, *supra* note 10, art. 28. *See generally* SADAT, *supra*

category consists of military commanders [194] and persons effectively acting as military commanders,[195] and the second category consists of other persons in a position of authority.[196] The ICC Statute makes a clear difference between the element of *mens rea* required for vicarious liability of a military superior and a civilian superior (respectively): while the military superior "knew or should have known" and liability can thus be based on negligence, the civilian superior can only be held liable for the criminal acts of his or her subordinates if he or she "consciously disregarded information which clearly indicated . . .," which denotes intent.[197] In both instances liability may derive from a mere omission.[198]

Leila Sadat maintained that "knew or should have known" and "conscious disregard" suggest "something less than 'intent,' such as criminal negligence or recklessness."[199] This is misleading. If someone knew, he or she acted intentionally; if someone should have known, he or she acted negligently; and willful blindness ("conscious disregard") is again indicative of intent (the perpetrator knew but did not want to know).

As a general rule, a military commander or the person effectively acting as a military commander is criminally liable

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note 12, at 203-08.

[194] A military commander is a member of the armed forces assigned to, or who assumed, command over one or more units of the armed forces. William J. Fenrick, *Responsibility of Commanders and Other Superiors*, *in* COMMENTARY ON THE ICC, *supra* note 8, 515, at 517.

[195] Persons effectively acting as a commanding officer include police officers in command of armed police units, persons responsible for paramilitary units not incorporated in the armed forces and persons who have assumed *de facto* control of armed forces, police units, or paramilitary units. *Id.* at 517-18.

[196] Other persons in a position of authority include "political leaders and other civilian superiors in a position of authority." Prosecutor v. Delalić, *supra* note 122, ¶ 356; *see also* Fenrick, *supra* note 195, at 521.

[197] *See* Per Saland, *supra* note 16, at 204.

[198] *See* SADAT, *supra* note 12, at 203.

[199] *Id.* at 207.

for any of the crimes within the jurisdiction of the ICC committed by forces under his or her effective command and control, or in the case of a person effectively acting as a military commander by forces under his or her authority and control.[200] However, this only applies if the military commander or person effectively acting as a military commander:

- failed to exercise proper control over the forces under his or her command and control;
- knew, or in the prevailing circumstances should have known, that the forces were committing, or were about to commit, a crime within the jurisdiction of the ICC; and
- failed to take all necessary and reasonable measures within his or her power to prevent or to repress the commission of the crime or to submit the matter to the competent authorities for investigation and prosecution.[201]

In the absence of direct evidence as to the superior officer's knowledge of the offenses committed by his or her subordinates, actual knowledge can be construed in view of *indicia* such as the number of illegal acts, the type of illegal acts, the scope of illegal acts, the time during which the illegal acts occurred, the number and type of troops involved, the logistics involved (if any), the geographical location of the acts, the widespread occurrence of the acts, the tactical tempo of operations, the modus operandi of similar illegal acts, the officers and staff involved, and the location of the commander at the time.[202]

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[200] ICC Statute, *supra* note 10, art. 28(1).

[201] *Id.*

[202] *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N.

The provisions in the ICC Statute pertaining to command responsibility are open to criticism. Thomas Weigend transcribed the above requirements for command responsibility into several hypotheticals:[203]

> (i) The military commander (MC) neglected his or her duty to exercise control over the forces under his or her command (FC); MC did not foresee the unlawful act committed by FC, but should have foreseen the act.
>
> (ii) MC sought to prevent the act of FC, but failed to take all necessary and reasonable steps to do so, and FC committed the act.
>
> (iii) MC could not prevent the act of FC, but did not after the event submit the matter to the competent authorities for investigation and prosecution.

Each one of these set of facts, according to Weigend, would not warrant prosecution and conviction of the superior military officer for the crime committed by his or her subordinate.[204] The first example would not warrant prosecution because the commanding officer did not foresee the act. The second example would not warrant prosecution because the commanding officer was only negligent in exercising his duty to prevent the act, and his involvement in the crime amounted to no more than assistance through an omission. The third example would not warrant prosecution because neglect of the commanding officer amounts to no more than obstructing the ends of justice through

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SCOR, Annex, at 17 (May 27, 1994), U.N. Doc. S/1994/674 (1994). *See also* Prosecutor v. Delalić, *supra* note 122, ¶ 386.

[203] Thomas Weigend, *Zur Frage eines "Internationalen" Allgemeinen Teils*, *in* FESTSCHRIFT FÜR CLAUS ROXIN ZUM 70. GEBURTSTAG AM 15. MAI 2001, 1375, at 1396. (Walter de Gruyter, ed., 2001).

[204] *Id.* at 1396-97.

an omission. Overall the problem is that a neglect of duty (a crime in its own right) is translated into a crime of quite a different kind—a crime which the commanding officer did not commit, attempted to commit, ordered, solicited or induced, or assisted through aiding and abetting.

Nor could the military officer who has been prosecuted for neglect of duty raise the defense of *ne bis in idem* (double jeopardy) if subsequently he or she were to be charged to stand trial in the ICC for the war crime that was *de facto* committed by his or her subordinate. *Ne bis in idem* excludes a second trial in the ICC (but not in a national court) for the same conduct, and the omission constituting a neglect of duty, and for example the killing of innocent civilians, are not the same conduct.

The Nuremberg Trials provide authority for the proposition that a superior officer who knows that troops under his or her command were violating international law upon instructions of the superior officer's own superior will also be vicariously liable for the illegal act. In the *High Command Case*, the Tribunal held that "by doing nothing he cannot wash his hands of international responsibility."[205] In another case, General Tomoyuki Yamashito was held criminally liable for widespread and repeated atrocities committed by Japanese soldiers under his command in the Philippines exactly because he failed to provide effective control of his troops as could be expected of him under the circumstances.[206] The United States Military Commission in Manila had this to say about command responsibility:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy

[205] Trial of Wilhelm von Leeb & Thirteen Others (Case No. 72), 12 L. REP. TRIALS WAR CRIMINALS 73-74 (1949). The Tribunal recognized the difficulties that the intermediary superior officer will inevitably face in these circumstances and accepted his or her predicament as an extenuating circumstance for purposes of sentence.

[206] Trial of General Tomoyuki Yamashita, 4 L. REP. TRIALS WAR CRIMINALS 1 (1948).

> responsibility. . . . It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is not effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[207]

The Tribunal went on to state the obvious: "Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood."[208]

### c. War Crimes Requiring Dolus Directus

Extensive destruction and appropriation of property constitutes a war crime, provided the destruction and appropriation was not justified by military necessity and was furthermore carried out "unlawfully and wantonly."[209] The wanton destruction or appropriation of property adds a dimension to the element of intent, designating a reckless disregard of the rights of others. The mental attitude of the perpetrator acting wantonly would almost inevitably include the desire to destroy or to appropriate the property concerned and

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[207] *Id.* at 35. *See also* In re Yamashita, 327 U.S. 1, at 16 (1946) (U.S. Supreme Court held, in a *habeas corpus* application in the same matter, that a commanding officer is under "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population" against excesses committed by the troops under his command.).

[208] Trial of Yamashita, *supra* note 206, at 35.

[209] ICC Statute, *supra* note 10, art. 8(2)(a)(iv).

would most likely be interpreted to require *dolus directus*.

The same would apply to the war crime of killing or wounding treacherously individuals belonging to the hostile nation or army.[210] It would also apply in cases of armed conflicts not of an international character, to killing or wounding treacherously a combatant adversary,[211] and to other instances of perfidy.[212]

Belligerents would always try to out-smart one another through superiority in military skills and weaponry, reconnaissance, and resourceful strategies. Resourceful strategies become treacherous, and therefore criminal conduct, if the belligerent creates a false impression regarding his or her reliability or the safety of his or her adversary. Perfidy in all its manifestations[213] includes the notion that the perpetrator through his or her treacherous act invited the confidence of an adversary to lead him or her to believe that the perpetrator is entitled to, or that the adversary is obliged to accord, protection under the rules of international law applicable in armed conflict.[214] According

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[210] *Id.* art 8(2)(b)(xi).

[211] *Id.* art 8(2)(e)(ix).

[212] *Id.* art 8(2)(b)(vii) (making improper use of a flag of truce, of the flag or military insignia and uniform of the enemy or of the United Nations, or of the distinctive emblems of the Geneva Conventions).

[213] Perfidy does not include ruses of war. Ruses of war is defined in Protocol I as "acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 37(2), U.N. Doc. A/32/144, 1125 U.N.T.S. 3, 21-22 (Aug. 12, 1949), *reprinted in* 16 I.L.M. 1391, 1409 (1977) [hereinafter Protocol I]. Ruses of war include the use of camouflage, decoys, mock operations and misinformation. *Id.*

[214] Elements, *supra* note 99, ¶ 1, at art. 8(2)(b)(xi); *see also* Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, 13 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 269, 288 (1974);

to Oppenheim:

> [W]henever a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of trust. Thus a flag of truce, or the cross of the Geneva Convention, must never be used for a stratagem; capitulation must be carried out to the letter; the feigning of surrender to lure the enemy into a trap, the assassination of enemy commanders, soldiers, or heads of State, are treacherous acts.[215]

The Lieber Code addressed the question of deception as a war strategy in compelling terms:

> While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common-law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them.[216]

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Michael Bothe, Knut Ipsen & Karl Josef Partsch, *Die Genfer Konferenz über humanitäres Völkerrecht: Verlauf und Ergebnisse*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 24-25 (1978).

[215] OPPENHEIM'S INTERNATIONAL LAW: A TREATISE, ¶ 165, at 430 (7th ed., 1952).

[216] Instructions for the Government of Armies of the United States in the Field, (Proposed by Frances Lieber, Promulgated as General Order No. 100 by President Lincoln), art. 101 (April 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICT, 3 (Dietrich Schindler & Jiří Toman eds., 1988), *reprinted in* 1 THE LAWS OF WAR: A DOCUMENTARY HISTORY, 158 (Leon Friedman. ed., 1972).

Article 37 of Protocol I Additional to the Geneva Conventions of 12 August 1949 provides as follows:

> 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.[217]

The examples listed in Article 37 of Protocol I serve as a useful guide of treacherous acts that would invoke ICC jurisdiction under the present heading, should such acts be resorted to with intent to kill or to wound the enemy and indeed have that result.

In a paper submitted to the Preparatory Commission for the International Criminal Court, the ICRC distinguished the following material elements of this crime:

> (1) The perpetrator killed or injured [or captured] a person belonging to the adverse party.

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[217] Protocol I, *supra* note 213, art. 37.

(2) The act in question was of a nature to cause or at least induce the confidence of that person.

(3) The confidence was based on a legal protection prescribed by rules of international law applicable in armed conflict, which that person himself is entitled to or which he is obliged to accord.[218]

A typical example would be if the treacherous party pretends to be a member of the armed forces of the enemy in order to kill or to wound members of the enemy forces. In his comments on the original provision in the Hague Convention No. IV, Oppenheim noted that "no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted."[219] Greenspan added to these instances of treachery, the simulation of death and pretended surrender "for the purpose of putting the enemy off his guard and then attacking him."[220]

The element of treachery included in these crimes would render any form of *mens rea* short of *dolus directus* inapplicable.

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[218] The ICRC document was submitted to the Preparatory Commission by the governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa, and the Permanent Observer Mission of Switzerland to the United Nations. *See* U.N. Doc. PCNICC/1999/WGEC/INF.2/Add.1 (July 30, 1999).

[219] OPPENHEIM, *supra* note 215, ¶ 110, at 341.

[220] MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE, 317 (Berkeley: Univ. of California Press) (1955).

### 2. Torture as a Special-Intent War Crime

Torture has been listed in the ICC Statute as a crime against humanity[221] and as a war crime.[222] It has been defined in the ICC Statute for purposes of crimes against humanity only, namely as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused," excluding the pain and suffering arising only from, inherent in, or incidental to lawful sanctions.[223] Since torture as a war crime is not defined in the ICC Statute, its definition must for that purpose be based on the common-law concept of torture. There is authority for the proposition that torture as defined in the Torture Convention[224] reflects the customary-law meaning of that concept and should be applied for purposes of its prohibition in humanitarian law.[225]

In fact, the *Elements of Crimes* clearly based its circumscription of torture as a war crime on the definition of torture in the Torture Convention. Torture occurs, according to the war-crimes provisions of the *Elements*, when severe physical or mental pain or suffering is inflicted on one or more persons for such purposes as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind." [226] The Convention definition of torture must evidently be adapted to suit the contingencies of armed conflict. For the purposes of ICC jurisdiction, the act of torture as a war crime must, for example, be committed "in particular . . . as a part of a plan or policy or as part of a large-scale commission of such crime, "[227] and since armed conflicts may include non-governmental armed forces, the infliction of

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[221] ICC Statute, *supra* note 10, art. 7(1)(f).
[222] *Id.* art. 8(2)(a)(ii).
[223] *Id.* art. 7(2)(e).
[224] Torture Convention, *supra* note 58, art. 1.
[225] *See* Prosecutor v. Delalić, *supra* note 122, ¶ 459; *see also* Prosecutor v. Anto Furundźija, Case No. IT-95-I.T, ¶ 160-61 (10 Dec. 1998).
[226] Elements, *supra* note 99, ¶ 2, at art. 8(2)(a)(ii).
[227] ICC Statute, *supra* note 10, art. 8(1).

severe pain or suffering by officials of such non-governmental participants in a conflict ought also to be included in the concept of torture for the purposes of humanitarian law.[228]

There are two basic differences between the definition of torture in the Torture Convention and the one contained in the ICC Statute (for the purposes of crimes against humanity):

- The Torture Convention defines torture as the infliction of severe pain and suffering for a particular purpose, such as obtaining from the victim or a third person information or a confession, punishing him or her for an act which he or she, or a third person, has committed or is suspected of having committed, or intimidating or coercing him or her, or a third person, or for any reason based on discrimination of any kind,

- The Torture Convention requires that the pain and suffering be inflicted by or at the instigation, or with the consent or acquiescence, of a public official.

The purposive element of intimidation, coercion, punishment or discrimination built into the Convention definition of torture was intended to exclude "private conduct." [229] It is almost inconceivable that severe pain and suffering by or at the instigation, or with the consent or acquiescence, of a public official would not be torture.[230]

For purposes of the present survey it is important to note that the definition of torture as a war crime (derived from the Torture Convention) is a special intent crime, while this is not the case as far as torture as a crime against humanity is concerned.

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[228] Prosecutor v. Delalić, *supra* note 122, ¶ 473.
[229] *Id.* ¶ 471.
[230] *Id.* ¶ 491.

### F. Grounds of exculpation

In criminal law, there are a category of defenses called "grounds of justification," which would deprive an act that in the normal course of events would be unlawful of its illegality. Those mentioned in the ICC Statute include defensive action, duress, necessity, and superior orders. A second category of defenses comprises grounds of exculpation. They exclude or diminish the ability of a person to form an intent, is subjective in nature, and thus have a bearing on the element of *mens rea.*

Some legal systems place an onus on the accused who raises a defense to prove (normally on a balance of probabilities) the facts upon which the concerned ground of justification or exculpation are based, especially if those facts are peculiarly within the knowledge of the accused. The ICC Statute does not subscribe to this view—and for that it has been criticized by common-law jurists not fully committed to the presumption of innocence as a basic rule of criminal justice.[231]

In terms of the ICC Statute, everyone shall be presumed innocent until proven guilty.[232] The onus of proving the guilt of the accused rests on the Prosecutor,[233] and the prosecution must convince the Court beyond a reasonable doubt of the guilt of the accused.[234] The ICC Statute expressly provides that the accused

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[231] *See* SADAT, *supra* note 12, at 147, 215.

[232] ICC Statute, *supra* note 10, art. 66(1).

[233] *Id.* art. 66(2).

[234] *Id.* art. 66(3). The Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda do not specify that proof beyond a reasonable doubt is required but only contain general directives, for example that the accused must be proved guilty "according to the provisions of the present Statute." ICTY Statute, *supra* note 57, art. 21(3); ICTR Statute, *supra* note 57, art. 20(3). However, the respective *Rules of Procedure and Evidence* of the two Tribunals do require for a conviction that "guilt has been proven beyond reasonable doubt." *Rules of Procedure and Evidence of the International Criminal Tribunal,* Rule 87, U.N. Doc. IT/32/Rev.13, *reprinted in* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL

shall not have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.[235] In cases where the facts relied upon to substantiate a ground of justification or exculpation are peculiarly within the knowledge of the accused, the ICC may impose an obligation to produce evidence on the defense, but this is not an onus of proof. At the end of the day, the guilt of the accused must appear beyond a reasonable doubt from all the facts placed before the Court by the prosecution and the defense team.

The ICC Statute specifies the following grounds for exculpation.

### 1. Mental Disorder

A person suffering from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or the capacity to control his or her conduct to conform to the requirements of law, cannot be convicted by the ICC for any of the crimes within its jurisdiction.[236]

The ICC Statute thus recognizes the principle that a person cannot be held criminally liable if he or she, due to a mental disease or defect, cannot appreciate the nature of his or her conduct. It also recognizes the principle that absence of

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HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, BASIC DOCUMENTS 29, 130 (1998); *Rules of Procedure and Evidence of the International Tribunal for Rwanda,* Rule 87, U.N. Doc. ITR/3/Rev.2 (July 5, 1996), *reprinted in* VIRGINIA MORRIS & MICHAEL SCHARF, 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 19, 55 (1999); *and see* Håkan Friman, *Rights of Persons Suspected or Accused of a Crime, in* THE MAKING OF THE ROME STATUTE, *supra* note 16, 247, at 250.

[235] ICC Statute, *supra* note 10, art. 67(1)(i).

[236] *Id.* art. 31(1)(a). *See also* Andreas Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom,* 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 47, 82 (1998).

guilty knowledge negates the capacity of a person to intentionally act unlawfully. If one is unable to appreciate the unlawfulness of one's conduct, one cannot be said to be breaking the law intentionally. Furthermore, the ICC Statute sided with those legal systems where irresistible impulse—the inability, by virtue of a mental disease or defect, to control one's conduct to conform to the requirements of the law—excludes liability for offences of which intent is an essential element.

The ICC Statute, on the other hand, only recognizes the exclusion of intent and knowledge in cases where the mental disease or defect is in the nature of a lasting condition.[237] The rather dubious notion of "temporary insanity" recognized in some legal systems as a ground of exculpation is therefore not part of the ICC's accountability philosophy. A mental condition that does not destroy but nevertheless diminishes the capacity of the perpetrator to appreciate the wrongfulness of the *actus reus* or to act in accordance with his or her perception of right and wrong would not be an excuse but would invariably serve as an extenuating circumstance.[238]

### 2. Intoxication

Being in a state of intoxication that destroys the intoxicated person's capacity to appreciate the unlawfulness or nature of his or her conduct, or the capacity to control his or her conduct to conform to the requirements of law, excludes liability for any of the crimes within the jurisdiction of the ICC, unless the perpetrator has become intoxicated under such circumstances that he or she knew, or should have known, or disregarded the risk, that as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the ICC.[239]

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[237] Albin Eser, *Grounds for Excluding Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, 537, 546 (reading this into the wording of art. 31(1) of the ICC Statute, which requires that the person "suffers" from a mental disease of defect).

[238] *Id.* at 546.

[239] ICC Statute, *supra* note 10, art. 31(1)(b).

Here, again, the principle requiring the ability to form an intent, grounding criminal liability on guilty knowledge and excluding criminal liability on grounds of irresistible impulse, is recognized by the ICC Statute. In this instance, though, (voluntary) intoxication in special circumstances will not exclude criminal liability.

The question whether or not intoxication ought to be recognized as a circumstance that excludes *dolus* was highly controversial. [240] Arab States committed to Islamic law considered the excessive use of alcohol an aggravating circumstance, while delegations schooled in Western perceptions of accountability considered intoxication as a mitigating factor or even one that would altogether exclude intent and knowledge. To bridge the gap, a footnote was recorded in Rome, declaring "voluntary intoxication as a ground of excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes."[241]

In principle, intoxication in certain circumstances ought not to exonerate a person for crimes committed while in a state of intoxication that renders that person *doli incapax*, negates his or her ability to appreciate the wrongfulness of his or her conduct, or instills in him or her the irresistible impulse to act unlawfully. Two such sets of circumstances can be distinguished:

- if the person decides to commit a crime while being sober and then becomes intoxicated in order, for example, to pluck up Dutch courage to do it (*actio libera in causa*); or

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[240] Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CR. L.F. 1, at 25 (1999); Eser, *supra* note 237, at 546.

[241] *Report of the Working Group on General Principles of Criminal Law*, U.N. Doc. A/CONF.183/C.1/WGGP/L.4./Add.1/Rev.1, n.8 (July 2, 1998).

- if the person becomes intoxicated while knowing, or disregarding the risk, that he or she might commit a crime while in a state of intoxication.

In their attempt to capture these two instances of criminal responsibility of an intoxicated person, drafters of the ICC Statute, by inserting the phrase "as a result of the intoxication," went about their business rather clumsily. The *actio libera in causa* is not committed "as a result of the intoxication"; nor necessarily is the crime committed by the person who became drunk while knowing that he or she might commit a crime while in a state of intoxication or in reckless disregard of that possibility. The formulation of the provision under consideration in the ICC Statute applies to crimes of which intoxication itself is an element, such as driving a motor vehicle under the influence of an intoxicating substance. Those are the type of crimes committed "as a result of the intoxication," and hardly apply to any of the crimes within the jurisdiction of the ICC.

The *actio libera in causa,* or the crime committed by the person who became drunk while knowing that he or she might commit a crime while in a state of intoxication or in reckless disregard of that possibility, was not committed "as a result of the intoxication." It should, in this writer's respectful opinion, nevertheless remain punishable under the ICC Statute. The ICC ought to apply the law generally recognized in this regard under its authority to apply "general principles of law derived . . . from national laws of legal systems of the world."[242] Although the ICC is restricted in this regard to principles of law that are not inconsistent with, *inter alia*, the ICC Statute,[243] the provision requiring that the crime committed while the perpetrator was in a state of intoxication must be one committed "as a result of the intoxication" does not contradict the principle applying to, for example, the *actio libera in causa.* The provision under

[242] ICC Statute, *supra* note 10, art. 21(1)(c).
[243] *Id.*

consideration postulates an instance of criminal liability of an intoxicated person *alongside* his or her liability, in terms of general principles of law, for an *actio libera in causa* or for a crime committed by the person who became intoxicated while knowing that he or she might commit a crime while in that state or in reckless disregard of that possibility.

A person seeking exculpation for a crime within the jurisdiction of the ICC must show that the circumstance relied upon to exclude liability was present "at the time of that person's conduct."[244] Some analysts regard this condition, by excluding the time at which the statutory result of the conduct sets in, as "a rather narrow view."[245] If the aider and abetter was *doli incapax* by reason of intoxication at the time of providing the means for the commission of a crime within the jurisdiction of the ICC[246] but sobered up by the time the crime was actually committed, should he or she not be held criminally responsible for facilitating the commission of the crime if he or she failed to interrupt the *actus reus*?

### 3. Juvenile Status

The ICC Statute does not expressly deal with the influence of tender age upon the capacity of a person to form a criminal intent. Nor was it necessary to do so because the ICC only has jurisdiction over persons 18 years of age or older.[247]

In the current state of international humanitarian law, children of 15 years and older may be deployed in armed combat. Restricting the jurisdiction of the ICC to persons over the age of 18 years while children under that age, but over 15 years of age, might as members of the armed forces commit war crimes does appear to be an anomaly.[248] However, it would be

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[244] *Id.* art. 31(1).

[245] Eser, *supra* note 237, at 545.

[246] *See* ICC Statute, *supra* note 10, art. 25(3)(c).

[247] *Id. art.* 26.

[248] Roger S. Clark & Otto Triffterer, *Exclusion of Jurisdiction Over Persons Under Eighteen, in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, 493, at 497-98.

wrong to assume that restricting the jurisdiction of the ICC *ratione personae* to persons over the age of 18 years "can, in substance, be considered as a ground for excluding criminal responsibility as well."[249] Under the complementarity regime, States remain obligated to bring perpetrators of war crimes to justice within their municipal legal system and based on the decrees of their domestic criminal law. Needless to say, if a child between the ages of 15 and 18 years were to commit a war crime, he or she was most likely prompted or even coerced to do so through the example or instructions of an adult comrade in arms or commanding officer.

### 4. Mistake

There are certain mistakes which exclude intent to commit a crime, while certain others do not affect the capacity of the perpetrator to intentionally break the law but nevertheless excludes criminal responsibility. Only the first category has an impact on application of the principle of no liability without fault.

A mistake can consist of being unaware of a particular matter that does exist or a miscalculation of a prevailing state of affairs.[250] For the purposes of the present survey the matter or state of affairs can either be a certain fact, event or condition, or a rule of law.[251]

Some legal systems of the world apply the adage: *ignorantia facti excusat, ignorantia iuris non excusat* (an error of fact is an excuse, an error of law is no excuse).[252] The premise that ignorance of the law is no excuse is inconsistent with the

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[249] *See* Eser, *supra* note 237, at 541.

[250] *See* Otto Triffterer, *Mistake of Law and Mistake of Fact, in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, 555, at 565.

[251] For an overview of the different manifestations of mistake, see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, 684-85 (Oxford Univ. Press) (2000).

[252] This view suggests that only a mistake of fact implicates *mens rea*. *See* FLETCHER, *id.* n.241, at 687; SADAT, *supra* note 12, at 217-18; Ambos, *supra* note 240, at 29.

principle of no liability without fault and its concomitant decree requiring guilty knowledge as a precondition for criminal liability based on intentional conduct.[253] If a person is unaware of the fact that he or she is acting unlawfully, it should make no difference in principle whether that lack of knowledge is based on a misconception of the facts or on ignorance of the law. And, as noted by George Fletcher:

> In a pluralistic society, saddled with criminal sanctions affecting every area of life, one cannot expect that everyone know what is criminal and what is not. The problem is compounded in some fields, such as abortion and obscenity, by constantly changing standards of permissible conduct.[254]

The ICC Statute in this regard recognizes ignorance of the facts as well as ignorance of the law as a legitimate ground for excluding criminal liability.

The language selected by the Drafters nevertheless seems to distinguish between *error facti* (mistake of fact) and *error iuris* (mistake of law). "A mistake of fact," according to the ICC Statute, "*shall be* a ground for excluding criminal responsibility only if it negates the mental element required by the crime."[255] "A mistake of law *may ... be* a ground of excluding liability if it negates the mental element required by such a crime [within the jurisdiction of the Court]."[256] This

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[253] In 1977, the South African Appellate Division of the Supreme Court (as it was then called) decided "[a]t this stage of our legal development, it must be accepted that the cliché proclaiming that 'every person is presumed to know the law' has no *raison d'être* and that in view of the contemporary concept of fault in our legal system the notion that 'ignorance of the law is no excuse' cannot be upheld." State v. De Blom, 1977 (3) SA 513 (A), at 529 (author's translation).

[254] FLETCHER, *supra* note 251, at 732.

[255] ICC Statute, *supra* note 10, art. 32(1). Emphasis added.

[256] *Id.* art. 32(2). Emphasis added.

could be interpreted to mean that a mistake of law which negates the mental element required by a crime within the jurisdiction of the ICC could, in the discretion of the Court, be taken to exculpate the perpetrator. If that is to be what was intended, it could perhaps be seen as a concession to the common-law position that ignorance of the law is no excuse. However, that interpretation would amount to a substantive inconsistency in the ICC Statute's basic premise of no liability without intent and knowledge.

A better interpretation would be that a mistake of law is not an objective ground of justification but may be a ground excluding liability, and would be such if it negates the mental element required for a particular crime. If for example the mental element of a crime is negligence, ignorance of the law (if it were to exclude liability) must not in itself be negligent. But if the error does negate whatever mental element is required to constitute the crime, it stands to reason that the perpetrator cannot be convicted of that crime.[257] The wording of the clause dealing with mistake of fact was probably intended to address the perception founded on those legal systems where an *error facti* constitutes an objective ground of justification (in contradistinction to a ground of exculpation). Under the ICC Statute, a mistake of fact will only serve as an excuse if it excludes *mens rea*.[258]

Antonio Cassese has criticized the ICC Statute for not upholding the rule of Anglo-American systems of law that ignorance of the law is no excuse.[259] However, holding someone accountable for any offence of which intent is an element if that person genuinely did not know that he or she was acting illegally would be a contradiction in terms. This is so because absence of guilty knowledge essentially excludes fault—irrespective of

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[257] *See also* Triffterer, *supra* note 250, at 561 (noting that if the error of law negates the mental element required, the consequence "is as self-evident as for an error of fact").

[258] *See* Weigend, *supra* note 203, at 1390-91.

[259] Antonio Cassese, *The Statute of the International Criminal Court: Preliminary Reflections*, 10 EUR. J. INT'L L. 144, at 153-56 (1999).

whether guilty knowledge is excluded by a mistake regarding the prevailing facts or regarding the legality of one's conduct.

For that very reason, the Nuremberg tribunals strictly applied the principle embodied in the maxim *ignorantia facti excusat*, but did not find comfort in its counterpart proclaiming *ignoratia iuris non excusat*.[260] In *The German High Command Trial*, the Military Tribunal observed:

> Many of the defendants were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military Commanders in the field with far reaching military responsibilities cannot be charged under International Law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under International Law. Such a commander cannot be expected to draw fine distinctions and conclusions as to the legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.[261]

There are indeed cases in which the Tribunal proceeded on the assumption that ignorance of the law is no excuse. For example, in *The Flick Trial*, it was decided that in dealing with property outside the State to which the perpetrator belonged, he

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[260] See *Digest of Laws and Cases Selected and Prepared by the United Nations War Crimes Commission*, 15 L. REP. TRIALS WAR CRIMINALS, 182-84 (1949).

[261] Trial of Wilhelm von Leeb & Thirteen Others (Case No. 72), *in* 12 L. REP. TRIALS WAR CRIMINALS, 73-74 (1949).

is expected to ascertain what the national law provides and to conduct himself within the applicable law: "Ignorance thereof will not excuse guilt but may mitigate punishment."[262] In the *Digest of Laws and Cases*, the writer observed that "if an order is not known to an accused to be illegal, *and it was not unreasonable for him to mistake it as legal*, he may plead in mitigation that he acted on that order in carrying out the acts charged."[263] In the *Trial of Erhard Milch*, the Tribunal referred to "reluctance of legal authorities to apply to the full the maxim *ignorantia juris non excusat*" where the relevant law is international law.[264] This was again explained more fully in *The Trial of Kato*:

> There are some indications that this principle [*ignoratia iuris non excusat*] when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable . . . In the present trial, the Judge Advocate, in his summing up, said that the Court must ask itself: "What did each of those accused know about the rights of a prisoner of war? That is a matter of fact upon which the Court has to make up its mind. The Court may well think that these men are not lawyers: they may not have heard either of the Hague Convention or the Geneva Convention; they may not have seen any book of military law upon the subject; but the Court has to consider whether men who are serving either as soldiers or in proximity of soldiers know as a matter of the general facts of military life whether a prisoner of war has

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[262] Trial of Friedrich Flick & Five Others (Case No. 48), *in* 9 L. REP. TRIALS WAR CRIMINALS, 23. (1949).

[263] *Digest of Laws and Cases*, *supra* note 260, at 184.

[264] Trial of Erhard Milch (Case No. 39), *in* 7 L. REP. TRIALS WAR CRIMINALS, 27, 64 (1948).

> certain rights and whether one of those rights is not, when captured, to security for his person. *It is a question of fact for you.*"[265]

The rule pertaining to *ignorantia iuris* must not be confused with the question of credibility. If ignorance of the law has not been established, then absence of guilty knowledge will evidently not arise. In the *Trial of Milch*, for example, the plea of *ignoratia iuris* was rejected "not on the grounds that a mistake of law, as opposed to a mistake of fact, is never an excuse, but on the grounds that it was unlikely that Milch could actually have been so mistaken."[266] In the *Trial of Flesch*, Judge Soeleth, in response to the defendant's claim that he could not be held responsible unless it could be established that he had known that the superior orders which he executed were illegal, indeed stated that superior orders could not be pleaded in exculpation. The Tribunal in the final analysis based a conviction on a finding that the defendants were in fact aware that they acted in violation of international law.[267]

Returning, then, to the ICC Statute: it upholds the principle of no liability without fault consistently by proclaiming that ignorance of the law or of the facts excludes liability for the crimes within the jurisdiction of the ICC. Establishing ignorance of the law will always be difficult, and will become increasingly so. It is to be hoped that military instructors will provide the troops under their care with proper instructions as to the provisions of humanitarian law in general and the provisions of

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[265] Trial of Captain Eikichi Kato (Case No. 28), *in* 5 L. REP. TRIALS WAR CRIMINALS 37, 44. (1948).

[266] Trial of Milch, *supra* note 264, at 64.

[267] Trial of Gerhard Friedrich Ernst Flesch (Case No. 36) (Appeal to the Supreme Court of Norway), *in* 6 L. REP. TRIALS WAR CRIMINALS 111, 120 (1948); *see also* Trial of Kapitänleutnant Heinz Eck & Others (The Peleus Trial) (Case No.1), *in* 1 L. REP. TRIALS WAR CRIMINALS 12, 15 (1947) ( the Tribunal stating that "it must have been obvious to the rudimentary intelligence that it was not a lawful command" to fire at helpless survivors of a sea attack struggling in the water).

the ICC Statute in particular.[268] The crimes within the jurisdiction of the ICC are so clearly wrongful that the defense of *ignorantio iuris* will always raise serious questions of credibility.

An error of fact can take on several forms.[269] A perpetrator might be unaware of certain circumstances that constitute an element of the crime as such, or the perpetrator might be well aware that the act falls squarely within the definition of the crime but believes, erroneously, that grounds exist which would justify the otherwise illegal conduct.

The notorious judgment of the British House of Lords in *Regina v. Morgan* exemplifies the principle that applies when the act that would constitute a crime is committed under the mistaken belief that an element of the crime was absent.[270] A majority decision of the Law Lords in that case upheld the principle that a mistaken belief excludes intent, even if the belief is unreasonable.

The facts were as follows: The First Defendant invited three friends to his home and encouraged them to have sexual intercourse with his wife. He told them that, being "kinky", the wife might simulate resistance, presumably to add to her sexual pleasures by being "forced" to submit. The three friends obliged and were subsequently charged with rape, while the husband was accused of aiding and abetting in rape. The three raised the defense that they honestly believed that the victim, in spite of her struggle and protests, consented. The Court did not believe them, and they were duly convicted, but not without the above exposition of the law being confirmed by way of *obiter dictum*. Lord Hailsham of St. Marylebone stated the position as follows: "Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held."[271]

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[268] *See* Cassese, *supra* note 259, at 156.

[269] *See also* Triffterer, *supra* note 250, at 562-63.

[270] Reg. v. Morgan, [1975] A.C. 182 (H.L. (E)); *see also* FLETCHER, *supra* note 251, at 699-707.

[271] Reg. v. Morgan, *id.* at 214, 237 (Lord Fraser of Tullybelton stating: "If the effect of the evidence as a whole is that the defendant believed,

If the perpetrator mistakenly believed that any of the constituent components of the *actus reus* did not exist, he or she cannot be said to have acted with intent and knowledge. If, for example, a commanding officer gives the order that a certain building be attacked in the *bona fide* belief that it was an arms manufacturing plant and it subsequently turns out that the target of the attack was indeed a pharmaceutical research installation, he or she cannot be convicted of "[i]ntentionally directing attacks against buildings dedicated to science, . . . provided they are not military objectives."[272] Where the perpetrator knows that his or her conduct is *prima facie* illegal but believes that the act is rendered lawful by the one or other ground of justification, the matter is more complicated. In some legal systems, a mistake of this nature is regarded as an *error iuris*, and as such, will not excuse the act (that is, if ignorance of the law is not accepted as an excuse).

In *Erdemović*, the ICTY, following this line of reasoning, denied "the availability of duress as a complete defense to combatants who have killed innocent persons."[273] The finding has been criticized because it failed to consider whether a belief that one is acting under duress might exclude intent on the part of the person under duress.[274] The criticism presupposes that duress is a ground of justification, which the ICTY was not willing to accept in cases where innocent persons have been killed.

The judgment of the Canadian Supreme Court of Canada in the case of *Regina v. Finta* exemplifies the absence of intent in cases where the perpetrator's acts would have been unlawful, but for his or her erroneous belief in the existence of a ground of justification—in this instance a superior order, which the

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or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined and . . . no question can arise as to whether the belief was reasonable or not").

[272] *See* ICC Statute, *supra* note 10, art. 8(2)(b)(ix).

[273] Prosecutor v Erdemović, *supra* note 53, ¶ 80.

[274] Ambos, *supra* note 149, at 29-30.

accused erroneously believed was lawful.[275] Imre Finta served as the senior gendarme officer at a concentration camp in Szeged, Hungary during World War II. He was charged with being responsible for the forced confinement of thousands of Jews, confiscation of their valuables during their internment, their forced removal form the concentration center to a train station and, ultimately, their death in German concentration camps. The removal of Jews occurred pursuant to a Ministry of the Interior order (the "Baky Order").

Intent to commit a crime against humanity or war crime presupposes knowledge of the illegality of the act and of the circumstances that would elevate the criminal conduct to a crime against humanity or war crime. Provided the accused acted on reasonable grounds and the orders under which he or she acted were not manifestly unlawful, an error of fact pertaining to the legality of the superior order would serve as a justification of the *actus reus*. With a bare majority, the Court decided that prevailing facts afford "an air of reality" to the defense of absence of intent due to a mistaken belief in the legality of a superior order.[276] *Finta* serves as authority for the proposition

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[275] Regina v. Finta, *supra* note 41. *See* Sharon A. Williams, *Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada, in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 151, 164-69 (L.H. McCormack & Gerry J. Simpson, eds.) (1997).

[276] Regina v. Finta, *supra* note 41, at 847-48. The facts that prompted the outcome of the case included the position of the accused in a paramilitary organization; the existence of a state of war; the imminent invasion of Hungary by Soviet forces; the Jewish sentiments in favor of the Allied forces; publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary; the universal expression in newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews; the organizational activity involving the whole Hungarian State together with its ally, Germany, in the internment and deportation; the open and public manner of the confiscations under an official, hierarchical sanction; and the deposit of seized property with the National Treasury or the Szeged synagogue.

that guilty knowledge is an essential component of intent to commit a crime and that a mistake of fact, even if it related to the existence of a ground of justification (in contradistinction to the mistaken belief that an element of the crime is absent), excludes guilty knowledge. However, applying the (theoretically sound) principle of guilty knowledge as a prerequisite for intent to the facts in the case was, to say the least, quite dubious and indeed provoked severe criticism of the judgment.[277]

The ICC Statute excludes liability if a mistake of fact (or of law) "negates the mental element required by the [or such a] crime."[278] It could be argued that the perpetrator who knows that he or she is acting illegally and intentionally executes the act, but erroneously believes that a ground of justification for the act exists, cannot claim that the mistake negated the mental element required for the crime in question. Assume that an Occupying Power causes the mass transfer of the population of a town in the occupied territory in the mistaken belief that their evacuation is necessitated by a pending natural disaster (heavy rains threatened a dam upstream to break its banks and the commanding officer thought if that were to happen, the town might be flooded—but the town was indeed not flooded). The war crime in contention consists of "[t]he transfer, directly or indirectly, by the Occupying Power . . . of all or parts of the population of the occupied territory within or outside this territory."[279] Each one of the elements to be detected in this definition of the crime was within the contemplation of the responsible occupying official. Must he or she for that reason be convicted?

Although the perpetrator in this example intentionally transferred the population, it cannot, in this writer's respectful opinion, be said that he knowingly committed *the crime*. The perpetrator, in a word, intentionally executed *the act* but did not intentionally commit *the crime*. Absence of guilty knowledge

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[277] *See, e.g.,* Irwin Cotler, 90 A.J.I.L. 460, 471-74 (case note) (1996); *see generally* José E. Alvarez, *Crimes of States/Crimes of Hate*, 24 YALE J. INT'L L. 365, 427-28 (1999).

[278] ICC Statute, *supra* note 10, art. 32(1).

[279] *Id.* art. 8(2)(b)(viii).

excludes the mental element required for the crimes within the jurisdiction of the ICC, irrespective of whether belief in the legality of one's conduct is founded on an error pertaining to the elements of the crime *per se*, or to facts and circumstances that constitute grounds for legal justification of the act.[280]

If the perpetrator knew that his conduct was unlawful but did not know that the crime he committed was one within the jurisdiction of the ICC, that mistaken belief, on the contrary, is no excuse.[281] Put another way, the perpetrator cannot avoid being prosecuted in the ICC simply because he or she does not know that the crime committed falls within the scope of the ICC's subject-matter jurisdiction.

The Nuremberg Trials have demonstrated that absence of guilty knowledge was most often raised in the context of superior orders: allegations of a subordinate that he or she did not know that the orders executed and which culminated in the illegal act were unlawful. To plead absence of fault in virtue of a belief in the legality of superior orders, the accused must show "an inexcusable ignorance of their illegality."[282] In the *Trial of Otto Ohlendorf,* it was further held that "one who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to."[283] The same judgment is authority for the proposition that a perpetrator cannot claim absence of guilty knowledge based on his or her ignorance of the illegality of the superior orders upon which he or she executed the act, if he or she in any event approved what had to be done:

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[280] *See also* Eser, *supra* note 237, at 549 (observing, with reference to self-defense, that a perpetrator who reasonably believes that he or she was under attack while that was, objectively, not the case, cannot rely on this ground of justification to escape liability but "may resort to mistake of fact . . . for excluding criminal responsibility.").

[281] ICC Statute, *supra* note 10, art. 32(2).

[282] Trial of Otto Ohlendorf & Others, *cited in* the *Notes on* Trial of Wilhelm List & Others (The Hostage Cases), *supra* note 50, 34, at 91.

[283] *Id.*

> The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior . . . In order successfully to plead the defence of Superior Orders the opposition of the doer must be constant . . . If at any time after receiving the order he acquiesces in its illegal character, the defence of Superior Orders is closed to him.[284]

The ICC Statute also deals separately with the special instance of ignorance of the law/facts deriving form superior orders.[285] As a general rule, acting upon superior orders to commit a crime within the jurisdiction of the ICC is no excuse, because the order to commit any of those crimes is in itself unlawful and must be disobeyed by the subordinate. But there is this exception to the rule: if the perpetrator of the crime acted upon the orders of his or her government, or of a military or civilian superior, while being unaware that the order was unlawful, the subordinate will not be responsible for the offence,

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[284] *Id.*

[285] Certain critique of the provisions regarding mistake advanced by Kai Ambos is based on the erroneous assumption that the ICC Statute only (explicitly) recognizes mistake of law as a ground of exculpation in the case of superior orders. Ambos, *supra* note 149, at 29. The ICC Statute in fact recognizes mistake of law as a ground of exculpation *in all cases* where the perpetrator, because of the mistake, lacks *mens rea.* It deals separately with command responsibility because that is the instance where a mistake of law would most likely occur. It is also wrong to assume, as does Kai Ambos, that a mistaken belief that a ground of justification (for example duress) exists does not exclude *mens rea.* Ambos, *supra* note 149, at 30. If the perpetrator honestly believes that his act would fall within the confines of circumstances that would legally deprive the act of criminality, then it cannot be said that he intentionally committed the crime. Guilty knowledge is an essential component of intent, and the ICC Statute deliberately excluded all doubts that might be entertained in this regard by basing accountability (as a general rule) on intent *and knowledge.*

provided he or she was under a legal obligation to obey orders[286] of the government or of the concerned military or civilian superior, and the order was not manifestly unlawful.[287] The ICC Statute goes on to proclaim that orders to commit genocide or crimes against humanity are manifestly unlawful, [288] which means that under the ICC Statute as it stands only war crimes can be excused under this provision. That, again, stands to reason. No one claiming *ignorantia iuris* in respect of genocide or crimes against humanity can be taken seriously.

Cassese pointed out that international humanitarian law does not make a similar exception in cases of war crimes. Under international law, superior order is never an excuse.[289] However, in providing that a war crime committed on the authority of a superior order will only come within the jurisdiction of the ICC if the order was manifestly unlawful, the ICC Statute actually took its lead from the Nuremberg Trials: the presumption that a soldier has the right to presume that the orders were lawful.[290] Superior orders could be unlawful on two possible grounds: because the officer giving the order had no authority to do so, or because the act which the subordinate was ordered to execute *per se* constituted a crime under international humanitarian law. Perhaps drafters of the ICC Statute were not sufficiently

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[286] The formulation here was carefully drafted. The ICC Statute does not refer to a legal obligation to obey the specific order to commit the crime being investigated, because the order to commit a crime within the jurisdiction of the ICC would never incur a legal obligation to obey. The appropriate requirement is an obligation in general to obey orders from the governmental, military or civilian source of those orders.

[287] ICC Statute, *supra* note 10, art. 32(2), read with art. 33(1).

[288] *Id.* art. 33(2).

[289] Cassese, *supra* note 259, at 156-57. Ruth Wedgwood has proposed that all policy decisions on employment of force ought only to be actionable in the ICC if they are manifestly unlawful and that the ICC should make allowance for "a margin of appreciation" in the detailed application of war crimes. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 103 (1999).

[290] *See supra*, the text accompanying note 261.

sensitive to this distinction. The requirement of the order having to be manifestly unlawful ought only to apply to the first of these two possibilities because an order to commit a war crime would most likely always be manifestly unlawful. This applies to almost all war crimes. As time goes on, the war crimes that might still not be matters of general knowledge will soon become so. Persons claiming that they did not know that the conduct in question constituted a war crime will increasingly find their credibility being challenged. According to Cassese, "[gi]ven the specificity of article 8 [defining war crimes], one fails to see under what circumstances the order to commit one of the crimes listed therein may be regarded as being not manifestly unlawful."[291]

A German analyst described the treatment of mistake in the ICC Statute, from a German perspective,[292] as "rather archaic."[293] Whereas the ICC Statute based its defenses theory on the common-law (and French) distinction between an error of fact and an error of law, and furthermore confines mistake of fact as a defense to instances where the error excludes fault (instead, as in some jurisdictions, as a ground of justification), there might be instances of a *bona fide* and inescapable error that would not exonerate the perpetrator from punishment.[294] Here, again, the critique is a matter of dogmatic classification rather than practical significance. The jurisdiction of the ICC is confined to a limited number of serious international crimes and not the kind of trivialities or technicalities that might benefit from a different focus. Furthermore, rendering the principle of no liability

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[291] Cassese, *supra* note 159, at 157.

[292] German jurisprudence relating to mistake is based on the distinction between mistake in regard to the definitional element of a crime (*Tatbetsandsmäßigkeit*) and a mistake in regard to the unlawfulness of the act (*Rechtswidrichkeit*); and as to the former, a further distinction is made between a normative mistake (an error as to the objective requirements for the crime) and a factual mistake (and error as to a fact that constitutes an element of the crime).

[293] Weigend, *supra* note 203, at 1392.

[294] *Id.* at 1390-93.

without fault the primary concern of its accountability regime, the ICC Statute is well on top of all ethical demands of the legal idea.

German jurisprudence pertaining to defenses in criminal law also accommodates the premise of situation ethics—an insight of existential philosophy which recognizes the salience of a moral demand that does not derive from a general norm of proper conduct (e.g., *love thy neighbor, do onto others*, etc.), but applies only to a particular person, at a particular moment, and in a particular situation. German jurisprudence accordingly distinguishes between *justification*, which applies generally, and *excuse*, which would warrant a finding of not guilty based on the individual situation or very special circumstances in which the perpetrator hound him- or herself. An excuse may thus be based on "honest error," that is, a genuine moral conflict, or an apparently unavoidable order that would make it reasonable to exclude punishability.[295] Examples may include a public official who has been given an ultimatum: rape a woman as an act in furtherance of genocide or face some personal hardship as a consequence of insubordination, or a soldier with orders to kill a prisoner of war or pay with his own life.

The ICC Statute adequately takes care of such contingencies within the reach of situation ethics. The person who commits a wrongful act in unavoidable circumstances that left him with little choice can be accommodated by either not being indicted,[296] or being exonerated under the rules of duress or necessity, or eventually receiving a lenient sentence.

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[295] *See* Albin Eser, *"Defences" in War Crime Trials*, 24 ISRAELI Y.B. HUM. RTS. 203 (1994).

[296] *See* ICC Statute, *supra* note 10, art. 53(1)(c) (affording the Prosecutor a discretion not to proceed with an investigation if, considering the gravity of the crime and the interests of victims, the investigation would not be in the interest of justice).

### 5. Other Grounds for Exculpation

The ICC Statute left the door open for the Court to consider other grounds for excluding criminal responsibility derived from applicable law, including general principles of law sanctioned by national legal systems of the world. [297] Provocation, for example, does not in general serve as a ground of justification of criminal conduct. However, should the cause of anger provoke the perpetrator to lose all control over his or her conduct, the provocation might well be taken to have excluded intent to commit a particular retaliatory act.

## II. Concluding Remarks

The power of the ICC to exercise jurisdiction in any particular case has deliberately been subjected to severe limitations. This is evidenced:

- by the principle of complementarity, which affords the first right and duty to prosecute perpetrators of the crimes within the subject-matter jurisdiction of the ICC to national states with a special interest in the matter and limits admissibility of a case in the ICC to instances where the national state is either unwilling or unable to bring the perpetrator to justice;

- by restricting "unwillingness" to instances where an investigation or prosecution in the national court was prompted by the special intent of shielding the perpetrator from prosecution in the ICC, and being "unable" to instances where the national state suffers from a total or substantial collapse of its criminal justice system;

- by confining the exercise of jurisdiction by the ICC

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[297] ICC Statute, *supra* note 10, art. 31(3), read with art. 21(1)(c); *see also* Eser, *supra* note 237, at 543-44.

to only the most serious manifestations of the crimes over which it has jurisdiction and incorporating in the definitions of crimes against humanity and war crimes a restrictive threshold to be met before the ICC can exercise jurisdiction;

- by affording to all states (not only States Parties) standing to contest the exercise of jurisdiction by the ICC on so-called admissibility grounds, which include the fact that the protesting state is conducting, or has conducted, a *bona fide* investigation or prosecution in the matter (no matter what the outcome of that investigation or prosecution might have been, provided only it was not a sham within the meaning of "unwillingness"), or that the crime to be prosecuted is not of a sufficiently serious nature to merit prosecution in the ICC;

- by insisting that the definitions of crimes shall be subject to restrictive interpretation, may not be extended by analogy, and in the case of ambiguities must be interpreted to the advantage of an accused, and thereby altogether precluding the advent of judicial activism;

- by making the exercise of jurisdiction by the ICC in cases other than those emanating from a Security Council referral subject to a decree requiring that either the state of which the accused is a national or the state on the territory of which the alleged crime was committed must either have ratified the ICC Statute or agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in a particular case;

- by subjecting the power of the Prosecutor to conduct an investigation *proprio motu* to judicial control.

Drafters of the ICC Statute has also set a high threshold for convictions in the ICC by upholding the salient principle of no liability without fault and by confining the *mens rea* element of the crimes within the subject-matter jurisdiction of the ICC, as a general rule, to the most stringent standards of intent, including the principle that guilty knowledge is an essential ingredient of willful criminal conduct.

The ICC regime has been criticized because it sets its jurisdictional aim, the conditions of admissibility, and the substantive elements of the crimes extremely high.[298] However, doing just that has been informed, on the one hand, by the express design to confine the exercise of jurisdiction by the ICC to the most serious violations of the concerned criminal proscriptions only, and on the other, by the resolve to uphold a certain perception of *mens rea* based on the highest ethical standards of the legal idea.

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[298] *See, e.g.*, Pellet, *Applicable Law*, *in* COMMENTARY ON THE ICC, *supra* note 8, 1051, at 1056, 1058-59, 1083-84.